JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 23/97

BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON J.A. (Ag.)

REGINA
V
LINTON BERRY

Terrence Williams for applicant
Carrington Mahoney and **Miss Lorraine Smith**
for Crown

25th - 28th January, and July 30, 1999

HARRISON, J.A.

The applicant was convicted in the Home Circuit Court on the 17th day of February, 1997, of the offence of murder of Paulette Zaidie on 11th January, 1987, and sentenced to imprisonment for life at hard labour with the recommendation that he be not eligible for parole before he had served a period of twenty five years.

The prosecution based its case on circumstantial evidence, admissions of the applicant and the forensic evidence.

The prosecution's case is that on Sunday the 11th day of January, 1987, at about 10:00 p.m. the prosecution witness Joseph Zaidie was at home when he received a telephone call from the applicant whose voice he recognized. The applicant said "Hello Jimmy I just killed Paulette at the foot of Jack's Hill and you lucky you weren't there; I would kill you too". On his query whether the statement was a joke, the applicant replied, "How you mean joke? I just tell you what I do. Go and pick up the

body or go look for yourself." Zaidie called several persons by telephone, including the police, who came and he went to a gas station at the foot of Jack's Hill road where he saw Paulette, a petite woman, slumped in the front seat of her jeep dead. Zaidie and Paulette, the deceased had got married in December 1986. Prior to that, on a night in June 1986, the witness Zaidie and the applicant met at the Illusions night club, which they frequented. The applicant told the witness Zaidie that Paulette the deceased who was then living with Zaidie at his home at Hope Boulevard was his woman and that he Zaidie should "...leave her alone... not trouble her or lay a hand on her." Zaidie left the club and drove home arriving at 2:00 a.m. and saw the applicant and three persons on his premises. The applicant said he had come to get Paulette who told the applicant to leave; they left. The accused in his statement in court agreed that he went there but to speak to Zaidie about his treatment of her. About a couple of weeks after this incident Paulette left home and went to an apartment on Surbiton Manor, the rent for which was allegedly being paid by the applicant. Zaidie continued to visit the deceased at the apartment, and saw the applicant there several times. She remained there for six months and then left and they got married in December 1986. The day before the wedding the deceased came to Zaidie's house. The wedding followed. He went to Miami and she joined him there. They spent one week and returned to Jamaica. Zaidie and the deceased continued to visit the said night club and on one occasion "near Christmas" the applicant spoke to them and said he wished to congratulate them on their marriage. He said however, that he wanted to know if Paulette got married to him Zaidie whilst she was at the apartment with him the applicant, that he had sent to Spanish Town to get the certificate and if that was so he would be annoyed and do something drastic to both of them. On Tuesday prior to the said Sunday the 11th of

January, Paulette came home, crying followed by the applicant who proclaiming his love for the deceased complained that he Zaidie had treated him badly, that he the applicant was hurt by the marriage, and that despite the fact that he had given the deceased, an apartment, a satellite dish and a car "... yet she is still going back to him," Zaidie.

The witness Zaidie, a coffee farmer, formerly a race horse trainer, admitted to four previous convictions, for larceny of a watch, fraud, and taking the drug cocaine. His first conviction for fraud he said, occurred after the death of Paulette. Cross-examined he denied using cocaine whilst he was married to the deceased, nor had he seen her use it. He also denied having hit her.

Another prosecution witness Daphne Matadial, the elder sister of the deceased, testified that prior to the marriage of the deceased and Zaidie, she summoned the applicant to her home. He came along with the deceased. She, the witness confronted the applicant with his conduct of threats and beatings of the deceased and suggested that he cease seeing her. The applicant in the deceased's presence admitted to the said acts of ill-treatment, begged for a chance to continue the relationship and promised to do better. After the marriage she said the applicant telephoned her in December, asked her where Paulette was and expressed a desire to buy a ticket and to go to Miami to kill the deceased and Zaidie. The witness, challenged in cross-examination that she had not mentioned the latter words of intention before giving a statement on 11th February, 1997, the said day she was giving evidence, said that she had said so before but it was not recorded.

On the 19th day of December, the applicant again came to the witness enquiring of the whereabouts of the deceased, and on her denial of such knowledge,

the applicant promised to "use his high office, his high contacts here at the airport and abroad to find Jimmy and Paulette." On the 9th day of January, 1987, at 8:00 p.m. the applicant came to her home, again enquiring of the whereabouts of the deceased, and said that he had heard that she got married and he was prepared to take her back. On the 10th of January, the applicant again telephoned her enquiring of the deceased, and the witness told the applicant that she was not there. She stated that on Sunday the 11th of January after 9:00 p.m. her husband answered the telephone, she then spoke to a female on the telephone, and as a result she and her husband went to the gas station at Jack's Hill. There she saw a large crowd and Zaidie's motor vehicle.

Prosecution witness John Johnson whose deposition was read at the trial, stated that on Sunday the 11th January, 1987, on his way home from church, he stood talking with a man on Barbican Road at about 9:00 p.m. He saw a jeep drive up and stop on the left side of the road beside a light post at the gas station. A white car stopped at the right side of the jeep. Both vehicles were about "120 to 250 yards" from him. The street was well lit. No one came out of the vehicles. About 15 to 20 minutes after he heard a "sound like clappers firing", twice, from the direction where the vehicles were. The white car reversed and drove off up Jack's Hill Road. He then went to the jeep where he saw a "clear-skinned" woman, with a wound to her face bleeding, in the driver's seat. He remained there until the police came; he told them what he saw.

At about 9:45 p.m. on the said day, prosecution witness Melrose Spence, a former sergeant of police, who had known the applicant as a district constable, since 1973, drove along Barbican Road and stopped at the service station at the intersection of Barbican and Jacks Hill Road. He saw the applicant sitting on the bonnet of his

white Honda Accord motor car and he went within 6-8 feet from the applicant and spoke to him. He saw a Cherokee jeep there also and a female was sitting in the driver's seat, with her hand at her jaw. The witness returned to his vehicle and drove away. He had worked with the applicant while they were in the police force, on several occasions. The applicant was hardworking and was an expert in the handling and use of firearms.

Daniel Wray, former Assistant Commissioner of Police, and Government ballistics expert visited the scene, at the intersection of Barbican and Jacks Hill Road at about 10:00 p.m. He saw the dead body of Paulette Zaidie in the left hand driver's seat of the jeep slumped across the centre and with her head over the left passenger seat, shot through the mouth. He saw a firearm bullet hole from the outside traced downwards and towards the rear, through the door, the inside panel and into the driver's seat from which he recovered a .44 calibre copper jacketed bullett from the inside of the right door in the vicinity of the door latch. He recovered two lead fragments of a bullet. A bullet was also recovered from the floor under the driver's seat. He said that powder burns to the body meant that the muzzle of the firearm was a distance of between 3 inches to 24 inches away when it was fired.

Under cross-examination this witness Assistant Commissioner Wray stated that the .44 Magnum revolver in this case required 7 ½ lbs. pressure, on double action to discharge it. Asked further he was of the opinion that it was possible that if someone is holding that revolver with his finger on the trigger, and received a violent blow to the stomach it could cause that person to involuntarily pull the trigger. The barrel would have to be pointed at the victim.

Dr. Royston Clifford, forensic pathologist, who conducted the postmortem examination observed an entrance gunshot wound to the left cheek extending to the neck ¼" x ¾" surrounded by a conical area of soot, namely, gunpowder deposit, 3"x 2½". The wound extended through the skin and underlying tissue. The missile shattered the lower mandible, the left carotid artery and the internal jugular vein, then went through the mouth shattering the right mandible and exiting at the right side of the mouth and cheek creating a gaping tearing wound 3"x2". He said that the cause of death was due to the said gun shot wounds; death was instantaneous, and the firing was at close range, as evidenced from the gunpowder deposits. He agreed with the witness Assistant Commissioner Wray that the muzzle of the gun when fired would have been between 3" to 24" from the wound which ran from left to right and slightly upwards. The deceased was five feet five inches tall, weighing 105 lbs and clothed in a white "T shirt" and pants.

Former Assistant Commissioner Rupert Linton, another ballistics expert, said that on 13th January 1987, he received and examined, three pieces and one fired .44 calibre magnum copper base jacketed lead bullets, damaged and mutilated, all of the type used in a .44 calibre Magnum revolver. He received and examined such a revolver, verified that two shots had been fired from it and said that to discharge the firearm, it would require 7½ lbs on double action and 2 lbs on single action. The trigger is surrounded by a trigger guard and the revolver has a built in hammer-block firing safety device, which prevents the firearm from being discharged unless the finger is on the trigger and the trigger is pulled.

He conducted tests on the white T-shirt the deceased had been wearing and it disclosed a heavy deposit of burnt black gunpowder residue on the left front of the

shoulder seam downwards and across to the front and a heavy deposit on the right side at the neck with intermittent deposits between the left and right. He concluded that the muzzle and the barrel of a firearm such as a .44 Magnum revolver was actually resting on the T-shirt when it was fired, in order to cause such heavy residue. In his opinion the intermittent deposits between heavy deposits on the left and heavy deposits on the right indicate that the right portion was folded against the left portion of the T-shirt when the shot was fired for such deposits to have been made "resulting in the intermittent deposits" between each portion. The witness Linton gave explanatory demonstrations to the jury of this folding of the T-shirt, stating in cross-examination that the said shirt was "big and flexible and something that could be dragged from one side to the other as if someone grabbed it causing it to be overlapping."

Detective Superintendent Hubert Miller also went to the scene of the shooting on the said night and saw the body of the deceased in the jeep. On the following day the applicant was brought by his attorney-at-law to the C.I.B. office and the latter handed over the applicant's .44 Magnum revolver and ammunition. The applicant was arrested for the murder of the deceased.

He made an unsworn statement from the dock. He spoke of a relationship between the deceased and himself from the "early eighties", after which she developed a friendship with Zaidie, in "the late eighties" and lived with him. Zaidie ill-treated her and introduced her to the use of the drug cocaine. In June 1986, the deceased spoke to him about Zaidie's ill-treatment and beating of her. Subsequently he spoke to Zaidie at a night club and later with two friends he went to Zaidie's home. Deceased was there. Zaidie came and he spoke to him. Zaidie asked him to leave; he did. A few days later the deceased left Zaidie and moved into the Surbiton apartment. Zaidie

visited her there on occasions and all three would meet there to have friendly talks. The applicant also spoke to Zaidie about assaulting her. About the 8th of December, the deceased told the applicant that she was going to marry Zaidie on the 10th. He had previously declared a lack of interest in marrying her telling her that he had a wife. He said that the very night of the wedding he slept with the deceased at the Terra Nova Hotel. Thereafter he continued on friendly terms with both the deceased and Zaidie. Some days later the deceased told him she had gone to Miami with Zaidie and expressed disappointment and regret concerning her marriage. He advised them both to try to "work it out". He denied that he told Zaidie that he was going to verify the fact of the marriage in Spanish Town or that he was going to do something drastic. On the fateful night the deceased telephoned requesting a meeting with him at 9:00 p.m. at the gas station at Barbican Road. They met there and spoke to each other from their respective vehicles. She expressed her reluctance to return to her husband and he advised her against such an action. He came out of his car and sat on the bonnet. She then came out of her vehicle. repeating her reluctance to return. She "seemed depressed and crying." She then pulled his firearm from out of the holster at his waist. He grabbed both her hands with both his hands pushed the firearm away and there was an explosion and a bullet from the firearm went through the left door of her motor vehicle.

He took the firearm from her, lifted her, placed her in the left driver's seat of her motor vehicle and told her to go home. She struggled and was hysterical. He was then holding the firearm "... in a reversed position," and held it against the door stanchion because she was "bracing to come back out." He stretched to turn on the ignition on the right hand side of the steering wheel, when suddenly he felt " a jerk in

my stomach," simultaneously the gun went off and fell from his hand. He said Paulette's body and head moved forward from against me, her face in gunpowder and blood." He was frightened, realized she was dead, picked up his firearm and drove home.

He telephoned the deceased's sister Daphne Matadial and "told her that Paulette was shot and that she was at the gas station at the intersection of Barbican and Jacks Hill Roads." He said, "I next called Jimmy Zaidie and told him the same thing... I called the police station and told them what had happened." The following day, accompanied by his attorney-at-law he went to the police station. He denied that he threatened the deceased or Zaidie. He expressed his love for her. His basic defence was that of accident.

Several grounds of appeal were advanced on behalf of the applicant.

Ground 1 reads:

> "1. The learned trial judge's comments on the defence were unfair, unbalanced inaccurate and weighted against the defence. In particular the learned trial judge
>
> a. ridiculed and misstated the defence version of the shooting
>
> b. put to the jury an alternative version of the shooting which was conflicting to forensic evidence
>
> c. failed to point out to the jury how the defence version of the shooting was supported by forensic evidence
>
> d. described the defendant in an unflattering manner which would cause adverse connotations "the accused is an expert gunman" (page 99)
>
> e. wrongly and unfairly commented on the applicant's failure in not giving any

> explanation of the events to the police (page 90)
>
> f Failed to legally explain the defence of accident and constantly failed to leave the issue of accident properly."

In support of ground 1a. counsel for the applicant argued that the learned trial judge improperly asked the jury to consider "where the jerk to the stomach come from", thereby ridiculing and misquoting the defence's version of the shooting.

The learned trial judge directed the jury in these terms, at page 85 of the transcript:

> "What Mr. Linton says is that this firearm cannot go off unless it is a deliberate pulling of the trigger; the trigger must be pulled, bearing in mind what Commissioner Wray is saying too, that if a person is kicked in the abdomen in the position he is saying, with a gun, and that gun, if his finger is on the trigger, then involuntarily that gun can go off in its position. He says he took away the gun from her and he lifted her up. "In a state of panic I took her to the jeep, pushed her She was struggling, becoming hysterical." So, here is something happening outside of the car, lifted her up, taking her to the jeep, put her in the seat, and she is struggling. He says at that time he had the gun in his hand. He says he had it in a reversed position; he held it against the door stanchion as she was bracing to come back out and whilst holding it he stretched to turn on the ignition on the right hand side of the steering when suddenly he felt a jerk in his stomach.
>
> Now, where is this jerk coming from? He is outside there by the stanchion of the car. He tells you he placed her in the seat. Where is this jerk coming from? But this is what he tells you, he felt a jerk in his stomach. "Suddenly I felt a jerk in my stomach. Simultaneously the gun went off." Remember he told you he was holding it in the reversed position, and if the expert Mr. Linton is saying this gun cannot go off without the trigger being pulled, the inference you are going to draw or

> you are invited to draw is that his finger must have been on this trigger."

and at page 98:

> "... I am quoting from what he said, Mr. Hamilton. That was his quotation, "I was still bracing on her, when suddenly I felt a blow", and he leans across to the ignition to the right side of the steering column still bracing on her.
>
> Well the jury heard the evidence, my notes read, "Whilst holding it, I stretch over to turn on the ignition on the right hand side of the steering column when suddenly I felt a jerking in my stomach, simultaneously the gun went off."

A significant aspect of the unsworn statement of the applicant appears at page 229 of the transcript of the evidence:

> "... I got her into the seat but at the same time I had the gun in my hand. It was being held in the reverse position. Instead of holding it in the way the handle was upward and I was holding it against the door stanchion for support because she was bracing to come out back... I stretched over to turn on the ignition... still bracing against her, when suddenly I felt a jerk, a heavy blow to my stomach region. Simultaneously the gun went off... Paulette's head and body moved forward... Her body along with her head moved forward from against me." (Emphasis added)

Nowhere in that narrative is any indication that the applicant was aware of what caused the "heavy blow to my stomach region." Furthermore, the "bracing" body of the deceased "moved ... from against..." the applicant's, only after the gun went off. Accordingly, there was no room for a clear inference by the jury as to the origin of the "heavy blow." Neither did the applicant state that his finger was on the trigger, a circumstance clearly indicated by Assistant Commissioner Wray, to have to exist, for the gun to go off involuntarily, if such a person received a blow to the stomach. On the

contrary, the applicant stated that he was holding the gun in a "reversed position" with the handle upward.

A trial judge has a duty to assist a jury in the consideration of the overall evidence in arriving at their verdict. In the circumstances of this case, the learned trial judge was obliged to and properly directed the jury to consider the origin of the blow to the stomach, in order to determine the fact of the consequential reaction of the applicant and the discharge of the firearm as recited by the applicant in his statement. We find no merit in this complaint that the learned trial judge was thereby ridiculing the defence.

Ground 1b. advanced by counsel maintained that the learned trial judge told the jury that the evidence of Rupert Linton, the ballistics expert, supported the fact that the deceased was held by one hand in the region of her chest and the gun placed close to her and the shot fired and that the firearm cannot "go off" unless the trigger is deliberately pulled. Such directions were material misdirections of the relevant forensic evidence, were inflammatory, and incorrectly advanced as rebutting the defence of accident.

It is necessary, in this context to examine the relevant evidence of the said witness Rupert Linton. He said, in examination in chief, at page 191:

> "Examination and tests conducted on the Tee-Shirt disclosed a heavy deposit of burnt black gunpowder residue located on the left side shoulder section of the neck down to the upper portion of the left shoulder seam for three and a half inches; then continuing in front along the right side of the neck for eight inches and spreading below the eight inches of the neck deposit for four and a half inches to the left and tapering off to three inches on the right, at which section the deposit is almost as heavy as on the right.

Q. Mr. Linton, can you account for the heavy deposit of gunpowder on the T-Shirt as you saw it?

A. The evidence of the heavy deposit of gunpowder residue located on T-Shirt as stipulated on the test, indicates that it was made from burnt gunpowder residue projected through the barrel bore of a firearm of the .44 calibre magnum revolver type and from the burnt gunpowder residue of a .44 calibre magnum revolver cartridge fired in the said revolver and that is the muzzle end of the barrel which is the front end of the barrel.

Q. Yes?

A. This is the muzzle end, the front end, was resting against the portion with burnt gunpowder residue.

Q. So it would have been held very close to the person wearing the T-Shirt? it was actually resting?

A. Actually resting when the firearm was fired for the deposit to have been made. The intermittent deposits between the bigger deposit on the left and on the right indicates that the right portion with the heavy deposit was folded against the left portion with the heavy deposit when the firearm was fired for the deposit to have been made and at which the burnt gunpowder residue seeped between both, resulting in the intermittent deposits between both."

and said, in cross-examination, at page 202:

"Q. You said that the clothing, the T-Shirt. Did you demonstrate on your own jacket or if you want to take off your shirt, with the court's permission, just where the deposit was and the intermittent... May he take off his jacket, m'Lord?

HIS LORDSHIP; Yes, yes, to assist.

A. From what I remember of the shirt it was a big flexible shirt and something that could be dragged from one side to the other.

Q. Could be dragged from one side to the other?

A. Yes.

Q. If pressure is applied to it?

A. Yes, as if somebody dragged the whole section, overlapping it.

Q. Either grabbing it or overlapping it?

A. Causing it to be overlapped.

Q. Or pressing on it?

A. No. I didn't say that."

In respect of the discharge of the firearm, the evidence of the witness Linton reads, at page 185:

Q. And to fire on double action you are talking about seven pounds?

A. Yes, Sir.

Q, Without cocking?

A. Without cocking.

Q. And can that gun go off without pulling the trigger?

A. No, Sir, it can't.

Q. Can't go off without pulling the trigger?

A. For double action cocking it is the pressing of the trigger alone for ...

HIS LORDSHIP; Just a moment. Just a moment.

Yes?

A. It is the pressing of the trigger alone, fully backward, for mechanical cocking.

HIS LORDSHIP; For mechanical cocking?

WITNESS: For mechanical cocking the hammer, mechanical cocking and the falling forward of the hammer for firing.

Q. And that is how much?

A. Seven and a half pounds.

Q. And what is the purpose of the trigger guard, Mr. Linton?

A. It is to prevent accidental firing of the firearm.

...

A. Safety is inbuilt in front of the hammer. When the trigger is pulled, whether on single or double action, the trigger withdraws that safety that is in front of the firing pin and and causing the firing pin to fall through and fire the chamber- in cartridge."

The evidence of this witness and the physical demonstration would have indicated to the jury that the right side of the T-shirt would have been "folded" across its left side causing it to be overlapped and the firearm discharged with its muzzle resting on the said garment in order to cause the heavy gunpowder deposits to the left and right sides and mere intermittent deposits in between the said sides. This witness also indicated that seven and a half pounds of pressure had to be applied to the trigger of the firearm on double action in order to discharge the firearm, which could not be discharged other than by "pulling the trigger."

Having quite properly pointed out that aspect of the evidence of this witness to the jury, the learned trial judge then said, at page 75:

> "If this is so, if you accept that, it would rule out accident altogether because this would be deliberate. These are matters that you must consider."

We are of the view that considering the nature of the defence and the circumstances of the prosecution's case this was therefore a correct observation by the judge, leaving it to the jury to consider.

In respect of ground 1c. counsel argued that the learned trial judge failed to inform the jury that the evidence of the witness Daniel Wray that a blow to the stomach could cause pressure to be applied to cause the discharge of the firearm, that the forensic evidence supported the defence that the first shot through the door causing the bullet to enter the driver's seat without causing injury to the deceased supported the view that she was not at that time sitting on the said seat and that both factors were favourable to the appellant's defence. Therefore that omission was unfair to the appellant. The learned trial judge in recounting the evidence of the witness Daniel Wray to the jury, said, at page 71:

> "He says, in relation to Exhibit 6, it requires 7-1/2 lb double action. If someone holding Exhibit 6 with his finger on the trigger were to receive a sudden, violent blow to the abdomen it is possible to cause that person to involuntarily pull the trigger. And he also says it is also possible that the gun would have to be pointed at the victim. The bullet would take the line wherever that barrel is pointed."

Counsel for the applicant omitted to recognise that the evidence of this witness as to the involuntary discharge of the firearm due to the blow to the stomach was based on the pre-condition that the holder of the firearm had "his finger on the trigger" and "involuntarily" pulled the trigger. The transcript of the evidence of the cross-examination of this witness Wray, by counsel at the trial reads, at page 216:

> "Q. If someone is holding that particular firearm with his finger on the trigger and was to receive a sudden violent blow ... to the abdomen, is it possible that this could cause that person to involuntarily pull the trigger?
>
> ...
>
> A. It is possible?

and the further re-examination of counsel for the crown at page 216:

> Q. Mr. Wray, is it possible that the gun would have to be pointed at the victim?

A. Yes, sir, the bullet will take the line of the barrel. Where the barrel points the bullet would take that line."

This proposition as to the possible discharge of the firearm is in stark contrast to the statement of the applicant himself at the trial, that at the time he received the jerk to the stomach he was holding the firearm "... in the reverse position...", with "... the handle... upward". We fail to see how the evidence of the witness Wray could have been seen by any jury as favourable to the applicant. Furthermore, the fact that Dr. Clifford, the pathologist did not observe, "... any bullet injuries to the leg or any where else...", of the deceased, is not supportive forensic evidence, that the deceased was not in the driver's seat at the time that the bullet entered the said seat. It would have been highly speculative, without more, to ask a jury to draw such an inference. The learned trial judge's directions in this respect were fair and accurate and in accordance with the evidence.

It was argued as ground 1d. that by the use of the words "... the accused is an expert gunman...", the learned trial judge may have led the jury to view the applicant in an adverse light to his detriment. The learned trial judge said at p. 99:

> "But what the prosecution is saying, you know, and asking you to say is that the accused is an expert gunman, and that is not denied."

The cross-examination of prosecution witness Melrose Spence, by counsel for the defence as to the proficiency of the applicant with a firearm reveals this dialogue at page 158:

"Q. It is correct to say, is it not, that in the course of your association with him you had attended at the practice range, the shooting practice range which is used by the police?

A. On several occasions. Yes, sir.

Q. Would it be correct to say that he attained the

standard of a marksman on the range?

A. Well, the standard used in the police force, expert is higher and I would say Mr. Berry was an expert?

Q. Expert is higher in the police force and you would say he was an expert?

A. Indeed, sir."

Although the learned trial judge made this comment in the context of a bullet entering the seat of the jeep, a ground of complaint dealt with by us immediately prior to this, he was doing no more than repeating the opinion of the witness Spence that from her observation of him on the "shooting practice range" he was indeed an expert marksman. The use of the word "gunman" by the learned judge has to be viewed in that light and we are of the opinion that the jury would have viewed it similarly. We find no basis for a complaint in that regard.

The complaint in ground 1e. is, that the learned trial judge:

> "e wrongly and unfairly commented on the applicant's failure in not giving any explanation of the events to the police (page 90)"

This complaint was directed at a passage in the directions to the jury, in respect of the applicant's conduct after the shooting. This was in the context of the defence of accident. It reads at page 88:

> "Now you will have to ask yourselves this question, whether he is capable of belief on this. What the accused is saying to you is that Paulette got shot as a result of an accident; and accident may be defined as an unforseen event which is not expected or designed; he had nothing to do with it, it is an accident, no intent, nothing. But you would have to ask yourselves this question: If this was so, if this was an accident, would not he at the first opportunity, the first report he is making say that she got shot as a result of an accident? Why is he moving away from the scene, going home leaving

> her there and calling Daphne and calling Mr. Zaidie among others? They are told he is a policeman, a very brave policeman too, risk his life on several occasions.
>
> Why didn't he say to Daphne, "Daphne, Paulette got shot by accident," or "was shot by accident."? Why didn't he tell Jimmy that? Instead he is just telling them - I am telling you the exact words - he says that Paulette was shot and that she was at the gas station. Now, isn't it reasonable to think that if this is truly what happened, an accident, he would be saying: "Look,Paulette got shot; gun go off and shot her; accident."? Paulette got shot and she is at Jacks Hill. Why is he removing himself from the scene? This is a woman he says he dearly loves. Do you think that panic could have caused him to behave in that way? Because, if you accept what Mr. Johnson is saying, that the car drove off at the time, just turned around and disappeared, what do you gain from that? When you say 'disappeared' does he mean sped off? It is a matter for you what you make of that. But did the accused man avail himself of the first opportunity or any opportunity at all to say this happened by accident? He didn't tell the police that; he didn't tell those people whom he first called - those four persons - that. But it is a matter for you, Mr. Foreman and your members."

The learned trial judge was inviting the jury to consider whether or not it would have been more reasonable to believe that if it was in fact an accident, then the applicant would have used the words "it was by accident," or words to that effect. Nowhere did the learned trial judge comment that the applicant failed to give "any explanation of the events to the police." Rather, he in fact reminded the jury that the applicant had said, "I called the police station and told them what had happened." It was quite proper and reasonable for the learned trial judge to invite the jury to consider the conduct of the applicant in such circumstances and the nature of the report he

made to the several persons after the incident. We find that this ground is ill-conceived and without merit.

Ground 1.f complains of a failure on the part of the learned trial judge to explain properly and leave the defence of accident to the jury. In explaining the defence of accident the learned trial judge said this to the jury, at page 88:

> "What the accused is saying to you is that Paulette got shot as a result of an accident; and accident may be defined as an unforseen event which is not expected or designed; he had nothing to do with it, it is an accident, no intent, nothing."

and at page 97:

> "Remember I tell you, if you accept what Mr. Berry tells you, that it was some accident, you acquit him, he is not guilty. If the evidence makes you feel unsure, if there is a doubt, you will have to resolve that doubt in his favour. You can only convict him if the evidence makes you feel sure of his guilt."

Counsel for the defence relied upon the decision in **R v. Stanley McKenzie, SCCA No 62/91** (unreported) delivered on 11th March, 1992, where the defence of accident arose but was not defined by the learned trial judge. The Court of Appeal, relying on a dictum of the said Court in **R v. Michael Bailey SCCA No. 141/89** (unreported) delivered 31st. January, 1991 (per Carey, J.A.) held that "in cases such as this" the jury should have been told that, "...a killing which occurs in the course of a lawful act without negligence is accident."

In the **Bailey and McKenzie cases** the appellant in each case was a police officer in the lawful execution of his duty engaged in a struggle for the firearm with the deceased during which it was discharged causing death. The defence in each case was accident. No definition of accident was given by the trial judge in the **McKenzie case**, but the Court of Appeal was of the view that the directions given on accident

when leaving the verdict to the jury were adequate as it concerned the definition of accident "...in a global way."

In the instant case, the latter cases are unhelpful to the defence. The circumstances are entirely different. Here, the applicant Berry, holding the firearm "in a reverse position" in a hand resting on the left stanchion of the jeep on the outside, was not subject to an act of or attempt by the deceased directed towards the firearm. Nor was the applicant purporting to act in any execution of his duty. The applicant's case was, that the firearm was discharged when he felt a blow to his stomach, an area remotely removed from the area of the stanchion where the firearm was then held and rested.

There was no evidence in the instant case to consider the circumstances as that which existed in the **McKenzie case**. In any event the learned trial judge, in his directions to the jury in the instant case, did define the defence of accident to the jury as "... an unforseen event which is not expected or designed..." In the circumstances of this case, and in particular, because of the nature of the defence contained in the statement of the applicant, the directions to the jury on the defence of accident were quite adequate. We find no virtue in this complaint.

A trial judge is entitled to make comments to the jury on aspects of the evidence where he finds it necessary to do so, provided that such comments are balanced, just and not unfair: Provided also that the jury is clearly told that in the final analysis the verdict arising from the evidence is theirs - **Byfield Mears vs.** R, (unreported) Privy Council Appeal No. 22/92 dated 25th March, 1993, **R.v. Dave Robinson** SCCA 146/89 dated 29th April, 1991. We find that the comments complained of were unjustified. Ground 1 therefore fails.

Ground 2 complains of the failure of the learned trial judge to leave to the jury the issues of self defence and manslaughter due to provocation or lack of intent.

It is well settled that a trial judge has a duty to leave to the jury any defence which fairly arises on the evidence, and even in cases where such defences are not specifically relied on by the accused: **R. v Porritt** [1961] 3 All E R 463, 468, relied on in **R v. McKenzie** (supra) and **R v. Bailey** (supra). Did the evidence in the instant case justify leaving to the jury the defence of self-defence and the offence of manslaughter?

Counsel for the applicant argued, in support of this ground that self-defence arose because the applicant would have forseen that his life was in danger, in that the deceased could have taken the firearm from him. In addition, if the jury rejected the defence of accident, it could have found that the applicant acted with gross negligence and without the intent to kill and was therefore guilty of manslaughter.

Self-defence may lawfully be employed where a man is attacked in curcumstances where his life is in danger or he is in danger of serious bodily injury: **Palmer v. R.** [1971] 1 All E. R. 1077), or where he honestly believes it to be so **Solomon Beckford v. R** [1988] 1 A.C. 130. He may use such force necessary to repel or resist the attack even to the extent of killing his attacker. The defence may also arise, as we have demonstrated above, where a firearm is discharged in the course of a struggle in which the deceased's efforts were directed towards the said firearm, as in **R v. McKenzie** (supra) and **R v Bailey** (supra). In the above instances there must therefore be either evidence of an attack in fact, or some manifest act to give rise to that honest belief or from which it may be inferred that the honest belief existed. In the instant case none of the above circumstances existed. The prosecution's case was that the firearm was deliberately discharged by the applicant

with the muzzle touching the T-shirt then worn by the deceased with its left side folded across the right, exerting 7½ lbs of pressure with his finger on the trigger nullifying the safety hammer block and that he did so whilst the deceased was sitting in the driver's seat of the jeep with the closed left hand door between them. According to the applicant's own description in his unsworn statement, he was holding the firearm in the "reverse position" with "its handle upward", a grasp which would effectively nullify its normal functions. His finger would no longer be forward of the trigger, that is "on the trigger" in order to "pull the trigger," to cause the discharge of the firearm, a circumstance referred to by both ballistics experts, Wray and Linton, as a pre-condition to the exertion of 7½ lbs of pressure to cause the discharge of the said firearm.

There was no evidence before the jury of any act on the part of the deceased that could be seen or construed as either an attack directed at the applicant or towards the firearm or to give rise to the honest belief in such an attack. We agree with the decision of the learned trial judge not to leave the issue of self-defence to the jury.

The offence of manslaughter did not arise on the facts of the instant case for the consideration of the jury, on either the prosecution or the defence case. Counsel for the applicant did not pursue the issue of manslaughter arising by reason of provocation and we entirely agree with counsel in that respect. He argued however that the offence of manslaughter should have been left to the jury because the jury could have rejected accident but found instead, that the applicant did not deliberately pull the trigger but that his action was grossly negligent or that he did not have the intent to kill. Manslaughter arises where someone, without the intent to kill causes the death of another by an act in which he the accused was grossly negligent, that is, in breach of the duty of care to a high degree, that is reckless, or committed an unlawful

and dangerous act which he knew was likely to cause some harm, and he proceeded to take the risk of causing such harm. (See **R v. Larkin** [1943] 1 All E R 217.)

Manslaughter did not arise in the circumstances of the case for the prosecution, particularly considering the forensic evidence, which we have referred to above. Examining the case for the defence, rather than displaying the action of the applicant to be unlawful and dangerous and likely to cause harm, or reckless, his statement reveals a careful and conscious effort to handle the firearm, in order to obviate any harm to the deceased. As we observed, the grasp was in the "reverse position" with the handle upwards, thereby presumably causing the jury to infer that the muzzle was pointing backwards, that is, towards the applicant himself. His finger would not then be "on the trigger" in order to exert 7½ lbs of pulling pressure, and the firearm was at the crucial time held in that way against the stanchion outside the jeep. The applicant claims that, in those circumstances, the firearm was discharged involuntarily, and not by his deliberate act. We are of the view that it would have been wholly speculative and wrong to leave the offence of manslaughter for the consideration of the jury, in those circumstances. Referring to the circumstances in which a verdict of manslaughter could arise, the Board in **Palmer v. R** (supra) (per Lord Morris of Borth-y-Gest), said, at page 242:

> "If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

Such a verdict of manslaughter could not be returned on the basis of either the case for the prosecution or that of the defence in the instant case. The argument on this ground also fails.

It was submitted in support of the complaint in ground 3 that the learned trial judge by repeatedly reminding the jury that the previous convictions and the acts of deceptions, admitted to by the witness Joseph Zaidie, all occurred after the death of Paulette was incorrect and served to mislead the jury on the manner in which they ought to view the credibility of the said witness. The learned trial judge directed the jury in respect of the said witness Zaidie in this way, at page 13 of the summing up:

> "He tells you at the outset that he was convicted for larceny of Rolex watch, also convicted for fraud and drugs, for taking cocaine. He says he has about four previous convictions. And you recall what he tells you that his first conviction for fraud was after the death of Paulette. That, in fact, says he, all his convictions were after the death of Paulette."

and at page 28:

> "So, here it is the Defence is showing up his bad character. What the Defence is saying, this is not a man in whom you can believe. He is a fraud. He practices dishonesty. He practices deception. But you will recall what he tells you, all this that happened, happened after Paulette's death, 'and what I am speaking to is something that happened before my convictions.' It's a matter for you how you are going to treat him, whether you viewed his evidence as credible, and you remember I told you, you must look at the demeanour of the witnesses, when they answer questions particularly in cross-examination, and you saw that he really did admit these convictions. He never denied them. He said, 'yes, I have these convictions.'
>
> So what do you make of him? Is he a man that you can believe? And it was suggested to him that the accused man never told him that he is lucky he wasn't there, and that he had just killed Paulette. He says 'yes, this is what the accused told me over the 'phone. He says, 'yes, I have a conviction for cocaine use,' and you remember he said that from the very instance, this is in cross-examination. He says he never used it whilst he was married to Paulette. He has never seen

> Paulette using cocaine and that he has stopped, he says he has stopped using cocaine'."

and at page 93:

> "In this bit of evidence coming from Mr. Bachstetz the defence is showing that Mr. Zaidie is not a man to be relied on; you can't take his word for it; you can't believe what he is saying because here he has gone to misrepresent the facts to Mr. Bachstetz in order to get money from him. But he admits it. What he tells you, all this happened after the incident with Paulette - after Paulette's death. In fact what he is saying, he is a changed man since Paulette's death because he never used to do any of these things before and there is no evidence of any conviction against him before."

We are not altogether satisfied that the defence should have been permitted to lead this latter evidence in challenge to the admitted deception by the witness Zaidie. Answers in cross-examination as to credit are final. In so far as the above directions would have merely suggested to the jury that because the convictions and deceptions occurred after the death of the deceased they should not be taken into account in considering the credibility of the witness Zaidie, such directions would have been flawed. It was the prosecution which introduced, in examination-in-chief the bad character of its witness Zaidie. However, the defence referred to the credibility of the witness Zaidie for a two-fold reason. Firstly, because of his previous convictions and bad reputation he should not be believed as a witness of truth, and also that he was a bad influence on the deceased. In support of the latter the defence suggested that the witness Zaidie introduced the drug cocaine to the deceased. This he denied and presumably to support that denial, added that the said convictions, including that for his involvement in cocaine occurred after the death of Paulette.

The learned trial judge earlier directed the jury, at page 5:

> "In considering the evidence given by the various witnesses, you are entitled to take into account their demeanour. You will bear in mind the way in which they replied to questions put to them, the way they acted in particular, under cross-examination. You will no doubt take into account the apparent level of intelligence of the witnesses. You are entitled to take into account the relationship which existed between the witnesses themselves and between them and the accused.
>
> Now having regard to all these matters and using your own commonsense knowledge of human nature and that of your fellow Jamaicans, you will eventually have to arrive at an assessment in respect to each witness as to whether or not you regard that witness as a witness of truth. You are entitled as judges of the fact to say what evidence you believe, what witness you disbelieve, what facts you find proved. It is open to you to believe all that a witness tells you or to disbelieve all he tells you. It is also open to you to believe a part of what he tells you and reject the other part."

We are of the view that the jury was entitled to consider whether prior to Paulette's death, the witness Zaidie was "a good man", as he claimed, and therefore unlikely to have introduced her to the use of drugs. The jury would not thereby have failed to consider his general character in determining his credibility as a witness. We find no merit in this ground.

Ground 4, as argued, advances the complaint that the learned trial judge failed fully and fairly to direct the jury that it was at the trial that the evidence of Daphne Matadial first disclosed that the applicant had made threats on the lives of the deceased and the witness Zaidie, and that her evidence lacked consistency as to whose voice she heard on the telephone on the said night of the incident. The cross-examination of this prosecution witness by counsel for the applicant is recorded in this way, at page 105 of the transcript of the evidence:

"Q. And on the 11th of February 1997, this morning to be exact ...

A. Yes, sir.

Q. ... you gave yet another statement to the police?

A. Yes.

Q. Would I be correct that the first time you are saying what I have just read to you on the 18th December, 1996, "I spoke to Linton and he said he bought a ticket to go to Miami to kill both Jimmy and Paulette." Is that the first time this morning, ten years later that you are saying that?

A. Are you saying something to me Mr. Hamilton?

Q. Is this the first time you are saying those words: "On the 18th of December 1996, I spoke to Linton on the 'phone and he said he bought a ticket and he was going to kill Paulette and Jimmy"?

A. I had said it before Mr. Hamilton; it was not used in my statement because my statement was aborted?

Q. It was said but it was not recorded?

A. That is right."

Counsel did not suggest, nor did he intimate, that he was in any way challenging that evidence as a recent invention. In any event, the witness gave an explanation that she had made the statement before and stated the fact that it was not recorded by the police until her further statement was taken on 11thFebruary, 1997. A further area of lack of consistency in the evidence of this witness is recorded, in this way, at page 106 of the said transcript:

"Q. ... Mrs Matadial. Did you say today that at some time after 9:00. you got a 'phone call and your husband spoke?

A. Yes.

Q. And that the voice was female?

A. Yes.

Q. And you spoke to the person and the person's voice was female?

A. Yes.

Q. In that statement that you gave the very next morning Mrs. Matadial, did you say, 'Sunday the 11th 1987, at 10:00 p.m. the telephone rang. My husband picked up same, told me something, as a result I went to the 'phone picking up the receiver said 'hello' and I recognised the voice to be that of Linton Berry'?

A. Yes, I did say that.

Q. You did say that?

A. Yes.

HIS LORDSHIP: Just a minute now.

Q. And all that Linton Berry said to you was, 'I have just shot Paulette. She is at Jacks Hill Service Station' and hung up. Isn't that so?

A. I did give that statement in fright and panic and anger but there was an explanation after that to the court...

Q. We will come to the explanation ...

A. ... and to the lawyers and the police corrected my statement.

Q. Did you say, 'I recognised the voice to be that of Linton Berry, 'and I just shot Paulette, she is at Jacks Hill Service station' and hung up the 'phone.' Did you say that in the statement?

Q. I said I did say that in fright and in a state of anger and that I corrected it.

The witness admitted the existence of the discrepancy and explained the reason why it arose. The learned trial judge dealt with the latter discrepancy, in this manner, in his direction to the jury, at page 42 of the summing-up:

> "... what Mr.Berry tells you is that he called four persons that morning, that ill-fated day. He tells you that he called Mr. Zaidie; he tells you that he call Mrs.Matadial; that is what he says. So, how do you resolve that, because he is saying he calls her, but she says when she got that telephone, although the husband say it was Linton Berry, when she got the phone it was a woman who come on the phone, and she sought to explain and correct it."

This was an adequate direction to the jury of a statement by the applicant which supported the evidence of the witness Daphne Matadial and her explanation of the discrepancy. Although the learned trial judge gave no specific directions to the jury of the manner in which they should deal with discrepancies generally, we find that in the circumstances of this case, such directions were unnecessary, in respect of the two instances referred to above. He did however direct the jury in general terms, at page 6 of the summing up as to the method of assessment of the credibility of each witness. This ground also fails.

The final ground, ground 5, was a complaint that the directions of the learned trial judge on the good character of the applicant were incorrect and insufficient. The learned trial judge said of the applicant's character, on page 96, of the summing-up:

> "Now Mr. Foreman and your members, <u>good character is primarily a matter that goes to credibility</u>. It is evidence to induce you to say whether you think it is likely that the accused would have committed this offence. However, if the evidence in the case makes you feel sure the accused is guilty of murder then the good character cannot avail him If you have <u>any doubts about the evidence that you have you may use the character of the accused to say that a man of this character is</u>

> less likely to commit an offence of this nature than a man of bad character. That's how the character evidence operates. So you take that into consideration."(Emphasis added)

In **Berry vs R.** (1992) 41 WIR 244 the Board of the Judicial Committee of the Privy Council (per Lord Lowry) referred to the cases of **R v Bellis** [1966] 1 All ER 552, [1966] 1 WLR 234, **R v Falconer-Atlee** (1973) 58 Cr App R 348, **R v Marr** (1989) 90 Cr App R 154, **R v Cohen** (1990) 91 Cr App R 125 and **R v Berrada** (1989) 91 Cr App R 131n., on the issue of evidence of good character, and held at page 258:

> "The last three cases are also authority for the proposition that it is proper, though not obligatory, for the trial judge to tell the jury that, as well as (1) going to credibility, (2) good character is relevant when considering whether the defendant is the kind of man who is likely to have behaved in the way that the prosecution alleged. But the primary point, one now has to accept, is credibility."

In the instant case the learned trial judge properly highlighted the two important aspects of evidence of good character, namely, the credibility of the applicant as the primary factor and secondly, whether it is likely that the applicant as someone of such good character would have committed such an offence. In an explanatory expansion, the learned trial judge directed the jury, in circumstances, where they were in doubt about aspects of evidence, they should resolve it in favour of such a man of good character. This was not a reference to the overall burden of proof, as counsel for the applicant advanced in argument.

We thought this latter direction by the learned trial judge was in some way generous to the applicant. We find the direction on good character adequate in the circumstances and that there is no merit in this ground.

For the above reasons the application for leave to appeal is dismissed and the conviction and sentence are affirmed.