**[2022] JMCA Crim 5**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE EDWARDS JA**
**THE HON MRS JUSTICE HARRIS JA**

**SUPREME COURT CRIMINAL APPEAL NO 54/2018**

**KEVIN PETERKIN v R**

**Lord Anthony Gifford QC, Vernon Daley and Ms Maria Brady instructed by Gifford, Thompson & Shields for the applicant**

**Adley Duncan and Roneiph Lawrence for the Crown**

**15, 16 February 2021 and 28 January 2022**

**EDWARDS JA**

## Introduction

[1] On 21 May 2018, Kevin Peterkin ('the applicant') was tried and convicted by a jury in the Circuit Court for the parish of Saint Ann, before Shelly-Williams J ('the learned judge'), for the murder of Sasha Edwards. On 25 May 2018, he was sentenced by the learned judge to life imprisonment at hard labour, with a stipulation that he serve 25 years before becoming eligible for parole. On 4 June 2018, he filed notice of application for leave to appeal against conviction and sentence. On 4 February 2020, the application was heard and refused by a single judge of this court. This is his renewed application before this court.

**The prosecution's case at trial**

[2] At the trial, the case for the prosecution was that, on the morning of 22 June 2011, the applicant deliberately stabbed Sasha Edwards, who was his girlfriend, in her neck, at her home in Milford, Saint Ann, causing her death. The account from the prosecution witnesses, in summary, was that Sasha was at home that morning getting ready for work. She went to the river to bathe as there was some problem with the water supply. Shortly after her return to the house, her mother, Mrs Esmie Lobban-McDougal ('Mrs McDougal'), who was in her yard next door, heard Sasha cry out, "Mommy mi dead". Mrs McDougal ran to Sasha's house, but all the doors and windows were locked. She shouted, "Open the door!", but got no response. Finally, after she threatened to break down the door, the door opened, and the applicant came out. His hands were "full of blood". He pushed past Mrs McDougal whilst muttering some curse words.

[3] Mrs McDougal entered the house and saw Sasha lying on the ground in a pool of blood. Sasha had a hole in her throat and was making a gurgling sound like she was choking. Mrs McDougal tried to stop the bleeding by putting her hand on the hole in Sasha's neck, but blood started coming through Sasha's teeth. Mrs McDougal removed her hand, ran outside and lost consciousness. Neighbours took Sasha out of the house and carried her to the hospital, where she was pronounced dead.

[4] The evidence of the police, who arrived on the scene after Sasha had been taken away to the hospital, was that two knives were found on the floor in the room where Sasha was injured, and both, according to the forensic experts, had human blood on them. The police also observed an overturned clothes basket. The police were unable to say how many persons had entered the room after the incident or whether the scene had been disturbed before their arrival there.

[5] Ms Eugene McCarthy, Mrs McDougal's mother-in-law, who was also in Mrs McDougal's yard that morning, had also heard Sasha's cry. She gave evidence that she entered Sasha's house immediately after Mrs McDougal and saw Sasha on the ground bleeding. She also saw the two knives on the floor.

[6] The post-mortem examination showed that Sasha had received three injuries during the incident. The fatal injury, however, was a wound to the lower right side of Sasha's neck measuring 3 cm long, 1 cm wide, and 10 cm deep, and was described as shaped like an egg. The other injuries consisted of an abrasion scratch to the upper right side of the neck, and a cut injury to the lateral side of the left arm, measuring 9 cm long. That latter injury was described, by the pathologist who examined Sasha's body, as a possible defensive injury.

[7] There were no eyewitnesses as to how Sasha's injuries were inflicted. Neither Mrs McDougal nor Ms McCarthy had heard any disturbance in the house before hearing Sasha cry out. However, Mrs McDougal insisted, under cross-examination, that if there had been a fuss between Sasha and the applicant, she would have heard it. The distance between where she was in the yard and Sasha's house, which was a small one-bedroom wooden structure originally built as a shop and measuring 10 feet by 10 feet, was just a fence away. At trial, it was agreed by the parties that that distance was about 15 to 17 feet.

[8] Sasha and the applicant had at one point in their relationship lived together in Sasha's room in her parents' house. Mrs McDougal said that the relationship between the applicant and Sasha was good at first, but then it "stopped being good". It started to get "a little miserable" and "fussy" because the applicant kept having relationships with her nieces. She said that the applicant and Sasha would argue because of this, and he had started to "put his hand on her". She recounted an incident that occurred when the applicant lived in her house with Sasha, where she saw the applicant stick Sasha in her eyes with his fingers.

[9] The prosecution's case depended, in no small measure, on the evidence of Mrs McDougal that she had heard no "fuss" coming from Sasha's house that morning; the conduct of the applicant after Sasha was injured; and the words he was alleged to have said to the police when he reported the incident at the police station. The evidence from the prosecution's witnesses was that the applicant did not help Sasha after she was injured, but had left the scene, taking the time to put on his slippers first, and then

pushing past her mother. He went to the Ocho Rios Police Station and told Constable Vick-Roy Mowatt that he had had an argument with his girlfriend and had "used a knife to stab her in the neck area". Constable Mowatt immediately placed the applicant in a holding cell and informed the sub-officer on duty. He had not known the applicant before and had not heard about the incident prior to the applicant going to the station. At trial, Constable Mowatt admitted that he had not written down what he alleged the applicant had said to him, nor did he tell it to the investigating officer.

**The defence**

[10] The applicant gave sworn evidence at the trial. He admitted that he was in the room with Sasha when she was injured but denied that he had intentionally stabbed her. He said Sasha had started an argument with him because she was "mad" with him for staying out all night. She accused him of spending the night with "that dutty gal", referring to her cousin Melissa, with whom he was admittedly having sexual relations. She took up a knife, and whilst stabbing the counter with the knife, listed three reasons why she would not kill him that morning. She then left the room and went to the river to bathe. She returned shortly thereafter, became enraged to see him 'relaxing' on the bed and watching a 'dvd'. She said to him, "Watch him a relax, watch him a bloodclath relax". She then walked over to him, took a knife from the breast area of her towel and stabbed at him. He grabbed her hand that held the knife, and they started to wrestle. He then picked up a knife from the countertop. The two wrestled and fell to the ground. He only realized something had happened when he heard her say, "Mummy mi dead" and saw blood running out on the ground.

[11] Thereafter, he heard banging on the door and shouting that he must open the door. He was frightened and did not know what to do. He put on his slippers and opened the front door. Mrs McDougal started coming into the house. He said to her, "Move man, you see all bloodclath you", and moved her out the way. He then went straight to the Ocho Rios Police Station and reported to Constable Mowatt that he and his girlfriend had had a dispute and "it look like she get a cut". He said he told the officer he did not know

where the cut was but that he had seen blood coming from "dem place deh" (the applicant indicated to the court with his hands where on the body he meant). He was immediately placed in a holding cell.

[12] He said he did not deliberately stab Sasha, and only took up the knife to defend himself because Sasha was strong and bullied him sometimes. He denied that he had told Constable Mowatt that he had had an argument with his girlfriend and used a knife to stab her in her neck area. He admitted that he did not try to help Sasha after she was injured, and that he had stopped to put on slippers before he ran from the house. He said he did so because he had panicked when he saw the blood. He did not realise that Sasha had gotten a life-threatening injury. He admitted that he had received no injuries from the incident.

[13] Although the applicant agreed to the suggestion that he had not told Constable Mowatt that Sasha had attacked him, he said this was so because he was not asked what had happened. He insisted, however, that he had told Constable Mowatt that they had had a dispute. Thereafter, he said, his attorney had advised him to remain silent.

## The appeal

[14] The applicant sought and was granted leave to argue eight amended supplemental grounds of appeal, filed 5 February 2021. These grounds will be dealt with under the subject areas in which they fall, that is, inferences (grounds 1 to 5), directions on self-defence and accident (ground 5A), improper cross-examination (ground 6), and sentence (ground 7).

## Inferences (grounds 1 to 5)

<u>The submissions</u>

[15] Counsel for the applicant, Lord Gifford QC, contended that the learned judge failed to "give any or any adequate or clear direction on the drawing of inferences" to the members of the jury, where the case for the prosecution depended on the inferences to be drawn from several pieces of evidence, there being no eyewitness to the fatal injury.

Queen's Counsel contended that the learned judge misdirected the jury by using the example of the spilling of a "glass of orange juice", to explain to the jury how to draw inferences, where that example was inappropriate and likely to mislead the jury into thinking that because the applicant was the only person in the room, he must have murdered Sasha. He also submitted that the learned judge further misdirected the jury, by failing to direct that they could only draw an inference of unlawful and deliberate killing if they were sure that there was no other credible explanation as to how Sasha received the fatal injuries.

[16] Queen's Counsel argued that the learned judge also failed to outline all the possible inferences to be drawn from the evidence and at no time directed the jury that they must rule out all possible inferences consistent with innocence before they could be satisfied an inference of guilt could be drawn. Relying on **Anthony Taylor v R** [2006] UKPC 12 and **Ian McKay v R** [2014] JMCA Crim 30, Queen's Counsel submitted that this omission was a fatal error.

[17] He further submitted that several different inferences could have been drawn from the various pieces of evidence relied on by the prosecution to show that the applicant had voluntarily and deliberately inflicted the fatal injury. These pieces of evidence, he said, included the medical evidence, the evidence of Mrs McDougal, the behaviour of the applicant, and the evidence of Constable Mowatt. There were also two other undisputed facts, he submitted, from which inferences could have been drawn one way or the other.

[18] Queen's Counsel argued that the medical evidence, taken with the evidence that the parties had been wrestling, gave rise to the following six possible inferences:

> "i. a deliberate act of stabbing;
> stabbing in lawful self-defence;
> stabbing in self-defence but using unreasonable force;
> a knife injury occurring by accident;
> stabbing deliberately but as a result of provocation."

[19] He submitted that the injuries were too unusual to be the result of a deliberate act (particularly the fatal injury which was a deep wound to the right of Sasha's neck), and were more consistent with an accidental infliction in keeping with the applicant's account. This, he said, was so, since the evidence was that the applicant had held a knife with his right hand and had held Sasha's hand, which had her knife, with his left hand. This, he complained, was not dealt with by the learned judge.

[20] In respect of Mrs McDougal's evidence that she would have heard a fight if there had been one, Queen's Counsel submitted that more than one inference could have been drawn from that. A fight, he said, could be "noisy or noiseless", and the fact that Mrs McDougal said unprompted that she would have heard a "fuss", which means noisy quarrelling, supports the applicant's evidence that there was no quarrelling and that the incident had happened quickly.

[21] Further, Queen's Counsel submitted, Mrs McDougal's evidence of how the applicant had cursed at her and had pushed her aside when he came out of Sasha's house that morning was not evidence from which it could be inferred that the stabbing was deliberate or voluntary.

[22] With regard to Constable Mowatt's evidence of what the applicant had said to him when he came into the station after the incident, Queen's Counsel pointed out that this was denied by the applicant, but argued that even if it were accepted as true, it could also give rise to several inferences.

[23] Of particular significance, Queen's Counsel submitted, was the evidence of the two knives found at the crime scene, from which an inference could be drawn that the applicant had attacked Sasha with a knife and that she had picked up a knife to defend herself, or, that Sasha had attacked him and he had picked up a knife to defend himself. Counsel submitted that the learned judge ought to have given a very clear direction on this evidence, as the latter inference could not be excluded.

[24] Queen's Counsel submitted that the evidence as to the nature of the relationship between Sasha and the applicant, particularly the problems caused by his relationship with Melissa, which was admitted by Sasha's mother, provided motive for an attack on the applicant by Sasha, and made his account believable. On the other hand, he said, there was no evidence of any motive for the applicant to attack the deceased. This, it was said, required the most careful directions from the learned judge.

[25] Counsel for the Crown, Mr Duncan, submitted however, that it was clear that the learned judge appreciated that there was no independent witness to the incident, and gave comprehensive and adequate directions to the jury as to how to draw inferences in accordance with what the law requires. He submitted that it was not incumbent on the learned judge to identify each possible inference as was being proposed by counsel for the applicant, although it was open to her to do so. The learned judge's duty, he said, was to explain to the jury what an inference is, how to draw inferences, who had the burden and standard of proof, as well as how to identify the evidence. This, he said, she did. He submitted that the learned judge accurately defined what an inference is, at page 360 of the transcript, and went on to define what amounted to circumstantial evidence. He maintained that the learned judge looked at all the factors that the jury could use to properly come to a conclusion, including a comprehensive direction on the burden of proof; the evidence each side was relying on and the challenges to that evidence; the applicant's answers on cross-examination as to Sasha's defiant nature; the depth of the injury as compared with the applicant's evidence that he did not see it; that no fight was heard; and that the applicant had gone to the police station and volunteered information.

[26] Though counsel conceded that the example given by the learned judge of the glass of orange juice on the table was "not the most helpful and accurate", he asserted that, in his view, it would not have misled the jury, and was not, therefore, a misdirection in law affecting the safety of the conviction. There was more than enough evidence, he argued, for the jury to come to the decision that it did. He submitted further that the assertion that "the learned judge erred in not directing the jury that they could only draw

an inference of unlawful and deliberate killing if they were sure that there was no other credible explanation of the facts", is wrong in law and is based on the old rule in **R v Hodge** (1838) 2 Lew CC 227; 168 ER 1136.

Discussion

[27] In this case, there were no eyewitnesses to the infliction of the fatal injury to rebut the applicant's account. The case for the prosecution depended solely on inferences which the prosecution asked the jury to draw from facts they found proved, to find that the applicant had, with no lawful justification, deliberately and voluntarily killed the deceased. The learned judge herself pointed this out to the jury at page 367 of the transcript. She pointed to the doctor's evidence of the injuries, the evidence of Mrs McDougal, and the evidence of Constable Mowatt, as pieces of evidence on which the prosecution was relying to prove that the applicant had intended, without lawful justification, to kill Sasha.

[28] With regard to the doctor's evidence, it merely described the injuries he saw on Sasha, which were a small abrasion, a cut to the left hand, which he said could have been a defensive wound, and the egg-shaped wound to the neck which was fatal. He was never asked and did not say whether this fatal wound could or could not have been received during a struggle and a fall, as alleged by the applicant. The only submission from Mr Duncan regarding the wound was as to its size and the possibility or impossibility of the applicant seeing or not seeing it. However, this was not put to the jury, and even if it had been, the evidence was that the applicant saw the blood coming from Sasha, so it is not clear whether he could have seen the size of the wound due to the blood. Also, Sasha's mother Mrs McDougal never gave evidence of seeing any large wound to Sasha's neck. Her evidence was that she saw the blood coming from Sasha's neck and covered it with her hand to try and stop the bleeding. The fact that Sasha had a slight wound to the left hand, which may have been a defensive wound, would also not have taken the prosecution's case any higher, as the applicant's evidence was that both had a knife and there was wrestling. It is, therefore, not clear on the evidence, or from the learned judge's summation, what inference the jury was being asked to draw from the medical evidence.

No possible interpretation of the actual injuries, as outlined in the medical evidence, was highlighted by the learned judge.

[29] Mrs McDougal's evidence was pertinent to the extent that she lived close to Sasha; she was in the yard when she heard Sasha cry out "Mommy me dead"; and that, if there had been a fuss, she would have heard it. The only inference the jury could possibly have been asked by the prosecution to draw from this evidence is that there had been no argument or fight leading to an accidental death, nor was there one resulting in the applicant having to defend himself and, therefore, the applicant had deliberately stabbed Sasha without justification or provocation. However, the evidence from the applicant is that Sasha only spoke certain words to him and pulled a knife, he also pulled a knife, and they wrestled. On his case, he gave no evidence of a noisy fight or fuss which Mrs McDougal could have heard. His report to the police was that there was a dispute. The learned judge did not point out the possible inferences that could have been drawn from Mrs McDougal's evidence, nor did she point out the flaw in relying on this evidence to come to a conclusion of guilt.

[30] There was also the evidence of the conduct of the applicant after Sasha was injured, where it was said that the applicant had stopped to put on his slippers and pushed pass Mrs McDougal, saying the words he is alleged to have said. The learned judge told the jury that the prosecution was relying on this bit of evidence as proof of guilt. The applicant admitted he had put on his slippers and pushed pass Mrs McDougal whilst cursing her, before going to the police station. The learned judge did not warn the jury that this conduct, reprehensible and disreputable as they may have found it, by itself, was not a sufficient basis on which to infer guilt.

[31] The final piece of evidence relied on by the prosecution was what the applicant supposedly said to Constable Mowatt at the police station. The officer said that the applicant had told him that he had an argument with his girlfriend and he used a knife to stab her in the neck area. There are two main problems with this bit of evidence from Constable Mowatt, which the learned judge failed to deal with. The first issue is that, in

the circumstances of the case where self-defence, provocation, and accident were live, the only fact which could reasonably have been inferred from that evidence, if the jury were to believe the applicant had said it, was that the injury was not caused by an accident but by a deliberate stabbing. If the jury accepted that the applicant told the police that there was an argument during which he stabbed his girlfriend in her neck, it did not provide proof that the stabbing was not done in self-defence or provocation. This is because both defences would not have been inconsistent with a finding that the fatal injury was inflicted voluntarily and deliberately by the applicant. Therefore, since the only evidence in the case of how the incident took place came from the applicant himself, the jury needed to be told that this statement to Constable Mowatt, if they believed it, by itself was not evidence of guilt of murder. The learned judge did not warn the jury of that fact except to tell them that the prosecution was relying on that statement to prove guilt.

[32] The second issue with the evidence of the officer is that this was an unrecorded, verbal admission that was denied by the applicant. It was not noted anywhere and was never told to the investigating officer. There is no way of knowing whether these were the words actually said by the applicant, or whether it was a convenient reconstruction by the officer of what was actually said to him. It was incumbent on the learned judge to warn the jury that little weight could be placed on it, as it was being said for the first time at the trial, and there was no contemporaneous note made of it. She did not do so.

[33] We, therefore, agree with counsel for the applicant that more than one inference could possibly have been drawn from the bits of the evidence relied on by the prosecution. There were also bits of evidence relied on by the applicant from which certain inferences could have also been drawn and which were not brought to the attention of the jury. For example, there was evidence of the fact that two knives were found in the room on the floor, one in the pool of blood and the other close by. Although the learned judge told the jury that this supported the defence of self-defence, she did not assist the jury as to how it possibly could have been viewed. This was significant because the prosecution's case was that the applicant was not attacked and that he had deliberately stabbed Sasha.

[34] There was also the evidence of motive. Although he did not have to, as he had nothing to prove, the applicant raised the issue of Sasha's jealousy of his relationship with her cousin Melissa, which was corroborated by the prosecution's witnesses. However, even though the prosecution does not have to prove motive, no motive for the applicant's sudden attack on Sasha that morning was suggested on the prosecution's case. There was also the question of the basket of clothes found overturned in the small room. Was any inference to be drawn from that, which was supportive of the applicant's claim that he and the deceased had been wrestling? The little black knife that Sasha was said to have drawn on the applicant was the one found in the pool of blood closest to where Sasha's body was found. Was this significant? Was any inference to be drawn from that? The applicant's evidence was that Sasha had taken the little knife from a pocket in the towel that she had been wrapped in. Although her mother gave evidence that no pocket was in the towel, the evidence from the investigating officer was that the towel recovered with Sasha's body had a small pocket. None of these things were brought to the attention of the jury by the learned judge.

[35] The learned judge's only direction to the jury as to how to deal with inferences came at the beginning of her summation. At page 360 of the transcript, she is recorded as saying:

> "Now, you are entitled to draw inferences; that is, come to commonsense conclusions based on the evidence which you accept. I give you this practical example as to how inferences can be drawn. You place a glass of orange juice on a table in a room. The table and the glass of juice are the only items in the room. This room has one door and no other means of access. Now, Mr. 'X' enters the room and you leave him there with the glass of juice and you stand at the door and watch for a little while. Nothing goes in, nothing comes out. When you return, Mr. 'X' is still there, but the glass is empty, and there is no sign that the juice was spilled, no damp spot on the table or the floor. Now, although you did not actually witness Mr. 'X' drinking the juice, you can draw a

> proper inference that he in fact did so. Now, whereas you may properly draw inferences from proven facts, you may not speculate about what evidence there might have been or allow yourself to be drawn into speculation. The evidence is what it is and only such evidence that you have heard from witnesses who gave evidence during the course of the trial or statements or depositions that were read in must form your decisions."

[36] At page 374 of the transcript, the learned judge referred to the two knives and said it supported the applicant's defence of self-defence. But she did not assist them with how it could be viewed, bearing in mind that the applicant had raised the issue that it was an accident.

[37] Whilst the learned judge correctly advised the jury that inferences were common sense conclusions they could draw from facts proved on the evidence and that they ought not to speculate, it is true, as contended by counsel for the applicant, that she did not specifically identify all the possible inferences to be drawn from the evidence, nor did she tell them that any inference drawn must be reasonable and inescapable. Also, as pointed out by counsel, she did not advise the jury that they had to rule out all other inferences consistent with innocence. This begs the question, firstly, whether it was necessary for the learned judge to direct the jury that any inference of guilt drawn must be reasonable and inescapable, and that all innocent inferences must be ruled out, and, secondly, if so, whether the omission to so direct resulted in a miscarriage of justice to the applicant.

[38] Apart from that early reference noted at para. [35] above as to what was an inference, the learned judge did not return to the issue of inferences to be drawn from any evidence in the case, nor did she point out any possible interpretation that could be placed on any piece of evidence relied on by the prosecution, leaving the jury to draw their own conclusions.

[39] On the first question, the authorities do not indicate that, in every case, a trial judge is required to identify to the jury all the possible inferences they could draw from

the evidence, and there is no specific formula or set of words that a judge must use when directing a jury on how to draw inferences from facts proved. However, some guidance must be given.

[40] The following direction was suggested by Carey JA in the case of **Sophia Spencer v R** (1985) 22 JLR 238. At page 243 of that case, he said the following:

> "We would have expected the jury to be told at some point in the summing up, something such as:
>
> 'Having ascertained the facts which have been proved to your satisfaction, you are entitled to draw reasonable inferences from those facts to assist you in coming to a decision. You are entitled to draw inferences from proved facts, if those inferences are quite inescapable. But you must not draw an inference unless you are quite sure it is the only inference which can reasonably be drawn'."

[41] This approach was adopted in **Cheddean Black v R** [2020] JMCA Crim 53 at para. [28] (which involved a trial by judge alone but required the judge to draw inferences from proven facts), and **Terry Foster v R** [2020] JMCA Crim 13 at para. [37] (which involved a trial by jury). It has also been accepted that, for an inference to be properly drawn it must be reasonable and inescapable based on facts accepted as true and proved (see also the application of this principle to a judge sitting alone in **Sheldon Moscoll v R** [2021] JMCA Crim 24, at paras. [22] and [23]). The necessity for such a direction is still good law. The jury must, therefore, be advised of this. The learned trial judge did not give this basic direction. To that suggested direction, we would only add that where any piece of evidence is capable of two meanings, the judge should draw to the jury's attention the two possible interpretations and leave them to decide which one they accept.

[42] The submission by Mr Duncan, that based on **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, followed in this court in **Pasmore Millings and Andre Ennis v R** [2021] JMCA Crim 6, in which it was said that a trial judge is not

required to give specific directions as to circumstantial evidence and that a clear and proper warning as to the burden and standard of proof will suffice, is not applicable to cases of this nature. This was not a case where the prosecution was relying only on circumstantial evidence. Furthermore, **McGreevy** did not say that no direction was necessary and that the standard direction on burden and standard of proof would be sufficient. All **McGreevy** has said is that no special form of words is needed to direct a jury on circumstantial evidence.

[43] It is absolutely essential that the case of **McGreevy** be properly understood in the context within which it was decided. That case involved the evidence of over 30 witnesses on which the appellant was convicted. His appeal to the Court of Appeal failed, the court having found that there was "no circumstance which was inconsistent with guilt in the logical sense that the circumstance and the guilt of the [appellant] could not co-exist". The court also found that there were few "circumstances" which could have been said to have pointed to innocence and that the most favourable view to be taken of those circumstances is that they could be regarded as "neutral". The Court of Appeal, however, certified that a point of law of general importance was involved and gave leave to appeal to the House of Lords. The point of law so certified was:

> "Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion."

[44] Lord Morris of Borth-Y-Gest took the view that such a requirement would introduce a new rule to cases where the prosecution depended entirely on circumstantial evidence to prove its case. He concluded that such a rule was not desirable or necessary. He

rejected the notion that there was any special obligation on a judge in the terms proposed, and concluded that there should be no set formulae that judges must use.

[45] Lord Morris, at page 507, said this:

> "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. The argument on behalf of the appellant in the terms of the proposition of law which I have set out seems to me inevitably to involve the suggestion that in the absence of a direction in the terms propounded a jury would not be likely to consider evidence critically so as to decide what it proves." (Emphasis added)

[46] He then went on to consider the case of **R v Hodge** (a case reported as being purely circumstantial), where Alderson B had told the jury that before they could find the accused guilty, they had to be satisfied "not only that those circumstances were consistent with his having committed the act, but that they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person" (page 508). Lord Morris, whilst regarding those words by

Alderson B as "helpful and admirable", found no indication that Alderson B was laying down a requirement for a summing up in cases involving circumstantial evidence. Neither was there any evidence that Alderson B was complying with any existing rule. Lord Morris, with whom the House agreed, found that no such rule, of "compulsive power", requiring that specific direction, which if not faithfully followed would "stamp a summing-up as defective", existed. The so-called rule in **Hodge's case** was thus relegated to a "helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial" (page 508).

[47] Having considered the direction given in cases from the Commonwealth, such as Canada and Australia, which were in line with **Hodge's case**, and an extract from Taylor on Evidence (11th edition, (1920), vol 1) at page 74, which stated similar principles, Lord Morris of Borth-y-Gest said this, at page 509 to 510:

> "I agree…that the form of any particular direction stems from the general requirement that proof must be established beyond reasonable doubt. I consider that the form in which this general requirement is emphasised to a jury is best left to the discretion of a judge without his being tied down by some new rule which would be likely to have the effect that a stereotyped form of words would be deemed necessary."

[48] Importantly, Lord Morris went on to say, at page 510, that:

> "In a case in which inferences may have to be drawn by a jury [from] such facts as are found by them a judge will wish to give the jury guidance as to their approach and in giving that guidance he will certainly be assisted by having in mind what was said by Alderson B ((1838) 2 Lew CC at 228) and by Dixon CJ ((1963) 110 CLR at 243) and by others who have given expression to the same line of thought. To the same effect were the words used by Lord Normand in *Teper v R* ([1952] AC 480 at 489) when he said:

> 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.
> …It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'"

[49] Having considered all the cases and the relevant principles, Lord Morris then concluded, at pages 510 and 511, by saying:

> "If, having regard to the facts and circumstances of a particular case, a summing up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance a conviction might be held to be unsafe and unsatisfactory. But I am adverse from laying down more rules binding on judges than are shown to be necessary.
>
> In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they

> accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.
>
> In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt." (Emphasis added)

[50] Brooks P, at para. [29] of the judgment in **Pasmore Millings**, cited with approval, the statement made at page 507 by Lord Morris, as quoted above at para. [45].

[51] It is, therefore, not entirely accurate to state that **McGreevy** is authority to say a trial judge need not assist a jury on inferences that might be drawn from the evidence and that a direction on the burden and standard of proof is sufficient. It is more correct to say that it authoritatively states that no specific or formulaic words are required in directing a jury on how to deal with circumstantial evidence. In cases where the prosecution relies on inferences which a jury may draw from a bit of evidence the jury finds proved, some form of words are required to ensure a jury knows that they are permitted to draw inferences from that proven fact. Although, as Lord Morris said, the final outcome is a matter of the application of common sense, a jury has to be assisted, in some form of words, to know what they are permitted to consider and the approach they are to take. As for cases which are based wholly or substantially on circumstantial evidence, the language used by Lord Morris does not lend itself to the interpretation being placed on it by counsel for the Crown, Mr Duncan. To say that the direction to the jury need not be given in a "special form" is a far cry from saying nothing should be said at all. It is to be left to the trial judge to devise some "suitable form of words".

[52] In the case of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, in which the appellant was convicted of arranging the killing of her husband in a joint enterprise, the prosecution's case depended on inferences to be drawn from several pieces of

circumstantial evidence, including words alleged to have been said at different stages by the appellant. This court rejected the argument that the learned judge had erred in his directions to the jury on circumstantial evidence. Although the court found that no special directions were required in cases depending solely on circumstantial evidence, it said that the trial judge had given "perfectly accurate directions on the question of inferences" generally, as well as a general direction on the nature of circumstantial evidence (see paras. [41] and [42]). The judge had then pointed out to the jury the need for them to draw inferences from the circumstances of the case, there being no direct evidence of the alleged plan by the appellant to kill her husband. He had gone into great detail as to how the jury was to go about drawing inferences. Of note, was that the jury was told that the inference must be reasonable and inescapable and that they had to look at the "whole circumstances at the time"; the evidence relied on by both sides was pointed out to the jury, as well as the inferences to be drawn from that evidence, both of guilt and innocence; the evidence that tended to weaken the inference of guilt was identified; and the jury was directed unequivocally that, having regard to all the evidence, they "must be satisfied of the standard of proof that the evidence points to one conclusion only" (see paras. [43] and [45]).

[53] In **Baugh-Pellinen v R**, Morrison JA (as he then was), at para. [39], approved those principles, stating that **McGreevy v DPP** had:

> "…resolved the question whether any special directions were necessary in such cases by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused."

[54] The words "any special direction" in the passage cited above must be read to mean any specific form of words, since the jury must be assisted in some suitable way, as the case requires, as the jury were in **Baugh-Pellinen v R**. **Shawn Campbell and others v R** [2020] JMCA Crim 10 was a case based completely on circumstantial evidence. In

that case, in respect of a ground that complained about the trial judge's directions as to inferences and that the judge had failed to tell the jury that "they must rule out all inferences consistent with innocence", this court found that the principles in **McGreevy** were a complete answer to that complaint (see paras. [290] and [291]). Having outlined the trial judge's directions as to inferences and the standard of proof, this court said, at para. [294]:

> "In these circumstances, it seems to us that, when taken in the context of these clear directions on the standard of proof, the jury would have had no difficulty in appreciating that, where there were competing inferences pointing to guilt, on the one hand, or innocence, on the other, they could not be satisfied of guilt beyond a reasonable doubt unless they wholly rejected and excluded the latter. In our view, therefore, it was not necessary for the judge to go on to tell the jury specifically that they must rule out all inferences consistent with innocence before they could find that an inference of guilt had been established."

[55] As already stated, that case was a case wholly dependent on circumstantial evidence and the inferences to be drawn from the circumstances.

[56] In **Kelly v R** [2015] EWCA Crim 817, the Court of Appeal of England and Wales agreed that in cases dependent on circumstantial evidence, there was no rule of law that required the trial judge to use any particular form of words, but that it depended on the nature of the case and the evidence. The court quoted, with approval, the words of Lord Morris at page 507 (quoted above at para. [45]). It noted that a circumstantial evidence direction is designed to confront (a) the risk of speculation being substituted for the drawing of a sure inference of guilt; and (b) the risk that the jury will neglect to take account of evidence that, if accepted, may diminish or exclude the inference of guilt (see para. 39). Reiterating that no special direction was required, the court said that it was the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence (see para. 39).

[57] Every case has to be decided on its own facts. The statement in **McGreevy** which is being relied on by the Crown in this case, must be confined to cases wholly involving circumstantial evidence, as in **Shawn Campbell and others**, **Baugh-Pellinen v R** and **McGreevy** itself (a fact made clear by Lord Morris himself). In cases dependent on circumstantial evidence, the usual elements are opportunity, conduct and interest (motive) (see **R v Thomas Michael Treacy** [1944] 2 All ER 229 at 231). The different strands of evidence, although by themselves insufficient, when pieced together, may lead to the inevitable inference or conclusion of guilt. The question for the jury at the end of the case, is whether all the circumstances, as they find them to be, lead them to conclude the prosecution has proven guilt beyond a reasonable doubt. In a case based on circumstantial evidence, where the pieces of evidence together form one picture leading to an inevitable conclusion of guilt, it would not be necessary for a trial judge to tell a jury to examine each piece of evidence and eliminate those consistent with innocence before arriving at an inevitable conclusion of guilt. In such a case, the jury would have to examine all the pieces of the evidence together to determine if the prosecution has painted such a picture on which they can feel sure that it leads to an inevitable conclusion of guilt.

[58] It is important to note, however, that whilst **McGreevy** is authority for the proposition that there is no rule or special form of words which a learned judge is obliged to use in directing a jury on circumstantial evidence, it also confirmed that in cases where a jury is obliged to draw inferences from proven facts, they should be given some form of guidance. That guidance may take the form of what was said by Alderson B in **Hodge's case**, and in **Teper v Queen** [1952] AC 480 (a decision of Privy Council on appeal from the Supreme Court of British Guiana), and in the line of cases giving expression "to the same line of thought" (see Lord Morris of Borth-Y-Gest in **McGreevy** at page 510 as highlighted above, at para. [48]).

[59] In cases where the prosecution's case is not based wholly or substantially on circumstantial evidence that, taken together, forms a picture from which an inescapable

conclusion of guilt may be drawn, but instead, is largely based on the inference to be drawn from a single piece of evidence or several separate individual pieces of evidence, the situation is different. In the latter cases, the dicta of Lord Morris of Borth-y-Gest in **McGreevy** on circumstantial evidence is not applicable, and the decision of the Privy Council in **Anthony Taylor v R** (which in any event, is in line with the dicta in **McGreevy** at page 510 as quoted above at para. [48]), must be followed.

[60] In **Anthony Taylor v R**, a much later case than **McGreevy**, and which makes no mention of that case, the Privy Council held that in a case which depended solely on the inferences to be drawn from statements made by the appellant, all possible inferences must be "spelt out" to the jury. In **Anthony Taylor v R**, the prosecution's case depended entirely on inferences to be drawn from a statement made by the appellant to the police in which he had admitted being present when the deceased was killed but had asserted that it was his co-accused who had shot the deceased. The appellant gave evidence at trial denying the contents of the statement and any involvement in the killing. The Board quashed the conviction and ordered a retrial on the basis that the judge had failed to properly direct the jury as to how to draw inferences and to identify all the possible inferences that could be drawn from the statement, including those consistent with innocence. Their Lordships said, at paras. 13 and 16:

> "13. It was imperative that the judge should keep the case against each Defendant carefully distinct and that the jury should receive sufficient direction on the drawing of inferences from the contents of the statement and on the liability of participants in a joint enterprise…
>
> …
>
> 16. It is possible, as counsel for the Appellant and the Respondent both acknowledged, to draw different inferences from the Appellant's police statement…All of the averments in it are capable of an interpretation consistent with the Appellant's innocence. **In these circumstances it was vital**

> **that the judge should give the jury careful directions about the possible inferences which could be drawn and firm instructions that they must rule out all possible inferences consistent with innocence before they could be satisfied beyond reasonable doubt that the inference of guilt has been established**." (Emphasis added)

[61] At para. 18, the Board said:

> "…**Their Lordships agree** with the submission made on behalf of the Appellant **that in the circumstances of this case** it was essential that the judge (a) give the jury sufficiently clear and accurate directions on the law relating to joint enterprise (b) in addition, **spell out the possible inferences to be drawn from the statement and instruct them that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt has been proved correct**." (Emphasis added)

[62] Then, at para. 19, it said of the judge's omission in that case:

> "The judge's directions on common design were correct as far as they went, but he did not explain how intention might be proved and the relevance of a participant's foresight that in the course of the enterprise another actor in it might kill or inflict grievous bodily harm on the victim: see R v Powell [1999] 1 AC 1, [1997] 4 All ER 545, [1997] 3 WLR 959 and the authorities there discussed. More particularly, **he did not in his summing-up enter into any discussion of the possible inferences which might be drawn from the Appellant's statement and the need for the jury to be satisfied beyond reasonable doubt that they should draw the inference of his guilt, ruling out any others in the process. While this may not always be necessary in cases of joint enterprise, their Lordships consider that it was essential in the present case. Failing that, the**

> **jury did not have sufficient guidance on how they should approach the assessment of the Appellant's complicity in the offence.** Moreover, the contradictory nature of the case made by the Crown, with its ambiguity about the part played by each Defendant in the offence, was a potential source of confusion for the jury. The judge rightly warned the jury that they must not take into account against one accused the contents of a statement made outside the courtroom by another accused. The warning could have borne repetition at the point when the judge was directing the jury on the elements of a joint enterprise, as there was a risk that they might have regard to the contents of Solomon's statement when assessing Taylor's state of knowledge and intention. Taking these matters together, their Lordships are compelled to conclude that the Appellant's conviction was unsafe and cannot be upheld. Although they were invited by Mr Knox to apply the proviso and hold that there was no substantial miscarriage of justice, they do not find it possible to do so, as they do not consider that a jury properly directly would inevitably have reached the same conclusion." (Emphasis added)

[63] It is clear that, in that case, which depended totally on the possible inferences which could be drawn from statements made, comprehensive and specific directions needed to be given by the judge to the jury as to how they could draw an inference of guilt. The principle in **Anthony Taylor v R** was applied by this court in **Ian McKay v R**, a case which was also concerned with inferences to be drawn from statements made. In that case, the applicant had been convicted of murder in circumstances where the case for the prosecution depended largely on inferences to be drawn from circumstantial evidence, as well as written and oral statements made by the applicant to the police. The deceased's nude body was found face down at an old fort along Port Royal Main Road. Her uniform, bag and other personal items were found a day before in an abandoned vehicle driven by the applicant and owned by the applicant's wife. The applicant denied any involvement in the deceased's killing and said he had been kidnapped and robbed of the vehicle, jumping out of the moving vehicle to escape. The investigating officer gave

evidence that, on being taken by the police to a beach in the Fort Rocky area in search of the deceased, upon approaching a nude body with face partially submerged in the water and where the sex of the person was still unclear, the applicant uttered: "mi neva touch har". The applicant denied this, asserting that it was the officer who had said to him, "see the woman whey yuh murder deh". To that he said he had responded, "mi noh kill nobaddy". Several inferences arose from that evidence, including inferences consistent with innocence. Counsel for the applicant complained that the learned trial judge had failed to point out all these possible inferences to the jury, relying on several authorities, including **Taylor v R**. Crown Counsel argued that to leave an inference to the jury that the applicant was present when the deceased was killed but had not participated, would have been incongruous with his defence that he was not involved at all and would have amounted to a misdirection. Like Mr Duncan, counsel, in that case, argued that **Taylor v R** was distinguishable due to its peculiar facts and the ambiguities arising on the prosecution's case.

[64] This court, in **Ian McKay v R** found that, although the learned judge had provided detailed guidance as to the prosecution's case regarding his alleged statement, as well as correct directions relating to common design and the requisite intention to prove murder, she did not explain, among other things, the applicant's version of the relevant conversation and the possible inferences to be drawn therefrom. The court said, at para. [27]:

> "This case, which was largely based upon circumstantial evidence (but also on inferences from statements of the applicant), was not the simplest of cases, and as it turned out, it required detailed guidance. In our judgment, the learned trial judge, did provide quite detailed guidance to the jury in relation to what the prosecution's case was in relation to the alleged statement of the applicant. She also appears to have given the jury clear and correct directions as far as they went in relation to the law relating to common design. Further, she dealt with the issue of how intention might be proved

> when she gave her directions as to the ingredients of the crime of murder. However, she did not explain the relevance of a participant's foresight that in the course of the enterprise another actor in it might kill or inflict grievous bodily harm. Also, it seems that the learned trial judge could have indicated in clearer language what the applicant's version of the conversation and sequence of events was. This is particularly so since, on his case, it was Detective Sergeant Buchanan who first raised the matter of there being a missing person who was female and who first mentioned that the body in question seen in the water was that of the 'woman' whom the applicant had murdered. Additionally, as Mr Fletcher argued, the judge did not spell out the possible inferences to be drawn from the applicant's statement. Whilst it was perhaps open to the jury to draw an inference of guilt from the statement and other facts and circumstantial evidence, this was far from being the only inference that could be drawn. Nor did the learned trial judge instruct the jury that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt had been proven correct. As, as in Taylor v R, the alleged statement of the accused at no point contains any admission of prior knowledge or foresight that the deceased might be killed or knowledge of any fact which might have fixed him with knowledge from which such foresight might be inferred. We do not share counsel for the prosecution's view that the facts in Taylor v R are readily distinguishable from those in the instant case; indeed the guidance provided in that case has proven invaluable."

[65] The court, in **Ian McKay v R**, concluded that even though there is no rule requiring special directions in cases where the prosecution's case depends on circumstantial evidence and that the learned judge gave clear directions about the standard of proof and inferences in general, the summation was inadequate as the circumstances of the case required that the inferences to be drawn from the applicant's statement be spelt out. The court put it this way, at para. [28]:

> "Counsel for the prosecution, indeed both counsel, are quite correct that there is no rule requiring a special direction in cases in which the prosecution relies either wholly or in part on circumstantial evidence - see paragraph [40] of ***Baugh-Pellin v R*** [sic], per Morrison JA and paragraphs [32] – [35] of ***Sheldon Palmer v R*** per Phillips JA, and the cases therein referred to. Further, the learned trial judge also gave very clear directions about the standard of proof and inferences generally. However, in the circumstances of this case, it appears that the summation was inadequate in that the inferences that could be drawn from the applicant's statement were not spelt out, and the jury were not told that they had to rule out all inferences consistent with innocence before they could be satisfied so that they felt sure of the applicant's guilt."

[66] From the authorities, it is clear that generally speaking, there is no particular form of words that must be used to direct the jury on a case in which the prosecution relies wholly on circumstantial evidence, albeit some 'suitable' direction must be given. In such cases, a judge is not duty bound to either spell out all the possible inferences to be drawn from the various pieces of circumstantial evidence or to direct the jury that they must rule out all inferences consistent with innocence from those bits of evidence.

[67] On the other hand, in cases in which the prosecution's case is based entirely or largely on inferences which may be drawn from one or more pieces of evidence or from a statement made by the appellant, from which a jury may infer guilt, it is the duty of the judge to give such directions as are necessary to enable the jury to understand what an inference is and that they are permitted to draw such inferences, how inferences can be drawn, and that they must be reasonable and inescapable, that is, that they are reasonable and inescapable common sense conclusions made based on facts that they accept as true or proven. If several inferences may be drawn or different interpretations may be placed on a piece of evidence on which the prosecution relies to establish guilt, we are of the view that these should also be pointed out to the jury.

[68] In Blackstone's Criminal Practice 2002, para. A1.32, at page 17, the learned authors note that if there are inconsistent explanations for a piece of evidence which the prosecution cannot disprove, the defendant must be acquitted.

[69] In the instant case, undoubtedly, the learned judge's directions on inferences were sparse. To compound matters, the example of the glass of orange juice may not have been as helpful to the jury as she may have wished, given the circumstances of this case. Particularly, in the case of the example of the glass of orange juice, the inescapable inference is that the lone person in the room (Mr X) drank the glass of orange juice. In the instant case, several different inferences could have been drawn from the circumstances surrounding the presence of the applicant in the room at the time Sasha met her demise, some of which may have been consistent with the applicant being innocent of the charge of murder. Yet, other than giving the example that she did give, the learned judge offered no assistance whatsoever to the jury in this regard.

[70] The learned judge comprehensively explained the ingredients of the offence of murder and the burden and standard of proof required to find the applicant guilty, and recounted the evidence for both the prosecution and the defence, putting the applicant's defence before the jury. She also explained what provocation, self-defence and the defence of accident meant in law, recounting the evidence in relation to each and directing the jury as to the possible verdicts they could reach if they accepted the applicant's account. She outlined all the inconsistencies, discrepancies and omissions that arose, particularly on the Crown's case, and reminded the jury that even if they disbelieved the applicant's account, they did not have to believe the witnesses for the prosecution; they had to go back to the prosecution's case to see if they felt sure that the applicant had stabbed the deceased with intent to kill her.

[71] Unfortunately, this was not sufficient. The prosecution had no eyewitness to the stabbing. Neither was this a case that was reliant on wholly circumstantial evidence. The applicant was the only witness to how the incident occurred. The evidence was that Sasha died in circumstances that involved the applicant. He put himself there. There was no

dispute that he had had a knife and was holding a knife when Sasha was inflicted with the wounds, one of which proved fatal. The only issue was whether his account of how she came to get those injuries was true. The jury could only be sure of the applicant's guilt if they drew inferences from the evidence which were averse to him, and which negatived the issue of accident which he raised or negatived the other defences that arose from the evidence. The prosecution was asking the jury to accept that the applicant's account was not true. In doing so, the prosecution was asking the jury to draw certain inferences that it said pointed to his guilt. As Lord Gifford submitted, several interpretations could have been made, and several inferences could have been drawn from the evidence in the case which were inconsistent with guilt. It was the duty of the trial judge to assist the jury on how to treat with those. A standard direction on the burden and standard of proof was not enough.

[72] It has long been accepted by this court, per Carey JA in **Sophia Spencer v R**, at page 244, that a judge's summing up should fulfil the following purpose:

> "A summing up, if it is to fulfill its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable men and women in this country."

[73] In that regard, in this case, with respect to the inferences the jury were entitled to draw from proven facts, the learned judge's summation fell short. These grounds, therefore, succeed.

**Directions on the burden and standard of proof and on self-defence and accident (ground 5A)**

Submissions

[74] In this ground, Lord Gifford complained that the learned judge erred in her directions to the jury on the burden and standard of proof by giving unclear, contradictory and confusing directions in relation to the defence of accident and self-defence. Queen's Counsel also complained that the learned judge incorrectly directed the jury that one of the applicant's defences was self-defence, where the applicant had only one defence, that of accident. Queen's Counsel submitted that although the applicant had asserted that he had picked up the knife in self-defence, the applicant was steadfast in his defence that he did not stab Sasha and that her injuries were caused accidentally.

[75] Queen's Counsel also submitted that the learned judge erred in her charge to the jury by telling its members that if they were in doubt, "it was open to them" to acquit. This, it was said, had the effect of "indicating to the jury that they could acquit or not as they pleased". Queen's Counsel argued that the jury must be directed that the burden of proof is on the prosecution to prove the defendant's guilt to the extent that they feel sure, and that if they are in doubt, they "must" acquit. He submitted that even though the learned judge was correct in some of her directions, the many instances where she used the words "it is open to you", especially in her final charge to the jury, served to contradict her previous directions and would have had so injurious an effect that the conviction must be quashed. The impugned words, it was said, would have conveyed to the jury the impression that it was a choice as if "you can if you want to, but you don't have to". Lord Gifford pointed to the fact that those words were repeated at the most crucial moments of the summing up when the jury would have known they were about to retire to deliberate on the verdict and would have been listening attentively. He identified several instances in the transcript (at pages 363, 368 to 370, 443 to 445), including eight in the judge's charge to the jury, where, he said, the learned judge incorrectly used the words "it is open to you" in relation to both a verdict of guilty and not guilty. These incorrect directions, he submitted, would have cancelled the instances in which she used the correct language.

[76] The authorities of **Regina v Lobell** [1957] 1 QB 547 and **Regina v Damion Coleman** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 37/2003, judgment delivered 11 March 2005 were relied on in support of these submissions.

[77] Mr Duncan, on the other hand, submitted that the learned judge gave comprehensive directions on the burden and standard of proof. He submitted that, although her choice of words was not within the "black letter of the law", looking at where in the summation the impugned words were used, it is clear that this was simply a matter of semantics and amounted to no more than a variation in the language used by the learned judge. Looking at the summation, he submitted, a jury presumed to have a minimum level of intelligence would not have been misled.

[78] Counsel further contended that, although using the word "must" might have enhanced her summation, the words "it is open to you" was not a misdirection, and technically correct, since if the jury "must" do something, it is, in fact, open to them. The Court of Appeal itself, in **R v Lobell**, he argued, used the language that the accused is "entitled to an acquittal", and not that the jury "must acquit". This, he said, indicated that use of language should not be a basis on which to conclude that the safety of a conviction is jeopardized. No miscarriage of justice, he submitted, was occasioned therefrom.

Discussion

[79] Lord Gifford's complaint was twofold. At the heart of the first complaint was the learned judge's repeated use of the words "it is open to you" in her charge to the jury. In this regard, at pages 444 to 446 of the transcript, the learned judge said this:

> "Now, this is how you approach your verdict, Mr Foreman and members of the jury, if you find that the death of Sasha Edwards was as a result of an accident or you [sic] not sure that it was a case of an accident, then it is open to you to find the accused not guilty of murder. If you find the killing was done lawfully as a result of self-defence or you are not sure

whether it was done in lawful self-defence, it is open to you to find the accused man…not guilty of murder. If you find that this accused man by a deliberate and voluntary act killed the deceased and you also find the accused man either intended to kill the deceased or to inflict really serious bodily harm to her, that he did so, not as a result of provocation, that is, the killing was unprovoked, without lawful justification then it would be open to find you to find the accused man guilty of murder.

**If you find that the killing was done as a result of legal provocation**, that is, he was provoked and caused him to suddenly and temporarily lose his self-control by things that were said and done by the deceased, Sasha Edwards, then **it would be open to you in those circumstances to say that the defendant would not be guilty of murder but guilty of manslaughter**. Let me repeat that. So the **options open to you**, you consider whether or not Sasha Edwards, the death of Sasha Edwards was the result of **an accident or you are not sure if it was an accident, it is open to you to find the accused not guilty of murder. If you find that the killing was done lawfully as a result of self-defence or you not sure whether it was done in lawful self-defence it is open to you to find him not guilty of murder**.

If you find the accused man by a deliberate and voluntary act killed the deceased and you also find that the accused either intended to kill the deceased or inflict grievous bodily harm, bodily injuries to her without lawful justification and that he did so as a result – that he did not do so as a result of provocation, that is, the killing was unprovoked, then it would be open to you to find the accused man guilty of murder.

**If you find that the killing was done as a result of legal provocation**, that is, he was provoked and cause him to suddenly and temporarily lose his self-control by things that were said and done by the deceased Sasha Edwards then **it would be open for you in those circumstances to say that the defendant is not guilty of murder but guilty of manslaughter**." (Emphasis added)

[80] There can be no dispute that if the jury believed that Sasha's injuries were the result of an accident or that the applicant had acted in self-defence, or if they were not sure or were in doubt on either issue, then the prosecution would have failed to discharge its burden, and the applicant in those circumstances would have been entitled to an acquittal. Similarly, the applicant would have been entitled to a verdict of guilty on the lesser charge of manslaughter if the jury believed he had acted due to provocation. We agree with Lord Gifford that to say "it is open to you" in relation to an acquittal does not carry the same mandatory meaning as do phrases such as "must be acquitted", "should be acquitted", "ought to be acquitted" or "must return a verdict of not guilty". The questions for this court are whether, taking the learned judge's directions as a whole, the jury would have understood what was required of them in coming to a verdict, and whether the impugned directions gave the accused man a fair opportunity for an acquittal or for a verdict of guilty on the lesser charge of manslaughter.

[81] In **Regina v Damion Coleman**, a case in which this court found the trial judge's directions on self-defence "confusing and unfortunate", this court, relying on the passage in **Sophia Spencer v R** cited above at para. [72], said the following, at page 7, in relation to how a trial judge should treat with defences in summing-up:

> "There is no magic formula in summing-up and provided that on a reading of the summing-up as a whole the jury are left in no doubt where the onus lies and how the defences are to be dealt with, no complaint can properly be made."

In that case, the court found that that was not the effect of the trial judge's summation.

[82] The court in that case also dealt with a complaint that the trial judge had failed to direct the jury that if they were not sure or in doubt, they "should acquit". The court said this, at pages 8 to 9:

> "We believe that a convenient way of directing the jury where self- defence is raised is to tell them that

the burden of establishing guilt is on the prosecution, but if, on consideration of the whole of the evidence, the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in necessary self-defence, they should acquit: **R. v. Lobell**…

In **R. v. Abraham** 57 Cr. App. R. 799, the English Court of Appeal suggested (at p. 803) that a judge should deal with such issues as follows:

'(G)ive a clear…general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus and standard of proof applies and go on to deal … for example …with the issue of self-defence by telling the jury something on these lines: 'Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of Not Guilty. Since it is for the Crown to show that the plea of Not Guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case.' Having done that the trial judge can then proceed to deal with the facts of the particular case…'

What the abovementioned cases demonstrate, is that, if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is true of an issue of self-defence as it is to one of provocation though of course the latter plea goes only to a mitigation of the offence. Had the learned judge in the instant case said either in his early directions on the burden of proof or in his final charge to the jury, that if the jury were in doubt then they should acquit, there would be no room for argument in the present appeal. We are of the view

> that his failure to direct the jury on the question of doubt regarding whether or not the appellant was acting in lawful self-defence was a non-direction amounting to a misdirection in law."

[83] The court then went on to consider whether, in the light of the errors in the trial judge's directions, it was proper to invoke the proviso and uphold the conviction on the basis that no miscarriage of justice had occurred. It concluded that the conviction could not stand.

[84] In **Regina v Lobell**, cited in **Regina v Damion Coleman**, the court, at page 551, suggested the following direction:

> "A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: **it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal**, or it may and sometimes does strengthen the case for the prosecution…what it really amounts to is that **if in the result the jury are left in doubt where the truth lies the verdict should be not guilty**, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence." (Emphasis added)

[85] In **Baptiste v The State** (1983) 34 WIR 253, a case in which the deceased was killed in circumstances in which the appellant similarly raised the defences of accident, self-defence and provocation, the Court of Appeal of Trinidad and Tobago said this as to the requisite directions on summing-up, at page 265:

> "We consider it important for the future guidance of judges to summarise the proper directions which should be given to the jury when the special 'defences' or issues of self‑defence, provocation or accident are raised either directly by the defendant

> or indirectly from the evidence. In every such case **the judge must, in addition to the general directions as to the onus of proof being on the prosecution, give a special direction that a further burden rests on the prosecution to negative beyond reasonable doubt the existence of these answers**. **The jury must be reminded that**, when the prosecution does not discharge the onus, **the verdict in respect of self-defence or accident should be an acquittal**, **and, in respect of provocation, manslaughter**.
>
> On the question of *mens rea* the judge should direct the jury that whereas an intention to kill negatives the plea of accident, this is not so in respect of self-defence and of provocation, where the pleas may succeed even though the defendant had formed the intention to kill..." (Emphasis added)

[86] In the instant case, the learned judge gave a clear and comprehensive direction on the presumption of innocence and standard and burden of proof generally. At page 362, she said:

> "[A]n accused person is presumed to be innocent unless and until you by your verdict say otherwise. He does not have to prove his innocence. He does not have to prove anything at all. It is the prosecution who has brought him here to answer to this charge and I am telling you that indeed the prosecution who must prove that Mr. Peterkin, the defendant is guilty.
>
> Now how does the prosecution succeed in proving Mr. Peterkin's guilt. They must satisfy you by the evidence elicited from the witnesses, so that you feel sure of his guilt and it is only if you are so satisfied that you can find him guilty and convict him. Nothing less than that will do. If after considering all the evidence, you are sure, that the accused man Mr. Peterkin the defendant, Mr. Peterkin committed the offence of murder, then <u>it is open to you</u> to return a verdict of guilty. If you are not sure, your verdict <u>must</u> be not guilty." (Emphasis added)

[87] The learned judge then outlined the particulars and ingredients of the offence and what the prosecution needed to prove, including that the act must have been "voluntary and deliberate, and done with intent to kill or cause bodily harm without lawful justification or excuse". She then went on to identify the different "bits of evidence" that the prosecution was relying on to show that the killing was voluntary and deliberate.

[88] Having summarized the applicant's account of what took place when Sasha was injured, at page 368, and having indicated that he was relying on the defence of accident, the learned judge explained what amounted to an accidental killing in law and that such an accident was not an offence. In giving the charge to the jury, she said:

> "Now, if you find and if you accept the evidence of Mr. Peterkin that he was, in fact, defending himself when he held on to Miss Edward's hand. If you accept the evidence this is what occurred that they wrestled, wrested until they went down to the ground and that whilst wrestling she got stabbed**, it is open for you to find that this was an accidental killing; or if you are in doubt you may wish to find that it was an accidental killing and if that is your position you <u>must</u> find the accused man not guilty**; if you find that it was an accident." (Emphasis added)

[89] However, she did not remind the jury that the burden was on the prosecution to negative accident.

[90] At page 371, the learned judge spoke to the applicant's entitlement to be found not guilty if the jury believed he was or may have been acting in self-defence and the prosecution's duty to negative this defence. Then, at page 374, she advised the jury that if they believed the force used was reasonable, the applicant was entitled to be acquitted. After again recounting the applicant's case, including the evidence of the two knives and the basket of overturned clothes found on the scene, the learned judge again, at pages 374 to 375, reiterated the following:

> "Now, if you accept his evidence and you're in doubt as to whether or not Mr. Peterkin was, or may, or may not have been acting in lawful self-defence, then **he is entitled** to be found not guilty. If you are of the view that the force used was reasonable, then he should be acquitted." (Emphasis added)

[91] The learned judge subsequently gave directions as to the burden of proof relative to the defences of accident and self-defence, as well as the partial defence of provocation. However, she once again failed to tell the jury that it was the duty of the prosecution to negative accident. Neither did she indicate the possible inferences that could have been drawn from the presence of the two knives or the overturned basket.

[92] In addressing the credibility and reliability of the witnesses, at page 388, the learned judge said:

> "…[I]f you are left in doubt about the truthfulness of the witnesses' account because the conflict cannot be satisfactorily explained, you **must** find the defendant, Mr Peterkin, not guilty." (Emphasis added)

[93] After recounting the applicant's evidence in full, the learned judge again referred to the standard of proof in relation to the defence of accident at page 437. She again correctly advised the jury that if they believed the applicant's account or if they were in doubt, they "must" find him not guilty. She said:

> "Mr. Foreman and Members of the Jury, he has raised a defence of accident and remember the directions I gave you in relation to accident. Now you recall my direction in relation to accident and **if you accept the evidence of Mr. Peterkin in relation to Sasha Edwards being injured in relation to the accident or you are left in doubt that it could have been an accident, then you <u>must</u> return a verdict of not guilty**." (Emphasis added)

[94] Here, again, however, the learned judge failed to seize the opportunity to direct the jury that the applicant had no burden to prove that it was an accident, but that the

prosecution must disprove it or point the jury to any evidence which could have that effect. Neither did she point to any evidence from which the jury could draw the inference that it was indeed an accident or not, as the case may be.

[95] At pages 441 to 443, the learned judge again gave the jury comprehensive and accurate directions on how to approach their verdict if they disbelieved the defendant or were unsure. She said:

> "Now **if you believe the defendant, then you <u>must</u> acquit**. Your belief of the defendant is not the result of him satisfying any legal duty to prove his innocence. It is simply the result of having heard him, if you believe him. **If his account puts you in doubt about the prosecution's case**, that is, **you do not believe him** completely **but you are not sure** that when he stabbed the deceased he was acting in self-defence or it is a case of an accident **then you must also acquit**. **If you also said that this was an accident or left in doubt, you <u>must</u> also acquit**. If his evidence produces the state of mind in you, then clearly if you are not sure of the accused man's guilt, in order to convict you must do two things. Reject the defence and believe the prosecution, you taking the approach by simply saying the defendant is lying, does not as a matter of logic means [sic] that the prosecution's case is true. If you listen to two persons, not believing one, does not mean you must believe the other. It may mean, it may be that you do not believe either. Not believing the defendant does not mean that you must believe the witnesses for the prosecution.
>
> If you do not believe the defendant then it is open to you to reject his evidence, but you must then go back to do a thorough examination of the prosecution's case and to say whether they have proven the guilt of the defendant. You asked yourselves, am I convinced so that I feel sure that the accused when he stabbed – sorry, you asked yourselves am I convinced that I feel sure that it is the defendant who stabbed the deceased and that

> when he did so he had the intent to kill or cause serious bodily harm? If your answer is yes, this is your state of mind after examining all the evidence then you must convict the accused man." (Emphasis added)

[96] Again, here was a lost opportunity for the learned judge to direct on the burden of the prosecution to disprove the issue of accident.

[97] With regard to Lord Gifford's first complaint, it is clear that despite the learned judge's choice of words, a reading of her directions on the standard and burden of proof as a whole, together with the rest of the summation, shows that the occasional use of the phrase "it is open to you" was not detrimental to the applicant having a fair trial. There was indeed a variation in the language used by the learned judge throughout her entire summation where she used interchangeably the words "must", "entitled to", and "open to you" in relation to both verdicts of guilty and not guilty. Notwithstanding this, considering the in-depth nature of the judge's summation, it cannot be said the jury would not have comprehended the overall effect of the directions. Therefore, the specific complaint of Lord Gifford about the learned judge's use of the words it is "open to you" in her charge to the jury is not made out.

[98] The same cannot be said about the second aspect of Lord Gifford's complaint, in this ground, with regard to the directions on the issue of accident raised in the applicant's defence. For although the learned judge did not give "unclear, contradictory and confusing directions" in relation to the defence of accident, as Queen's Counsel asserted, we are concerned about the failure by the learned judge to indicate at any point that the burden was on the prosecution to disprove the issue of accident.

[99] The learned judge directed the jury, at many points in her summation, that one of the applicant's defences was self-defence, even though in his evidence, he had maintained that the infliction of the injury was accidental. Self-defence and provocation did arise on the applicant's case, and the learned judge would have been duty bound to address these issues by giving appropriate directions to the jury and

explaining the possible verdicts open to them that arose therefrom. In **Director of Public Prosecutions v Bailey (Michael)** (1993) 44 WIR 327, a special constable of police had killed the deceased following a struggle in which he alleged that his firearm had accidentally gone off following a struggle between the deceased and another man who were attempting to take it. There was evidence before the court that the men had exchanged hostile words prior to the incident on that day, and on another occasion. The Privy Council held that, in such circumstances where the killing might have been the result of deliberate murder, an accident, provocation or self-defence, the trial judge was obliged to leave all of those possibilities to the jury.

[100] In the instant case, although self-defence and provocation did arise on the facts and were properly left to the jury, the applicant's main contention was that Sasha's death was an accident. There was no eyewitness account to contradict that claim. It was imperative in a case such as this that the jury be made aware that the prosecution had to disprove, by evidence, the applicant's claim that the injuries sustained by the deceased were as a result of an accident. At no point was this made clear to them. Furthermore, this direction was properly given with regard to the other two defences. The omission by the learned judge concerning the issue of accident may have led the jury to believe that the prosecution had no burden to disprove accident and that it was for the applicant to prove it.

[101] No particular form of words would have been required for the learned judge to direct the jury on the burden and standard of proof once they were told in clear terms that the prosecution had, throughout the trial, the burden to prove the guilt of the applicant beyond a reasonable doubt, that is, to the extent that they felt sure that without lawful justification, he had stabbed the deceased with the intent to kill her or cause her serious bodily harm. It is conceded that the learned judge did do so. However, having pointed out to the jury the fact that the applicant had raised the issue of accident, it was the duty of the learned judge to direct the jury that the burden remained on the prosecution throughout to negative or disprove the issue of accident raised by the

applicant. The jury would also have to be told that if the prosecution failed to negative the issue of accident, the defendant must be acquitted (see **Baptise v The State** and **Regina v Lobell**). It is apparent from the transcript that the learned judge did not do this.

[102] Where a defendant puts forward a justification such as self-defence or provocation or raises the issue of accident, he assumes no burden to prove it. Instead, the burden rests on the prosecution to negative it (see **R v Wheeler** [1967] 3 ALL ER 829 and **R v Abraham** [1973] 3 ALL E R 694 with respect to self-defence and provocation; and **The State v Guy Simmons** (1976) 24 WIR 149, with respect to accident). Therefore, in addition to the general directions on burden and standard of proof, the learned judge was bound to give a specific direction that the prosecution bears the further burden of providing evidence to negative the defence of accident to the requisite standard. Unfortunately, as we have noted, she failed to seize the opportunity to do so.

[103] This ground of appeal has merit.

**Improper cross-examination (ground 6)**

Submissions

[104] In this ground, Lord Gifford contended that the learned judge erred when she failed to intervene to prevent the prosecution from asking the applicant unfair questions during cross-examination. These questions related to the conversation that had taken place between the applicant and Constable Mowatt when the applicant had turned himself in to the police station. Queen's Counsel argued that the learned judge should have intervened because what the applicant did not say to the police was being unfairly used against him when the evidence was that, after the applicant made his statement to Constable Mowatt, he was immediately placed in custody. That conversation, argued Lord Gifford, was not a formal interview in the course of the investigation.

[105] Mr Duncan submitted, on behalf of the Crown, that the prosecution was entitled to ask the impugned questions in an attempt to weaken the defence, given that the

applicant was asserting that he had gone straight to the police station. In those circumstances, he argued, the questions were not unfair, and there was no need for the learned judge to interfere. Mr Duncan admitted, however, that it may have been useful for the learned judge to give a direction on how to deal with that evidence and the applicant's right to silence, even though it was not necessary, as this right had not been engaged. This was so because the applicant had not been confronted by the police or any person in authority, but rather, had volunteered the information.

Discussion

[106] Counsel conducting cross-examination has a wide ambit to interrogate a witness. Questions are permissible, not only to elicit evidence relating to any fact in issue, but also, to test the credit of the witness (see Blackstone's Criminal Practice 2021[1], para. F7.17).

[107] In respect of an accused who gives evidence in his defence, section 9(e) of the Evidence Act provides:

> "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

[108] The only express restriction in the Evidence Act as to questions that may be asked of an accused, are questions relating to previous offences, charges, convictions, or bad character, unless the accused has himself raised them. Notwithstanding this, a trial judge has the discretion to restrict questions that he or she deems unnecessary, irrelevant,

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[1] Blackstone's Criminal Practice 2021/PART F EVIDENCE/Section F7 Cross-examination and Re-examination/Rules Governing Conduct of Cross-examination. F7.16

improper or oppressive (see Blackstone's Criminal Practice 2021[2], para. F7.16). The general rules as to admissibility and fairness still apply, and a trial judge has the discretion to limit or exclude certain questions on cross-examination where they may be subject to an exclusionary rule of evidence, are unfair to the accused, and/or the prejudicial effect of that evidence outweighs its probative value (see Blackstone's Criminal Practice 2021 F7.19; section 31L, Evidence Act).

[109] The authors of Blackstone's Criminal Practice 2021, at para. F7.21, say the following as to the scope of cross-examination as to credit:

> "….[A] witness may be cross-examined about his or her means of knowledge of the facts to which he or she has testified, opportunities for observation, powers of perception, the quality of the witness's memory, mistakes, omissions and inconsistencies in evidence, and omissions or inconsistencies in previous statements that relate to the witness's likely standing with the jury after cross-examination but which are not 'relative to the subject matter of the indictment' (Funderburk [1990] 2 All ER 482)."

[110] In the instant case, the impugned portions of the cross-examination are to be found at pages 322 to 326 of the transcript:

> "Q. …[Y]ou said that is your lawyer, on the advice of your lawyer, why you didn't tell Detective Inspector Hamilton, all the things you told us today, which is that you were lying in the room, you see har pull out the black handle knife and she come to attack you. You remember all of that that you told us?
>
> A. Yes, ma'am.

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[2] Blackstone's Criminal Practice 2021/PART F EVIDENCE/Section F7 Cross-examination and Re-examination/Rules Governing Conduct of Cross-examination. F7.16

Q. You're saying is you lawyer told you not to say anything about that. Isn't that true? Isn't that what you said to your lawyer a while ago?

A. Yes, ma'am.

Q. Now, Mr. Peterkin, you will agree with me sir, that on the date in question, when you went to the police station and you spoke to Officer Mowatt, you didn't have a lawyer at that point, in't that true, sir?

A. No, ma'am.

…

Q, Now, I putting it to you…that you went to the station and you talk to the brown officer, dat a Mr. Mowatt, what you said to him was you had an argument with your girlfriend and you used a knife to stab her in her neck area, isn't that true, sir?

A. No, ma'am. I tell you just like how I say it.

Q. All right, you would agree with me though, sir, that you never tell him anything about Sasha come with the knife and she a stab you three times and she said one, two, three and she listing out reasons, you didn't tell Mr. Mowatt any of them, sir, isn't that true, sir?

A. No, he didn't ask me.

Q. Isn't it also true that you didn't tell Mr. Mowatt that she come out of the house and then she came back in and come towards you with the black handle knife like she want to stab you?

A. No, he didn't ask.

Q. You also never tell officer Mowatt that you had to grab onto her hand to stop the knife from catching you?

A. He didn't ask.

Q. Mi not asking what him never ask you, asking what you tell him. I am asking what you told him. You follow me?

A. Yes.

Q. Now, you also never told officer Mowatt that you grab up the brow handle knife, you never tell him that, isn't that true, sir?

A. No.

Q. You also never said you were wrestling and reach on the ground, isn't that true, you never tell officer Mowatt that?

A. No."

[111] Then, at page 329:

"Q. I am putting it to you, sir, that at no point when you went to the police station when the incident would have just happened did you tell the police that Sasha attacked you and you had to defend yourself, isn't that true?

A. They didn't ask me what happened.

Q. I am asking you if you told them, sir?

A. I told them we were in a dispute."

[112] Defence counsel did not re-examine the applicant.

[113] We take the view that the questions at page 329 of the transcript were proper and did not give rise to any unfairness. The applicant had given evidence that he had gone straight to the police station after the incident to make a report of what happened. No doubt, the purpose of that evidence was to support his defence that Sasha was injured due to an accident after she had attacked him. It would have, therefore, been open to

the prosecution to test the veracity of his assertions by asking him questions as to his omission to tell the police that Sasha had attacked him with a knife.

[114] We also agree that the applicant's right against self-incrimination would not yet have been engaged as he is the one that volunteered the information, he was not being treated as a suspect by the police and had not yet been charged.

[115] The evidence of what the applicant said was admissible on two possible bases. First, the statement showed his attitude at the time he said it on his report to the police, before he became a suspect. Secondly, if taken to be an admission, it would have been admissible as a declaration against interest and is evidence of the facts which have been admitted. A statement which is not an admission is also admissible if made in the same context as an admission (see (see **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 37 at para. 53 relying on **R v Pearce** (1979) 69 Cr App R 365). As such it was quite proper for the prosecution to cross-examine on the statement within reasonable boundaries. In this case, the questions from the prosecution, at page 329 of the transcript, did not go outside of what was relevant and permissible, and as such, there would not have been any need for the learned judge to intervene.

[116] We would, however, have to agree that the questions at pages 322 to 326 were unfair to the applicant. These questions relate to details which could only have come out during an interrogation of the applicant or if the applicant had been asked or allowed to give a full account of the incident. It would have given the jury a negative impression of the applicant, that his evidence was a fabrication because he had not given that version on the first opportunity he had to do so. However, even on the prosecution's case, from the evidence of Constable Mowatt that he had placed the applicant in custody immediately after the report, the applicant had no opportunity at the time of his initial report and before he was charged to give any further details. Therefore, those questions were unfair and ought not to have been allowed. Having been allowed, the jury should have been directed accordingly.

[117] We are also concerned with the inferences that the jury were left to draw from what took place at the police station, without a proper direction from the learned judge. On the face of the evidence of both the applicant and Constable Mowatt, no full interrogation took place at the police station, and immediately after he made his report he was handed over to the sub-officer and placed in a holding cell without being interviewed or questioned at all. The jury would have heard both bits of evidence, and it would have been open to them to assess whether the applicant could have said more at the time about the incident and could have told the police that he was attacked by Sasha, and that they had wrestled and fell. They were also well placed to assess whether the evidence showed that he had the opportunity to say more and did not make use of it, and, therefore, what he was now saying in court was a fabrication, as was being suggested by the prosecution. However, there was always the risk that the jury would accept what Constable Mowatt claimed the applicant had said and view it as an admission. Careful directions regarding these words, therefore, which were never recorded by Constable Mowatt, were necessary. None was given.

[118] In **Vernaldo Graham v R** [2017] JMCA Crim 30, this court considered that very issue at para. [87] of that judgment, and applied the ruling of the Privy Council decision of **Leroy Burke v The Queen** (1992) 29 JLR 463, where it was said that a trial judge was obliged to direct the jury to approach undocumented oral confessions with caution. Although the statement in that case was not a confession per se, it was, as in this case, an undocumented, unsupported assertion, which was denied by the appellant, but from which the jury could infer guilt. In the instant case, the jury ought to have been directed to approach the evidence of what Constable Mowatt said the applicant had reported at the police station with caution, as it was undocumented and had been denied by the applicant, who had given a different version. They were also to have been told that they firstly had to determine whether they accepted Constable Mowatt's evidence of what the applicant supposedly said at the police station as true, and that if they did accept it as true, they then had to determine what it meant and what value they wanted to place on it. They should also have been directed that even if they believed he had said those

words, it did not mean that he was guilty of murder, and that the words were capable of more than one meaning. Therefore, although the words allegedly said by the applicant at the police station were admissible in evidence to show the attitude of the applicant at the time, the jury should have been told to consider whether any interpretation they placed on it was consistent or inconsistent with his defence.

[119] This ground has merit.

**The proviso**

[120] The applicant has shown that there is merit in his proposed grounds of appeal and that leave to appeal his conviction and sentence ought to be granted. The failure to direct the jury, as indicated, is a material misdirection and is enough for this court to treat the hearing of the application as the hearing of the appeal, to allow the appeal, and to quash the conviction. The question that arises is whether the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ought to be applied. That section states:

> "14. - (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> 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."

[121] The test of whether or not to apply the proviso was extensively discussed by this court in the case of **Vince Edwards v R** [2017] JMCA Crim 24 at paras. [125] to [137] and we adopt that test and apply it here. It is impossible to say, in the circumstances of

this case, that the jury would have inevitably come to the same conclusion had they been properly directed with regard to the inferences that could have been drawn from the evidence, the burden of proof which rested on the prosecution to prove that the deceased did not die by accident as alleged, as well as, the unrecorded statement that was alleged to have been said by the applicant. On that basis, it is impossible to say that there has been no substantial miscarriage of justice, and therefore, the proviso ought not to be applied.

**Retrial**

[122] Based on the failures identified in this case, the applicant's conviction is unsafe and cannot stand. The remaining issue is whether there ought to be a retrial. Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court to order a retrial, if it is in the interests of justice to do so. In the light of the fact that this conviction must be overturned as a result of a misdirection by the learned judge, the question is whether, in the interests of justice, there ought to be a retrial.

[123] The applicant was convicted and sentenced relatively recently in 2018, for an incident which took place in 2011. There was a delay in his trial and regrettably a delay in his appeal. Nevertheless, this is a serious offence, and although some time has passed since the incident, this is a simple case in which, in a retrial, as in the previous trial, the prosecution's case will stand or fall on the inferences that a jury may draw from the pieces of evidence on which it is relying to prove guilt and disprove the applicant's defences. It is in the interests of justice that a new trial be ordered.

[124] In the light of the above, it is not necessary to deal with the issue of whether the sentence is manifestly excessive.

**Disposition**

[125] The orders of the court are as follows:

1. The application for leave to appeal conviction and sentence is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed.

4. The conviction is quashed and the sentence is set aside.

5. In the interests of justice, a new trial is ordered and the case is remitted to the Home Circuit Court for the trial to take place as soon as possible.