[2014] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 2 & 3/2008

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

HAROLD BERBICK
KENTON GORDON v R

Dr Randolph Williams for Harold Berbick

Keith Bishop and Raoul Lindo for Kenton Gordon

Miss Sanchia Burrell for the Crown

1, 2 July 2013 and 7 March 2014

MORRISON JA

Introduction

[1] In his time, Mr Trevor Berbick ('the deceased') was a famous and internationally known boxer. In his retirement, having earned a total of five heavyweight championship belts over the course of his career, he returned to Jamaica to live at Ranch Hill,

Norwich, in the parish of Portland. Shortly after 6:00 am on 28 October 2006, he was found dead on the steps of the chapel of the Church of God in Norwich.

[2] Mr Harold Berbick, the deceased's nephew, and Mr Kenton Gordon (also known as 'Sheldon') were jointly charged with murdering him. For easy reference, we will refer to them individually as 'Mr Berbick' and 'Mr Gordon', and collectively as 'the applicants'.

[3] Both applicants entered pleas of not guilty and, on 26 November 2007, their trial commenced before McDonald J and a jury in the Circuit Court for the parish of Portland. On 20 December 2007, the jury returned verdicts of guilty of murder against Mr Berbick and guilty of manslaughter against Mr Gordon. They were sentenced on 11 January 2008, when Mr Berbick was sentenced to imprisonment for life, the court stipulating that he should serve a minimum of 20 years before becoming eligible for parole; and Mr Gordon was sentenced to 14 years' imprisonment at hard labour.

[4] On 10 September 2010, both applicants' applications for leave to appeal against their convictions and sentences were refused by a single judge of this court. These are therefore their renewed applications to the court itself.

The issues on appeal

[5] The case for the prosecution against both applicants depended to a significant extent on statements allegedly made by them to the police, in the case of Mr Berbick, during the course of a question and answer session conducted in the presence of an attorney-at-law on 30 October 2006; and, in the case of Mr Gordon, in a statement under caution given by him on 31 October 2006. The primary issue on appeal in respect

of both applicants is whether the learned judge's decision to admit these statements into evidence was correct ('the admissibility issue').

[6] Mr Berbick contends further that (a) he was deprived of the benefit of a good character direction and a chance of an acquittal by the failure of his counsel to put his character in issue at the trial ('the good character issue'); and (b) the learned trial judge misdirected the jury on the question of the requisite intention for the offence of murder ('the misdirection issue').

[7] Additionally, both applicants contend that the sentences imposed by the trial judge were manifestly excessive in the circumstances ('the sentence issue').

The prosecution's case

[8] Miss Christine Davis, an employee at McCarthy's Bar in Norwich, Portland, testified that, at minutes to midnight on Friday, 27 October 2006, the deceased entered the bar. After exchanging words briefly with her, the deceased sat at the bar watching television, something he had done in the past. After about an hour, he left the bar. Under cross-examination, she said that the deceased "was looking very pail [sic]…as if he was sick or something like that". She had never seen the deceased drink heavily and, whenever he came to the bar while she was there, he always behaved "very well".

[9] Mr Shawn Bishop was at the material time a resident of Ranch Hill, Norwich District. He was a 'sound selector' and he operated a sound system known as 'World Beat'. Both applicants were previously known to him, Mr Berbick for around six years and Mr Gordon for around a year and a half. He was accustomed to seeing both of

them on a daily basis around Norwich. The deceased was also known to him as a resident of Norwich.

[10] On the evening of 27 October 2006, Mr Bishop was engaged in playing the sound system at a party at Miss Dorraine's bar in Norwich. The deceased was at the party, as were the applicants, though not all at the same time. Mr Berbick in fact played a role in providing music for the party, as his laptop was in use playing some music videos. Mr Bishop remained at the party from 7:00 pm that evening to 1:00 am the following morning (although he did take a break at some point in between to go home and freshen up). He finally stopped playing music at about 1:00 am, he packed up the sound system and left for home. At around this time, he saw the deceased across the road "going down to the other bar".

[11] At some point between 1:30 and 2:00 am, while on his way home on foot along the main road, Mr Bishop heard a voice call out from the yard of the Church of God, "Say, way you a deal wid." He stopped and looked in the direction of the church yard. The area was illuminated by a light in front of the deceased's verandah. Mr Bishop then saw Mr Berbick standing in the church yard. Mr Berbick was shirtless, but was wearing the same pair of shorts that he had been wearing the evening before and Mr Bishop was able to see his face from a distance of about 9-10 yards away. Mr Bishop also saw Mr Gordon standing just behind Mr Berbick in the church yard. He too was shirtless. In answer to Mr Berbick's question, Mr Bishop said that he was going home and continued on his way.

[12] Mr Canute Lambert, who was a deacon of the Church of God in Norwich, had for many years been accustomed to having an early-morning prayer meeting in the chapel of the church every Saturday. The church and the house in which the deceased lived are in close proximity to each other. Mr Lambert, who was 84 years old at the time of the trial, had known the deceased from birth. On the morning of Saturday 28 October 2006, he arrived at the church on foot at a little after 6 o'clock. From the bottom of the steps leading up to the chapel, Mr Lambert saw an object, which he at first took to be a black garbage bag, at the top of the steps. But when he went up the steps and got closer to this object, he realised that it was not a bag. He saw what appeared to be blood on the steps and the object "looked like a human being". Asked if he was able to recognise this human being, his response was, "…it resemble [the deceased] body to me".

[13] Later that morning, after speaking with his mother at about 7:00 o'clock, Mr Bishop got up and took a walk down the road, back to the church yard. There, in "actually the same place [the applicants] were standing the night I left them", he saw the body of the deceased lying on the steps of the church. Later still the same morning, after returning to his house and venturing out again, Mr Bishop encountered the applicants "up by the Top Norwhich [sic]". This time, Mr Berbick was wearing a shirt and the same pair of shorts that he had been wearing the evening before. He had an army jacket in his hand and a knapsack on his back and he was shaking.

[14] When he was cross-examined by counsel for Mr Berbick, Mr Bishop accepted a suggestion that Mr Berbick had confided to him in the past that "him have to walk

through bushes to avoid [the deceased] in the nights", and that he was afraid of the deceased. He also agreed that, despite the light of which he had spoken, the area in which he had seen the applicants in the church yard was dark, though, he insisted, not "all that dark". But he accepted that what he had told the police in his statement was, "I left them standing in the dark."

[15] At about 7:30 on the morning of 28 October 2006, Constable Keneata Cornwall, a constable of police attached to the Port Antonio Scenes of Crime Office, was dispatched to Ranch Hill, Norwich District. When he arrived on the scene at around 8:00 am, a body lying in a pool of what appeared to be blood was pointed out to him in the yard of the Norwich Church of God. Constable Cornwall was able to identify the body as that of the deceased, who he knew before. He observed several wounds to the back of the deceased's head and he collected pieces of what appeared to be bone beneath the deceased's head. These were placed in an envelope, which was sealed and labelled, as were samples of the substance resembling blood which were also taken from the deceased. In the end, nothing turned on this material, as no expert evidence was tendered in relation to it at the trial.

[16] On 6 November 2006, Mrs Elaine Berbick Dryer, the sister of the deceased, formally identified his body to Dr David Crawford, who conducted the post mortem examination on that day. Dr Crawford's examination revealed that the deceased had sustained several head injuries. In the doctor's opinion, the cause of death was massive brain damage and haemorrhage due to a compounded depressed left parietal skull fracture, involving a hard, blunt object, such as an iron bar, delivered with excessive

force. Dr Crawford's estimate was that death would have resulted in not more than half an hour from the time of infliction of the injuries which he observed.

[17] Mr Berbick was taken into custody and taken to the Port Antonio Police Station at around 11 o'clock in the morning of 28 October 2006. In the afternoon of 30 October 2006, he was taken to the office of Superintendent Kelsor Small at the police Area Two Headquarters, Pompano Bay, St Mary, for questioning. In addition to Superintendent Small, the police officers present were Detective Inspector Patrick Callum, Detective Sergeant Kenneth Bailey and Detective Corporal Pike. Also present was an attorney-at-law, the late Mr R. A. 'Bill' Salmon. Before the questioning began, the police officers left the room for a short while to allow the applicant and Mr Salmon, at the latter's request, to speak in private with each other, which they did for about 10 minutes.

[18] When the officers returned, Mr Berbick was told by Superintendent Small that he wished to put some questions to him about the murder of Trevor Berbick at Norwich District on 28 October 2006. He was cautioned in the following terms: "…you are not obliged to answer any of these questions, but if you do, the questions and answers will be taken down in writing and may be given in evidence." Superintendent Small then proceeded to ask Mr Berbick a series of questions, 26 in all, while Detective Sergeant Bailey recorded both the questions and the answers. At the end of the session, Mr Berbick was invited to make corrections, which he did, after which he indicated that the questions and answers were correctly recorded. The document recording the questions and answers was then signed by Mr Berbick and witnessed by the other persons present. For convenience, we will refer to this document hereafter as 'the Q and A'.

[19] When the prosecution sought to tender the Q and A in evidence at the trial, objection to its admissibility was taken by Mr Berbick's counsel on unspecified grounds. The learned trial judge then commenced a trial within a trial in the absence of the jury.

[20] All three of the police officers who were present gave evidence of the circumstances surrounding the interview with Mr Berbick. According to Detective Inspector Callum, Mr Berbick was "treated well" during the interview and "did not make any complaint whatsoever". According to Superintendent Small, Mr Berbick "was treated with all his legal rights observed…[h]e was not intimidated nor threatened, he spoke on his own free will". And, according to Detective Sergeant Bailey, Mr Berbick was "treated normal" before the interview started and no promise or threat was held out or made to him either before or after the session. The entire session, which started at about 3:30 pm, ended at about 7:15 pm.

[21] In cross-examination on the voir dire, Detective Inspector Callum was unable to recall whether there had been any refreshment breaks during the interview with Mr Berbick. Nor could he recall Mr Salmon going in and out of the interview room while it was going on. He denied counsel's suggestion that, early in the morning of 30 October 2006, he had told Mr Berbick that he was going to "make it hard for him" if he did not give a statement. He also denied telling Mr Berbick to "just cooperate and give the statement" and he would make everything alright for him. Further, he did not tell Mr Berbick that "Sheldon [Mr Gordon] seh him stay inna bush and see him lick down Berbick and Sheldon gone home".

[22] When Superintendent Small was cross-examined, he confirmed that it was he who had made the arrangements for Mr Salmon to be present during the interview with Mr Berbick, "because we respect the rights of the accused". However, although he was made aware that Mr Berbick had given an earlier statement to a Sergeant Mullings, he had not thought it necessary to give any instructions for that statement to be given to Mr Salmon prior to the interview. He was aware of the Legal Aid Regulations 2000 ('the legal aid regulations') and he was also aware that each parish has a roster of duty counsel. He was insistent that Mr Berbick was not handcuffed and denied that Mr Salmon had left the room on several occasions during the interview.

[23] When he was cross-examined on the voir dire, Detective Sergeant Bailey agreed that on 28 October 2006 he was given a statement which had been taken from Mr Berbick at Port Antonio Police Station by Sergeant Mullings on the morning of that same day. However, he could not recall whether he had mentioned this statement to Superintendent Small or Detective Inspector Callum. He did recall speaking with Mr Berbick's mother, Miss Gwendolyn Facey, but he did not recall having any discussion with her about her getting a lawyer to represent Mr Berbick. In fact, he had advised Mr Berbick that he could request a lawyer through the Legal Aid Council. He was told by Mr Berbick that he was 20 years old, but he was not aware that Mr Berbick had been taken to the Port Antonio Hospital on several occasions between 28 and 30 October, including the morning of the 30th. He could not recall having been told by Miss Facey that her son "had a medical condition and was highly stressed". He denied telling Mr Berbick that Mr Gordon had stated that he had seen him (Mr Berbick) "licking down" the

deceased and that he (Mr Gordon) had gone home. He denied offering any inducement or encouragement to Mr Berbick to make a statement to the police or suggesting to him what answers he should give on the voir dire. He too denied that Mr Berbick was handcuffed and Mr Salmon had been in and out of the interview room during the interview.

[24] Mr Berbick gave evidence on the voir dire. He confirmed that, after he was taken into custody on 28 October 2006, Sergeant Mullings spoke to him and told him that he needed to give a statement, which he did. His mother, Miss Facey, came to see him at the Port Antonio Police Station that afternoon. In Mr Berbick's presence, Miss Facey spoke to Detective Sergeant Bailey, told him she was going to get a lawyer for Mr Berbick and gave him her telephone number. Asked whether he had any sort of "medical condition", Mr Berbick indicated that he suffered from "stress" and that, while he was in custody, the police had had to take him "several times" to the hospital for treatment.

[25] Between 4:00 and 4:30 in the early morning of 30 October, he was taken out of the lock-up at the Port Antonio Police Station by Detective Sergeant Bailey, who told him that he was going to be taken to Area Two to give a statement. Detective Sergeant Bailey also told him that, "Sheldon, him say Sheldon saw me lick down, Mr Trevor Berbick, and him take himself out of it and him gone home".

[26] Later that same morning, at about 7:30, Mr Berbick said, he was taken to the hospital by Detective Sergeant Bailey and then, later still, he was taken to Area Two.

While on the way there in a police vehicle, Mr Berbick testified, Detective Sergeant Bailey told him that, "when me reach down, everything will be all right man, me not fi worry, him soon let me go, that him tell me". Further, as he was being taken out of the vehicle at Area Two, Detective Sergeant Bailey "use him finger point inna mi head and say me need to go up, me going to give a statement 'cause a hell, when me and him go up". Asked how being told this made him feel, Mr Berbick responded, "Me feel like him a goh torture me, you see me."

[27] Once inside the office, Mr Berbick said that he was introduced to Superintendent Small, "and a lawyer dem call Mr. Bill Salmon". Mr Salmon "only waved his hands at me only, say, 'Hi' and that's all". As the interview progressed, the police officers all asked him questions. When the session ended, Mr Berbick said, he asked Detective Sergeant Bailey whether, now that he had given a statement, he could be let go, to which the response was no. According to Mr Berbick, on the way from and back to Port Antonio Police Station, and during the entire interview session, his hands were handcuffed behind him; they were only "pulled when I was to sign". He had not had anything to eat all day and the last time he ate was on the night of Saturday, 28 October 2006, when his mother fed him at the Port Antonio Police Station. He denied that Detective Sergeant Bailey had told him that he could request a legal aid lawyer on the Monday morning following the interview.

[28] Mr Berbick was cross-examined by counsel for the prosecution, who challenged his evidence in several respects. Though he could not recall how many, he insisted that "a lot" of the 26 answers recorded in the Q and A as having been given by him had

been suggested to him by the police officers. In answer to the suggestion that Detective Sergeant Bailey had told him that, if he requested, a lawyer could be provided for him, Mr Berbick maintained strongly that, "[h]e didn't say it none at all, didn't say it".

[29] Miss Facey also gave evidence on the voir dire. She said that, shortly after her son was taken into custody, she told Detective Sergeant Bailey that she intended to secure the services of a lawyer for him. Later that same day, she said, at about 6:00 pm, after she advised him again that she was going to get a lawyer, Detective Sergeant Bailey told her that in this case she would "have to get a lawyer", who would "have to keep begging the judge".

[30] Miss Facey also said that Mr Berbick had a "medical condition", which she described as "a stressed out problem, he stress out easily". She had first discovered that he suffered from this problem about six months before and he had received medical treatment for it before he was taken into custody.

[31] The two final witnesses on the voir dire were Woman Corporal Donna King and Woman Corporal Sonia Newman, both of whom were at the material time stationed at the Port Antonio Police Station. The former confirmed that, on 30 October 2006, at about 10:00 am, Mr Berbick was handed over to Detective Sergeant Bailey, at his request. The latter told the court that, at about 11:00 am on the same day, a prisoner named Lincoln Chambers, otherwise called Bob, was released from custody on the instructions of Detective Inspector Callum.

[32] After addresses from counsel for Mr Berbick and counsel for the Crown, the learned trial judge ruled, without stating any reasons, that the answers given in the Q and A were given voluntarily and were accordingly admissible in evidence.

[33] The main trial then resumed. Although it does not appear from the transcript precisely when the Q and A were read to the jury, it is clear from the learned trial judge's summing up, in which several references were made to them, that they were read to them. We reproduce below the full text of the Q and A:

> "PLACE: Area II Police Headquarters, Crime & Office, Pompano Bay, St. Mary
>
> PRESENT: Attorney-at-Law R.A. (Bill) Salmon S.P.K. Small, Det. Inspector Callum, Actg. Crime Officer for Portland, Det. Sgt. K. Bailey Det. Cpl. C. Pike and suspect Mr. Harold Berbick o/c "Junior" o/c "Berbs"
>
> DATE: 30. 10. 06 - 3 30 pm
>
> 'You are not obliged to say anything unless you wish to do so but whatever you say will be taking [sic] down in writing and may be given in evidence.'
>
> [Sgd - H. Berbick, R.A. (Bill) Salmon, S. Small, P. Callum]
>
> I wish to put some questions to you about the murder of Trevor Berbick committed at Ranch Hill, Norwich District, Portland between the hours of 1 am and 6:30 am on 28. 10. 06. You are not obliged to answer any of these questions but if you do the questions and answers will be put in writing and may be given in evidence.
>
> [Sgd - H. Berbick, R.A. (Bill) Salmon, S. Small, P. Callum]
>
> Q 1 What is your registered name?
>
> ANS. Harold Gilbert Berbick

Q 2 Are you called by any other name?

ANS. Yes, JUNIOR, BERBS and STEPHAN

Q 3: Where do you live

ANS. Ranch Hill, Norwich District Portland.

Q (4) With whom do you live

ANS. My mother Gwendolyn Facey and father Harold Berbick who works and partly live [sic] in New Jersey, New York but he comes home every year.

Q 4 Did you know the late Trevor Berbick

ANS. Yes, he is my father [sic] brother.

Q 5 Do you know one Kenton Gordon o/c Sheldon of Breeze Wind Lane Norwich, Portland.

ANS. Yes, he is my friend

Q 6 Do you know one Shawn Bishop

ANS. Yes he is my friend

Q 7 I am told that you are involved in the killing of Trevor Berbick your uncle is that true

ANS. Yes sir

Q 8 Do you care to tell me of your involvement

ANS. Yes.

It started from a party that was going on down the road I was playing some music in the bar then I saw him outside he was eating bread and chicken he was staring at me with an angry face I started to play some soca music and he started to dance he was dancing with a woman after I finish playing soca he come in the bar he came to buy a drink and he was staring at me mumbling and making sign with his hand using to run across his throat which let me believe that he wanted to cut my throat I took my eyes off him and wasn't paying him any mind I finish playing about couple more tune and pack up my lap top to leave. I went on the road at the square of the big shop I was talking to my friend Savan I saw a car approach two persons came out

of if, it was Miriam and Biggie known as Kevin he was over the next side of the road so they call me. I went over there to talk and I saw Uncle Trevor leaving from the party, he was going around the corner when he stopped and looked around and looked at us he came back up, he went in a different bar so I asked Miriam for a call off her cell phone to call Sheldon I told him to come, he said him soon come. I was there chilling talking to Miriam and Biggie and I saw him come so Miriam told me she was going up to sleep and Biggie told me he was going around to sleep so I told Sheldon we were going to Ranch Hill and I gave my bag and phone to Savan. I told him me and Sheldon was going to Ranch Hill, while we were walking down, I told Sheldon that uncle Trevor was making sign to cut my throat and I consider that a threat. Me and Sheldon went to Ranch Hill we sat on the wall at the church gate next to uncle Trevor gate. We didn't sit on the wall yet we go fi weapon first over mi mother land in some bushes next to the light post. I took up a piece of iron Sheldon ask me if I could manage it I said, not really so I went up for a next weapon at my house which was a crow bar I gave it to Sheldon we took off our shirt and put it in a bush with Sheldon phone, I never remember say Savan said to send him a please call me, on my phone which he had and I told him when I reach up back the road I would send it off Sheldon phone. We was on the wall me and Sheldon waiting for uncle Trevor because we a plan fi beat him and frighten him while we were waiting on uncle Trevor me have the pipe iron and Sheldon have the crow bar while we was waiting I saw Shawn passing, he didn't see us so me and Sheldon call him he stopped and ask we wah gwaan and mi tell him seh we deh yah a deal wid a shipment we was there talking about his sister calling him, his sister call him and tell him seh him must come home now cause she fraid cause a she alone did deh he told us say him soon come he went up and didn't come back. We were there for a good while waiting for Uncle Trevor we see him a come up the hill and Sheldon tell me fi get ready fi beat him he was coming up the church steps mumbling he had a phone in his hand with the light turn on when him pass me he could not see us and I use the piece of iron to lick him in his head back twice, I was aiming for his neck and shoulder but it catch him in his head he held his head with both hands and bend forward and Sheldon use the crow bar and hit him two times in his head also. Uncle Trevor drop to the ground

and try to bawl out in a low voice and tried to get up but when he was getting up Sheldon hit him in his head two more times and he dropped to the ground. Sheldon told me to take up the flashlight phone out of his hand. I took it up. Sheldon said he was going to search him and I asked him fi wah Sheldon say him nah touch him wid him bear [sic] hand he told me to go for something to lift up his shirt and I go for it up by my house, I went for two white T-shirt and carry them down and give him one, Sheldon use the T-shirt to hold uncle Trevor shirt and lift it up and was looking for a pocket to search for money but he did not find any pocket, Sheldon said better we left this place then he said hold on mek we go check the house if any money in deh we went in the house and search the house but we did not touch anything, he used the flashlight and shine and look we never find any money so we left, we get in the house by Sheldon using the crow bar to force open the grill to the back door, the door did not have any lock and as I tried to open it, it just go down and I catch it and lean it up back we left and went up to my house. I washed off the crow bar with the white T-shirt that I had I washed off the crow bar under the outside pipe at the front of the yard and put it inside the house I throw away the white T-shirt in the bushes in front of the yard. Sheldon had his shirt and I don't know where he throw it we went down back to the church and took up the pipe iron that was left down there and went across the road and throw it in the bushes we went to top Norwich and Sheldon ask me if I am going down by Donnette house and I told him that I don't feel like mi a go down deh suh mi seh mi better mi go round a Biggie, Sheldon ask me if mi alright and mi seh yes Sheldon, then went home him seh him have some business fi deal wid so a morning. I knocked on Biggie door and he opened the door I did not have any idea of the time mi mek a next mistake after we did come up to Top Norwich mi tell Sheldon fi send a please call me to my phone which Savan had, he did not reply so that was the time we walk go round a Biggie. When Biggie open the door mi go in and Biggie ask mi whe happen to mi, mi seh boy you wouldn't believe him seh awright then mi must tell him a morning before mi left, mi then go in a Biggie settee to sleep but mi couldn't sleep, morning come and mi left bout 6:00 or 7:00 when mi go in a Biggie house in the night mi tell him seh mi have a little thing wid Uncle Trevor and it look like him dead yuh know a don't know if him hear mi but him

went into him room and alright then a morning. After mi left Biggie house in the morning mi tell him seh mi gone. When mi come pon the road next door to Biggie house Miss Peggy ask mi if mi nuh hear bout mi uncle she say him dead and mi seh dead because mi never believe say him dead. Mi go out a Top Norwich a di square mi see Sevan and some more friends and Sheldon and Shawn mi tell Sevan seh mi a go want the Lap Top and the phone. Sevan go fi it and carry it come give me, mi nuh remember if him have the phone pon him or him go for it, mi tell him seh mi a go down the road, mi Sevan, Sheldon and Shawn go down the road but before mi go down the road, mi go over Miriam and her son tell me seh mi left mi jacket over there and I collect it mi tek off the shirt weh mi have on and give Shawn also the phone weh mi tek out a uncle Trevor hand, I then put on the jacket and we went down the road up to Ranch Hill. My friends stop along the road so I alone went up to the church, I went and lift up the yellow tap a Detective ask me who am I and whats my name, him started asking me some questions mi nuh remember the questions but all I know is that after him done ask me the questions, him tell mi that him a carry mi down town to ask mi some questions, he then called a policeman who handcuffed me and took me to the Port Antonio Police Station mi did tell the police seh mi nuh know nothing bout the killing at first, later on mi conscience start to bother mi and I decide to tell them the truth and carry them and give them the crow bar and show them where I throw the white T-shirt that's [sic] all I know.

Q 10: After you left the party why did you called [sic] Sheldon

ANS: To tell him about the problem I had with uncle Trevor

Q 11: Did you both planned [sic] to attack uncle Trevor after you spoke to Sheldon

ANS: Yes

Q 12: What do you mean by dealing with a shipment

ANS: Beating him uncle Trevor

Q 13: Was breaking into the house and robbing Uncle Trevor a part of the plan

ANS: No

Q 14: Why was he searched for money and his house entered

ANS: It was Sheldon's decision to do that

Q 15: Did he get anything from Uncle Trevor's pocket or from the house

ANS: No

Q 16: Who did you give uncle Trevor's flashlight phone to

ANS: The morning mi give Shawn fi hold fi mi till mi come up back

Q 17: Did he give them back to you

ANS: The morning I was taken to jail so I don't know what him do with it

Q 18: Did you believe that uncle Trevor had money with him or in his house

ANS: No, I don't know

Q 19: Was uncle Trevor armed with anything when you hit him

ANS: Don't know

Q 20: You hit him from behind did you

ANS: Yes sir

Q 21: Was uncle Trevor one of your favourite

ANS: He was not my favourite uncle

Q 22: Is it a fact that he had beaten up your mother sometime ago

ANS: Yes

Q 23: Does that make the relationship between you and uncle Trevor a bad one

ANS: Yes

Q 24: Has uncle Trevor ever hit you before

ANS: Not really hit me him push mi down

Q 25: You seem to be a very intelligent young man, which school you attended

ANS: Annotto Bay High School and graduated from there

Q 26: When you were hitting your uncle Trevor on Saturday the 28/10/06 in the morning was he attacking either you or Sheldon

ANS: No

Q 27: Have you given me true answers to all the questions asked of you

ANS: Yes honestly

[Sgd - H. Berbick, R.A. (Bill) Salmon, S. Small, P. Callum]

All these questions numbering one to twenty six were read over to me in the presence of all the persons mention [sic] at the beginning of this statement. I have been told that I could add, alter, delete or correct anything I wish these questions and answers are correctly recorded except, page 5 I meant to say Sheldon use his phone as light when he went in the house and page 6 Miss Peggy ask mi weh mi did deh and mi tell her seh a down a Biggy mi sleep. I spoke on my own free will without any intimidation.

[Sgd - H. Berbick, R.A. (Bill) Salmon, S. Small, P. Callum]

All these questions and answers numbering 1 – 26 were recorded by me between the hours of 3:30pm and 7:15pm on 30/10/06 at the end I read them over to Harold Berbick the suspect and told him he could add, alter, correct or delete anything he wished. He said the questions and answers were correctly recorded except for 2 corrections he

made at page [sic] 5 and 6 respectively. These corrections were noted in the certificate signed by him above. These questions and answers were recorded in the presence of all the persons noted as present at the beginning. He spoke on his own free will and was in no way intimidated or induce [sic] to do so.

[Sgd K. Bailey, 30. 10. 06]"

[34] In due course, Detective Inspector Callum and Detective Sergeant Bailey were further cross-examined in the presence of the jury, revisiting much of the ground that had been covered in the voir dire. Much of the questioning concerned the statement given by Mr Berbick to Sergeant Mullings on 28 October 2006. Admitted into evidence through Detective Sergeant Bailey, the statement was as follows:

"Name, Harold Berbick o/c Junior. Address, Norwich District Portland, occupation, computer technician. Age 20 years old. DOB 25, 1, 86. Port Antonio Hospital

Telephone number 434-2144. States I am otherwise called Junior, and I live with my mother, Mrs. Gwendolyn Facey at the above address. The father, Mr. Harold Berbick, senior, who is currently living in the U.S.A. is the brother of the deceased, Trevor Berbick, my uncle, Mr. Trevor Berbick, who was a former Heavy Weight Boxer was deported from Canada, a few years ago and having [sic] since living in his mother's house in Norwich District, Portland. This house that he is living in is in close proximity to my mother's house, however unfortunately, the deceased Trevor Berbick, and my mother and myself did not share a good relationship. In fact there was an incident in July 2006, where he physically abused my mom, and he was charged for this incident, and the matter is currently before the court. Prior to this, my uncle Trevor Berbick break [sic] and entered my mother's house, and stole two television sets, and a quantity of clothing belonging to my mother and myself, some of the items were recovered and Trevor was subsequently charged and taken to court, so resulting from

all of this, Trevor my mother and I weren't on any speaking terms, and whenever I see him, I avoid him.

On Friday the 27th October 2006, about 6:00pm, I left my house and went to Norwich crossroads where I later visited a few friends. I visited Miss Miriam who live beside Miss Marlene shop at the crossroads. I also visited my cousin, Donnette Berbick and a good friend Miss Miles, who lives at Breeze Wind lane close to the crossroads. In addition to my occupation as a computer technician, I also work as a disc jockey and I do parties, dance [sic] and weddings. I was scheduled to do a party at Dorraine's bar, that is situated just above Norwich Primary, as a result, approximately 8:00pm, I went to a party where a start to play some music. Whilst at the party, I saw Trevor, he was eating bread and chicken, and he was dressed in a sweatsuit pants and I cannot recall the type of shirt, however, he was talking to a few persons, I cannot recall who the persons were but I later observed Trevor dancing with a middle-aged lady from Norwich District named Daughter. I saw Trevor, up to about 10:00 p.m., at the party, but I left the party at about 10:30 p.m., with one of my friends, Savon Roper and we were in the crossroads area of Norwich where I link up with Miriam, Biggy and Sheldon.

Whilst at the crossroads, it could be about 11:00 p.m., I saw my uncle Trevor Berbick leave the party, and when he reach this incident and the matter is currently before the court. Prior to this my uncle Trevor break [sic] and entered my mother's house..."

HER LADYSHIP: Just a minute.

THE WITNESS: I am sorry, sorry."... and when he reached the corner at the school, he looked around, then turned back and went into the bar beside Marlene grocery shop and that was the last time that I saw my uncle Trevor Berbick. I was still at the crossroads with my friends at about 11:50p.m., the 27th, 10, '06, I was feeling cold and as a result, I went up to my house and pick up my army jacket to keep me warm. I then went back to Norwich crossroad. By this time it was only Sheldon who was still present, myself and

Sheldon then talk for a while and about 1:30 a.m. the 28th, 2006, I went to Biggy's house to sleep but he weren't there, so I went and sleep at my cousin's house, Donnette's house in Norwich district. I sleep alone in the room and Donnette was in another room. I woke about 6:00 or 7:00 a.m., in the morning, and went back to Biggy's house and went around the back but I did not see him.

I was walking along the road when a lady name Miss Peggy stop and ask me if I don't hear that uncle is dead, as a result, I went down the road where I saw a large crowd gathered and I spoke to some police officers on the scene. This is not the first time that I sleeping out, I sleep out on a regular basis sometimes at Biggy's and sometimes at cousin Donnette. The reason for doing that is that because I love company and nobody is at my house apart from my mother. The shirt that I was wearing was a green multicoloured ganzie. I took it off at about 7:44 p.m., the 28th 2006 and gave it to my friend Shawn Bishop to keep because it was smelling bad. This was done after I heard about the death of my uncle Trevor Berbick.

After I took off my shirt, I was left in my army jacket and my black and white shorts, and I was wearing a blue and white slippers. When I was leaving my house at 4:00pm, the 27th, 2006, I was dressed in a multicolour green ganzie, a black and white, shorts and a blue and white slippers.

Prior to this in the day from about 12 midday 27, 10, '06, I was at Crystals Place at West Palm Avenue playing music with friends, Sheldon, Shawn and Chris. I was dressed in the same black and white shorts and said multicoloured ganzie and same slippers. Initially, when I spoke to the police I told them that I slept at Biggy's house but I lied because I did not want my mother and girlfriend Diane Johnson, to know where I sleep, however, the truth is that I slept at my cousin Donnette's house.

On Saturday 28th, October 2006, between the hours of 4:30pm, and 7:38 I gave the statement to the police, it was read over to me and I signed to its correctness. This statement consisting of six page [sic], each signed by me is

> true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have wilfully said anything I know to be false or do not believe to be true.
>
> Signed H. Berbick.
>
> Taken by me the 28th October 2006 between the hours of 4:30pm, and 7:00pm, at Port Antonio CIB Office, declaration was read over by the make, who has indicated that he understood the meaning of it. This statement was also read over by him and he signed the statement and declaration as true and correct.
>
> H. Mullings, Detective Sergeant, number 3926, 20, 10, '06"

[35] Under further cross-examination, Detective Sergeant Bailey confirmed that he had been in possession of this statement, which he described as a witness statement, from the night of 28 October 2006. Asked if he agreed that "it is highly irregular to take a witness statement from a suspect", Detective Sergeant Bailey responded that, "It would have been taken before he was told that he was a suspect." Pressed by counsel on the point, Detective Sergeant Bailey finally agreed with the suggestion that it would be "highly irregular" for a police officer to take a witness statement "from a person, after he is deemed to be a suspect". He repeated his earlier evidence that he had informed Mr Berbick of his right to request a legal aid attorney and that Mr Berbick did not request one.

[36] Superintendent Small also gave evidence on the resumed trial. In cross-examination, he revealed that he gave the instructions for Mr Berbick to be taken to Pompano Bay for the interview on 30 October 2006. He was also the person who made the arrangements for Mr Salmon to represent Mr Berbick at that session, after being

informed that Mr Berbick did not have an attorney of his own. Although he could not recall if Mr Berbick was handcuffed when he arrived at Pompano Bay, Superintendent Small maintained that he was not handcuffed during the interview. He said that Mr Berbick and Mr Salmon had been "given at least ten minutes" to talk to each other in private before the session began. Further, he insisted, he had made the arrangements for the interview "in the interest of justice for everybody, including [Mr Berbick]…in accordance with the guidelines of the law, to the best of my knowledge". While he accepted that, from 29 October 2006, Mr Berbick was a suspect in the case, he stated repeatedly that, at the time of the interview, he had not been charged.

[37] Detective Inspector Jervis Moore was at the material time attached to the Port Antonio Police Station. At approximately 5:15 pm in the afternoon of 31 October 2006, Mr Gordon, who was in custody at a police lock-up, was brought to his office. Detective Inspector Moore cautioned Mr Gordon and advised him that he had received information that he wished to make a statement in connection with the murder of the deceased. According to Detective Inspector Moore, Mr Gordon was advised of his right to have an attorney-at-law present and of his right to the assistance of duty counsel, but made no request in this regard. As a result, Detective Inspector Moore testified, he sought the assistance of two justices of the peace, "in order to allow for fairness, transparency and to ensure that [Mr Gordon] gave his statement free [sic] and voluntarily".

[38] Through his counsel, Mr Gordon objected to the giving of evidence of his statement, on the ground of "its voluntariness and whether it conforms with all the

principles in law as to how these matters are to be dealt with". In the absence of the jury, the judge then commenced a trial within a trial to determine the circumstances in which the statement was made.

[39] Detective Inspector Moore's evidence was that Mr Gordon was not assaulted, beaten or promised any favours, nor was any form of duress used, at any time before, during or after the taking of the statement. After the statement was dictated by Mr Gordon, over a period of about two hours, it was read over to him and he was invited to make such corrections as he thought necessary. Mr Gordon made and initialed a few corrections to the statement, and it was then signed and dated by him and the witnesses.

[40] Cross-examined on the voir dire, Detective Inspector Moore insisted that, before taking a statement from him, he had informed Mr Gordon of his right to have a lawyer present, and further, that if he could not afford to engage the services of a lawyer, "a lawyer could be provided for him under the Legal Aid Act". However, Detective Inspector Moore accepted that he did not invite Mr Gordon, or offer him assistance, to make a telephone call to secure the attendance of a lawyer; nor did he offer to advise his parents or guardians that he might need a lawyer for the purposes of making a statement under caution. He could not recall whether on 31 October 2006 there was a sign on display at the Port Antonio Police Station advising persons who were unable to afford an attorney of their choice of their right to request the services of duty counsel under the legal aid regulations.

[41] Detective Inspector Moore also maintained that he had made Mr Gordon "very comfortable" before and during the interview process and that he had been assured by the investigating officer, Detective Sergeant Bailey, that Mr Gordon had had a meal before the interview had begun. He accepted that Detective Sergeant Bailey had been present during the taking of Mr Gordon's statement, as was the practice, and indicated that in his view there was "no problem" with this. Detective Inspector Moore strongly resisted the suggestion that Detective Sergeant Bailey had told Mr Gordon in his presence that "they would only lock him up but he can't be convicted because nothing he has done to [the deceased] caused his death".

[42] Detective Inspector Moore's cross-examination ended with a series of suggestions, all of which were denied, from Mr Gordon's counsel:

> "Q. Suggesting to you that you directed the plan and was part of it to separate the accused men
>
> A. You are incorrect, sir.
>
> Q. Suggesting to you that the statement that you said you recorded was not given voluntarily.
>
> A. It was voluntarily given.
>
> Q. Suggesting to you, sir, that you are a part of a plan, certainly was, you are part of a plan with Sergeant Bailey to make a promise to Kenton Gordon for him to say certain things.
>
> A. You are incorrect, sir.
>
> Q. Suggesting to you, sir, that you brought two Justices of the Peace because you were concerned that what was being done to Kenton Gordon was not fair to him.
>
> A. You are incorrect.

Q. Suggesting to you, sir, that at the time that you took the caution statement you made no enquiries as to whether or not Kenton Gordon had eaten.

A. I did.

Q. I am also suggesting to you, sir, that you knew, that Mr. Kenton Gordon had only one small meal that day from early in the morning.

A. I don't know

Q. You don't know?

A. No, I don't."

[43] Mr Orrel Dunstan, a justice of the peace for the parish of Portland, was one of the witnesses to Mr Gordon's statement. His evidence on the voir dire was that on 31 October 2006, at the request of the police, he attended the Port Antonio Police Station. There, he was directed to a room by Detective Inspector Moore, where he saw Detective Sergeant Bailey, his fellow justice of the peace, Mrs Vinnette Mitchell-Forrester, Mr Gordon, who was handcuffed (and, Mr Dunstan said, remained so throughout the interview) and a police constable. He saw and heard Detective Inspector Moore administer the caution to Mr Gordon and remained in the room for the duration of the statement (close to two hours) which Mr Gordon then made. No violence was used or threats of violence made to Mr Gordon in Mr Dunstan's presence, nor did he hear any promise or inducement held out to Mr Gordon while the statement was being taken. Mr Dunstan stated that Mr Gordon appeared to be normal, not sick or handicapped in any way, and he observed no wounds, bruises or other signs of ill-treatment on him. He did not make any enquiries as to whether or not the Mr Gordon had a lawyer, indicating to counsel that "I did not see that as my duty".

[44] Mrs Mitchell-Forrester was also a justice of the peace for the parish of Portland and she too attended the Port Antonio Police Station on 31 October 2006, at the request of the police, for the purpose of witnessing Mr Gordon's statement. Her evidence of the circumstances of the taking of the statement was similar in essential respects to Mr Dunstan's. But her recollection was that, on the instructions of Detective Inspector Moore, the handcuffs were removed from Mr Gordon's hands before the statement was taken from him.

[45] Detective Sergeant Bailey also gave evidence on the voir dire. He told the court that on 31 October 2006 he had caused Mr Gordon to be brought to the Port Antonio Police Station from the Castle Police Station and had served him with a copy of Mr Berbick's Q and A. He was asked by Mr Gordon to read its contents to him, which he did, at which point Mr Gordon indicated that he wished to make a statement. According to Detective Sergeant Bailey, after cautioning Mr Gordon and asking him if he had an attorney, to which Mr Gordon answered no, he "told him that he may request one through the Legal Aid Council,…[but] he did not request any". He then took Mr Gordon to Detective Inspector Moore's office, where, in the presence of Justices of the Peace Dunstan and Mitchell-Forrester, Mr Gordon dictated and in due course signed the caution statement. Detective Sergeant Bailey said that, as soon as the interview began, "the handcuff was taken off his hand".

[46] When he was cross-examined by counsel for Mr Berbick, Detective Sergeant Bailey agreed that he had said in his statement that, after Mr Gordon said that he did not have an attorney, he had told him that "one would be provided for him". Pressed as

to the difference between this answer and the one he had given in chief, Detective Sergeant Bailey insisted that there was no difference between them and that he had not promised Mr Gordon that he would provide him with a lawyer.

[47] Mr Gordon's counsel also took up the point in his cross-examination of Detective Sergeant Bailey, who agreed that he did not inform Mr Gordon of his right to representation by counsel or to legal aid on 29 October 2006, the day on which he was arrested. However, after he had served Mr Berbick's Q and A on Mr Gordon, Detective Sergeant Bailey said, he then regarded him as a suspect and told him that a lawyer would be provided for him, if requested. Detective Sergeant Bailey said that there was a conspicuous sign in the guardroom at the Port Antonio Police Station advising accused persons of their right to legal aid. He did not at any time attempt to contact Mr Gordon's mother or guardian to say that he might need the assistance of an attorney.

[48] Mr Gordon gave evidence on his own behalf on the voir dire. On 29 October 2006, he said, he was taken by the police from his home in Norwich to the Port Antonio Police Station. There, he met Detective Sergeant Bailey, who told him that Mr Berbick had said that he (Mr Gordon) was the one who had killed the deceased, and that "I have to talk". Detective Sergeant Bailey then asked him to "give him the next side of the story", which he did. After Mr Gordon's account of what had happened was written down by Detective Sergeant Bailey, Mr Gordon signed the statement at the officer's request. He was then taken to Castle Police Station in the evening of 29 October 2006, where he remained in the lock-up until 31 October 2006.

[49] On the morning of 31 October 2006, Mr Gordon testified, he had breakfast at the station at about 8:00 o'clock. That was the only meal he had there that day, he said, "because the second one came and I didn't took [sic] any". At some point after 12 noon, "some minutes to 3:00 or 3:00 to 4:00, some minutes between there", Mr Gordon said that he was taken to the Port Antonio Police Station, with his hands handcuffed behind his back. In the same room in which he had seen Detective Sergeant Bailey a couple days before, he met an inspector, who sent for Detective Sergeant Bailey. When Detective Sergeant Bailey arrived, he told Mr Gordon, in the presence of the two justices of the peace, that he had "to give the Inspector the same statement that I have give [sic] to him". Still handcuffed, he proceeded to give a statement to the inspector and signed it. At that time, he had had no other meal that day apart from breakfast at Castle Police Station at about 8:00 am. He was not cautioned by Detective Sergeant Bailey and he was not given any statement made by Mr Berbick. A few days later, on 2 November 2006, Detective Sergeant Bailey assured him that he had nothing to worry about, since he (Detective Sergeant Bailey) had the doctor's report to prove that Mr Gordon was not the one who had caused the deceased's death.

[50] Under cross-examination by counsel for the Crown, Mr Gordon agreed that, when he made a statement to Detective Sergeant Bailey on 29 October 2006, he was "not making up anything". Shown the statement produced by Detective Inspector Moore as having been made by him on 31 October 2006, Mr Gordon accepted that his signature appeared on every page of the document, though he denied making any corrections to the statement or that the initials which he was shown were his. He did not request a

lawyer at any time on that day, nor did he ask for any family member to be present. The handcuffs were not removed from around his wrists while he gave the statement, but he made no complaint to the inspector or the justices of the peace of discomfort caused by the presence of the handcuffs. The decision not to eat the second meal provided at Castle Police Station was his and he made no complaint of hunger at any time. While he was in the process of giving the statement, he was not threatened, beaten or bruised by anyone, but the statement was not given by him freely and voluntarily.

[51] That was the evidence on the voir dire and, after addresses from counsel on both sides, the learned judge ruled, without stating any reasons, that Mr Gordon's statement was given voluntarily and that it should be admitted in evidence.

[52] On the resumed trial, Mr Gordon's statement under caution was in fact tendered in evidence through Detective Sergeant Bailey when, as it turned out, Detective Inspector Moore became unavailable through illness. Detective Sergeant Bailey, who had been present throughout the taking of Mr Gordon's statement, gave evidence for the benefit of the jury of the circumstances in which the statement was taken by Detective Inspector Moore. He identified the statement by reference to the signature of Mr Gordon, as well as his own signature as a witness and it was in due course admitted in evidence and read to the jury. The statement was in the following terms:

> "We leave Crystal around after 8 o'clock. After we reach Norwich, we go over Mr. Laing bar, weh the sound World Beat was playing, and around after 9:00, dem time deh, mi

tell Shawn and Berbick seh, mi a goh home, go get something fi eat 'cause me never eat from in the morning. Mi tell dem say, when mi get something fi eat, mi a goh come back at the dance. Mi leave and go home go get something fi eat and come back at di dance about 10 o'clock. When me come back at di dance, the owner fi di sound, Oprah, buy me a Red stripe, me did a dance and enjoy mi self.

Around after 12:00, me auntie seh mi fi follow har go home. Mi follow har go home. After me follow har, mi go over my yard and did a watch one DVD when mi phone ring, and it was Berbick, me call him 'Berbs', me call him 'Berbs', him ask me if me naw come back a di dance. I say yes, and him seh forward. Mi hang up the phone and when he reach up a di road, him did a talk to one lady name Miriam. After him finish talking to the lady, him go fi the laptop weh him did a use fi play the music a Mr. Laing bar, him put it inna one bag and give it to one youth name Sevan and him seh to mi, come in, and we walk goh down a Ranch hill, we walk go up a Norwich Church of God and him pull out a piece of pipe iron from under some bush near to one light post. Him leave the pipe iron at the side of the road and we walk goh up a him gate where him live, is just pass the gate of him uncle Trevor Berbick yard, who most people call Trevor. Him go fi the crowbar up a him yard and when we a come down from deh, him seh to me seh, 'Mi a goh lick Trevor cross him back, fi scarce [sic] him.'

When wi reach at the Church of God, weh near to weh Trevor live, we take off wi shirt dem and put them pan the Verandah of the church. We den go a few feet from Trevor gate and shortly, we see Shawn a pass, wi den seh 'Shawn, yow', him seh to we seh, him a goh up, 'cause him sister call him pan the phone and seh a she one up deh and she 'fraid. When Shawn seh dat, a went towards the church verandah fi look pan mi phone weh mi did leave pan it, when me come back out to weh Berbick deh, me ask him fi Shawn and him seh Shawn, soon forward. Me lean up pan one ole lady gate who live nearby and Berbick sit down upon one block. Shortly, we see Trevor a come up. Berbick get up and screechy behind him, and by the time me fi seh, no bother with it, him lick him inna him head, the second one, mi nuh sure if him get it inna him head or pan him shoulder, him den drop a ground, me then use the crowbar and lick him

two time inna him head, Berbick did a goh lick him inna him head again and mi seh, no man, a it dat. We then left Trevor pan the ground and we go up a Berbick gate and him go up wid the crowbar inna him yard and me could a hear the water running. Him den go inna him house and come back, out to the gate and tell me seh him wash off the crowbar. When him come back, him tek up the piece of iron dat him use fi lick Trevor.

We then left fi go at top Norwich. Mi see when him throw the piece of pipe iron inna some bush across from the Church of God church. When he reach a top Norwich, we sit down upon one wall, near Log bar and we did a talk. Him den seh him feel like him a goh drop down. Me tell him seh, it betta him sleep 'round a him cousin and him seh, him naw sleep 'round Donnette, who is him cousin, him rather sleep round a Biggy. Mi follow him go round a Biggy, when him go through the gate, me ask him if him all right and him seh, yes, and me ask him if him sure and him seh, yes. Mi seh, all right den, me a cut and me goh straight home. When mi wake up the next morning mi hear somebody a run pass me gate and seh Berbick dead, me think seh is small Berbick, through him seh him feel like him a goh drop down, when mi see him the last time. Mi get a call from my mother phone 'cause me never have no credit and me call Berbick phone, when mi mek the call Sevan answer Berbick phone and mi seh to him, 'What happen to Berbick' and him tell me seh a Trevor dead, and me seh all right, mi a forward mi hang up the phone and go call mi auntie, me and har walk go down to Ranch Hill. When me did a goh look pan Trevor, a police officer turn me back and seh mi can't goh, me can't goh up there, mi can't pass. Me turn back and when me go up top Norwich fi go back a my yard, me see Berbick a come down the road, and mi turn back with him, when he a goh back, mi see one youth name Crayfish, him seh to Berbick say, no mek sense him look pan the body cause him sick with him heart and him gooda drop dung, him going drop dung dead to. Berbick seh him have fi goh up deh same way. When him goh up deh, him a talk to a police officer and me see when him handcuff Berbick and put him inna police car and leave with him, me hear somebody seh, dem a goh question him. After dat mi and mi auntie goh back a wi yard, me did a sleep a mi yard that night when police come fi mi and carry me goh a station. Me talk to Detective Bailey and mi tell him what happened but mi did leave out

> the part weh mi, weh mi did lick Trevor with a crowbar, me then carry Detective Bailey goh show him weh Berbick throw the pipe iron weh him use fi lick Trevor inna him head.
>
> Sign Kenton Gordon, [Orrel] Dunstan, Mitchell-Forrester, T. Edwards, myself, All onthe 31st of October 2006 the foregoing statement was read over to me by Detective Inspector Moore. I was told that I could add, alter or correct anything that I wish. I made only one change to my statement, that it was on page three in line eighteen where the word live was changed to yard. I also initialed the word my on the first page and look on the sixth page where Detective Moore had made a mistake. This statement is true. I made it of my own free will. I sign, Kenton Gordon, Gwynette Mitchell-Forrester, T Edwards and myself, all on the thirty-first of the 10,06."

[53] Detective Sergeant Bailey was cross-examined at great length by Mr Keith Bishop, who appeared for Mr Gordon at the trial, as he has done before us. It emerged that on 29 October 2006 Detective Sergeant Bailey had also taken a statement from Mr Gordon shortly after he was taken into custody at the Port Antonio Police Station. Asked what had become of that statement, Detective Sergeant Bailey's response was that it was "on the file". It turned out that Mr Gordon was not cautioned before making that statement. It was taken from him by Detective Sergeant Bailey during the course of an interview, at which only the two of them were present, between 1:30 and 4:30 am. This statement was produced by the prosecution during the course of the cross-examination of Detective Sergeant Bailey, who read it to the jury:

> "Name, Kenton Gordon o/c Sheldon, age, 18 years old. Occupation, labourer. Address Breeze Wind lane, Norwich Portland. Telephone number 852-3860, states.
>
> I live at the above address with my mother, Sharon Hunter o/c Miss Cherry, my sisters Nikisha Smith, Shantel Hunter,

Gayon Hunter, Kayon Hunter, my brother, Johny Brown and Glendon Hunter, my stepfather.

I know Harold Berbick, o/c Berbick, o/c 'Berbs'. From between three to four years, we have been friend [sic] for all this time. He is the nephew of one time World Boxing Champion, Trevor Berbick…he lives with his mother and father, who is abroad most of the times. He [sic] about 6 feet tall, black complexion, medium built and lowly cut hair. He is a selector on High Roller Sound. He use [sic] a laptop to play his music. On Friday the 27th October, 2006, at about 1:30p.m., I went to Ranch Hill Norwich, at the Church of God church and met 'Berb' we went to Crystal Night Club in Port Antonio, where he play some music. He was testing out the music system to see that everything was o.k. because he was to play the sound on Saturday night which would be the 28th, 10, '06. While we there, Shawn Bishop, o/c Shawn, came there and met us. Shawn, 'Berb' and myself are friends. Shawn play[sic] the sound sometimes. Shawn lives in Ranch Hill, Norwich, Portland. We left Crystal Night Club minutes to 8:00, all three of us went to Norwich. We went to Dorraine [sic] bar in Norwich where a party was taking place 'Berb' and Shawn started selecting the sound. The name of the sound is World Beat. Music was playing, people eating, dancing and having fun, Trevor Berbick, the uncle of 'Berb' was dancing and having fun also, meanwhile 'Berb' and Shawn are selecting the sound system, the owner bought me a Red Stripe Beer and took half of it and I left about 9:15 p.m. and went home to get something to eat because I did not eat from morning. I told 'Berb' and Shawn I was going to eat and come back.

I went home, eat and return to the party about 10:00 p.m., the 27th, 10, '06. 'Berbs' and Shawn was [sic] still selecting the sound. I started [to] dance and enjoy myself, about 11:45 p.m. I follow my aunt Cindy Nolan home, she live next door to me at Breeze Wind lane in Norwich. I then went to my home. About 20 minutes after I reach home 'Berb' call me on my cellar [sic] phone, and ask me if I am not coming

back to the dance, I told him, yes. He said all right, forward. I went up back to the party immediately. When I went up back I saw 'Berb' and a lady by the name [sic] Miriam speaking, Miriam is 'Berbs' friend. Shawn was still playing the sound about 12:20 a.m., 28, 10, '06 'Berb' stop talk to Miriam and went for his laptop, put it in a bag and give it to a youth name Savan to keep for him. 'Berbs' then told me to walk come down Ranch Hill with him, on reaching Ranch Hill he told me that he was going to hit Trevor Berbick with something over his back and scare him. We left Trevor Berbick by the party. When we were leaving the sound had stopped playing both of us went to 'Berb' [sic]gate. He went inside and came back with a piece of iron. I saw the piece of iron when he came down to Trevor Berbick [sic] gate because light was showing on Trevor [sic] verandah, I know that Trevor lives beside the Norwich Church of God church and he has to walk through the church gate to get to his house. 'Berb' has to walk through the same gate to get to his house. When he came back down we stand up on the banking, inside the church yard near to the church gate. We were standing beside a little gate that leads to an old lady [sic] yard.

We were on the banking for some time when I saw Trevor Berbick coming through the church gate. He walk passed [sic] both of the [sic] us. He did not see us. When he reach near to go to his gate, I was about to tell 'Berb' not to hit him but Berbick hit him in the back of his head, with the piece of iron, Trevor Berbick drop on the ground 'Berb' hit him again with the piece of iron. I don't know if it catch Trevor on his shoulder or in his head. I say to 'Berb' "A it dat," meaning he should stop. Trevor lay on the ground not moving, I did not know that his head burst, I thought he got knock out. Berb did not hit Trevor again. He went up to his yard, I went to his gate waiting for him. He came back from his yard shortly after and we walk down to the main road leaving Trevor Berbick motionless on the ground 'Berb' then throw the piece of iron in some bush [sic] across the church just above the pear tree.

We then walk go up the road to top Norwich. When he reach by top Norwich, he started to talk about the dance group and football team, while we were talking, he told me that he did not feel good, him feel like him a goh drop down and mi said to him, it best if him go round by Donnette or Biggy goh sleep and in the morning when him go down him take him medication. Donnette is 'Berb' [sic] cousin and Biggy his friend. He told me that he was not going to Donnette, him a goh round a Biggy. I follow him go round to Biggy and when he reach down there, I ask him if him all right, he said yes, I ask him if him sure, he said, yes. I then said, all right then, me a cut. I then left him and went home.

On Saturday, the 28th of October 2006, about after 7:00, I heard somebody running pass my yard saying that Trevor Berbick dead, I thought it was 'Berbs' so I called him and Savon who had the laptop answered his phone told me that it was not 'Berbs' but Trevor Berbick. I then told Savon that I was going to forward. I hang up the phone. I then went to call my aunt, Cindy Nolan and both of us walk to the church at Ranch Hill where Trevor Berbick was. I wanted to look at him but police told me that I cannot pass. This was the same place in the church yard where 'Berb' hit Trevor with the iron and he dropped motionless. I turn back and walk to top Norwich, while I was going up to top Norwich, I saw 'Berb' coming down the road. I turn back with him and I saw a youth weh name crayfish who told 'Berb' not to go and look at Trevor because him, Berbick, sick with him heart and might drop. Berb then told him that he was still going to look, when he reach at Ranch Hill where the body was we went and spoke to one of the officer [sic], and this officer handcuff [sic] him and took him away for questioning, after that I went away with my friend.

When 'Berb' and I was [sic] at the church where he hit Trevor Berbick in his head with the piece of iron 'Berb' was wearing green shirt with yellow stripe, black shorts with white stripe at the side and black and blue slippers. I was wearing blue shorts, blue, red and white sleeveless, T-shirt

> and a blue and white sneakers. These were the same clothes that we were wearing at the party in Norwich at Dorraine [sic] bar.
>
> The piece of iron that 'Berb' used to hit Trevor Berbick in his head had something on one end of it. Sign Kenton Gordon 29th, 10, '06.
>
> This statement consisting of six pages each signed by me is true to the best of my knowledge and belief. I made it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have willfully stated anything I know to be false or do not believe to be true. Signed Kenton Gordon again 29th, 10, '06.
>
> Taken by me 29th, 10, '60 [sic] about 4:30 a.m. at Port Antonio CIB office Portland. The declaration was read over to the maker who indicated that he understood the meaning of it. This statement was read over and he signed both declaration and statement as true and correct to the best of his knowledge and belief.
>
> Signed, Kenneth Bailey, number 2761, Detective Sergeant, 29th, tenth, '06."

[54] After taking this statement from Mr Gordon, Detective Sergeant Bailey instructed that he should be taken to the Castle Police Station, at his request, "to stay with the police". However, he made no record in the station diary of the reason why Mr Gordon was being kept in custody. At that time, Detective Sergeant Bailey said, he viewed Mr Gordon as a potential witness to the deceased's murder rather than as a suspect. He did not come to regard Mr Gordon as a suspect until 30 October 2006. It was for that reason that he had Mr Gordon brought back to the Port Antonio Police Station from the Castle Police Station on 31 October 2006, so that he could speak to him and serve him with a copy of Mr Berbick's Q and A. Once the Q and A were served, Mr Gordon was

cautioned. It was also on that day, Detective Sergeant Bailey agreed, that he advised Mr Gordon to tell Detective Inspector Moore the "same thing" that he had told him. It was after he had done that, Detective Sergeant Bailey said, that he informed Mr Gordon that he was a suspect and advised him of his right to legal aid. No attempt was made by Detective Sergeant Bailey to speak to Mr Gordon's mother or step-father after he had become a suspect, despite the fact that he was aware that he was 18 years old at the time. During the interview which was conducted by Detective Inspector Moore, which could have lasted for about two hours, Detective Sergeant Bailey could not recall Mr Gordon having been offered refreshment of any kind.

[55] Briefly re-examined by counsel for the Crown, Detective Sergeant Bailey reiterated that he had indeed informed Mr Gordon of his right to legal aid, but he was insistent that Mr Gordon did not make any request for the services of duty counsel.

[56] Evidence of the circumstances in which Mr Gordon's caution statement was taken on 31 October 2006 was in the main given by Mrs Mitchell-Forrester, Mr Dunstan, the other justice of the peace, who had been present when the statement was taken and who had given evidence in the voir dire, was put up by the prosecution for cross-examination. On the evidence given by both justices of the peace, Mr Gordon gave the caution statement voluntarily. But there was an inconsistency in their evidence as to whether he remained in handcuffs throughout the interview: Mrs Mitchell-Forrester's recollection was that, on the instructions of Detective Inspector Moore, the handcuffs were removed at the start of the interview, while Mr Dunstan's was that they were not.

[57] Finally, to complete the case for the prosecution, Detective Inspector Moore gave evidence. He identified the statement which Mr Gordon had dictated to him and reiterated that Mr Gordon was not threatened or beaten by him or by anyone else present at any time during the recording of the statement. He stated that, upon Mr Gordon indicating that he wished to make a statement, no attempt was made by him to contact any of the lawyers on the list of lawyers interested in doing legal aid work as duty counsel. However, he said, this was because Mr Gordon did not request any such assistance. He agreed that, by the time the statement came to be taken, Mr Gordon was a suspect in connection with the murder of the deceased. He could not recall if he had offered any refreshment to Mr Gordon during the taking of the statement, though he did enquire if he was comfortable. He insisted that, while the statement was being taken, Mr Gordon's handcuffs were removed on his instructions.

[58] At the close of the prosecution's case, counsel for both applicants made no case submissions in the absence of the jury. These submissions were refused and the applicants were accordingly called upon to state their defences. They both opted to make unsworn statements from the dock.

[59] This is what Mr Berbick told the court:

> "My name is Harold Berbick. My occupation is a Computer Technician and I also play – I am also a Disc Jockey, a Music Disc Jockey and a Video Disc Jockey. I live in the parish of Portland, Ranch Hill. I know Mr. Trevor Berbick, he's my uncle and a former heavy Weight Champion of the world. Well, I can remember one night I was coming from a party that I play at, I was tired, very tired and very weak. A party

held at Top Norwich that down at Breeze Mill Lane. I was walking down from Top Norwich, when I was reaching around the corner, Mr. Berbick, that is Mr. Trevor Berbick, my uncle, he lay-waited [sic] me and hold me from behind and throw me in Johnny Gutter in the gully. And I didn't recognise till the following morning I woke up and it is a Saturday morning. When I woke up at my house, my mother ask me how mi clothes stay suh dirty. I told her that I fell. Later on in the night I started to fell excessive pain in my back and my feet. I was lying down in my bed, I called my mother in a low voice, I was so weak. I told her I could not move none at all. I told her I wanted to go to the hospital, she said, yes, but when she replied and said, 'But Junior, me don't have any money.' It was about 12 o'clock in the night that Saturday night. When I took up my cellphone and called one of my friend to tell mi cousin if he could pick me up because he has a car. When I told him that, I got dizzy, I just wake up and see my friend by my bedside. He helped me go to the car and we went to the hospital. I see the doctor, I think the doctor's name is – her name is Doctor Adams.

HER LADYSHIP: What is her name?

ACCUSED: Doctor Adams. She told me I am suffering from a stress and she used a machine to test my heart, she said something was wrong. She said something was wrong and I would have to stay over for the night. I have been in the hospital for about at least three days and I came out the Tuesday morning and I received some medication from her that I had to take three times a day after meal. I remember a time when my mother was feeling ill and I was confused, don't know what to do. My sister in Portmore, she called me saying that if I could carry her over there to stay and I said, yes. I was going to school at the time. I was attending Annotto Bay High at the time. When we were over there, we went over there in Portmore and I had to leave from Portmore to Annotto Bay School at morning time. I had to leave from Portmore to Annotto Bay at morning times and school starts at 8:00 in the morning. We were over there about - - we were in Portmore about at least two months. My mother was actually feeling better. My sister was taking good care of her and when we came over to Portland we went to our house, the door was kicked off. The two doors, my mother's room door and the living

[sic] door was [sic] kicked off. When I went inside, everything in there for me and my mother was missing. We missed about three TV, some clothing, my mother's clothing, radio, appliances, shoes missing, food was cooked and on the stove and it look like it was there for at least three days, smelling sour. I immediately run down at Ranch Hill and went down uncle Trevor house. I went inside, that time he and my mother wasn't in no relationship, only me, and I would say, hello and soh. I went in the house, I saw my TV, clothing, I saw clothing for me and my things in the house and I run down back to my house to tell my mother I saw them. We informed the police and the police came and that matter was in front the Court. That matter was in front [sic] the Court and we got back the radio, the TV and the clothes, and that case was over after we get the clothes. At night times I have to ask my friend to follow me go up at nights. I remember one night, almost every night Shawn by the shop would follow me come. I remember one night when he was - - every time almost – one night I remember at least four persons had to follow me come down that night. I have a lady by the name of Ava, that works in a bar at Norwich. I have a cousin by the name of Speckle. I remember one night I had to walk behind some bushes to reach at my home because he has always been lay-waiting [sic] me. And I remember this one time I was at Boundbrook, I was playing at a 'Session' at a infant school, when my mother called me and was crying that say Trevor lick har down wid big stone. I rushed over there and went up to the house and my mother actually sitting down on the ground crying. She saying that uncle Trevor lick har down with stone and bit har between har finger, between har thumb and next finger between here, and she reported it to the station. My mother reported it to the station I remember I was walking down one morning and he was threatening me saying that me can't pass come up, he said he was going to kill me and my mother. I went to the station to report it, likkle after he was there too. He came in there and started cursing and going on bad. He threatened me in the station and said he going to get guys fi come mash me up, me and mi mother can't stay 'pon the hill. He was coming towards me, he girt up him hand, him girt up him fist and the Station Officer Corporal Barry, 'Soop' had to come between us and had to part off. Come between us, come between us to part. The station officer said to me that I need to go to the Court's Office and

get a Threat Warrant. From that day I hardly have to sleep at my house often. At my house, if I am going to my house I cannot make him see mi. I can't make him see mi none at all. I remember Friday, the last Friday in last year October, the 27th, I was playing some music alongside with Shawn, I was there playing some music, my uncle Trevor Berbick, he been steering [sic] at me at [sic] the whole night. He has been drawing his finger across his throat and looking at me. Almost every time him see me he draw his finger across his throat. So, when I see that I am extremely afraid of him when I see that, just call it seh him want to kill me when I see him do that.

Sheldon was also there at the party and I pack up my laptop and went down. We went, me and Sheldon went down at mi gate and we were there talking about twenty minutes. We were there sitting down talking, after we saw my uncle coming, he had two big stones in his hand. He fling one after me and I got up and ran in the direction of the road. He was coming after me with the nodda stone in his hand and I thought he was going to kill me. Sheldon picked up a stone and he fling it after him but it missed and then he was running towards Sheldon. I thought he was going to kill Sheldon. I look [sic] in the pass and I saw a pipe iron and take [sic] it up. I went towards him and hit him with the pipe iron. Sheldon also made movements with his hand too. We didn't -- we didn't think seh him dead and we didn't mean to kill him. And on Saturday morning the 28th, a policeman by the name of Mr. Mullings, he told me that he needed me to give a statement out at the police station. I was handcuffed behind also. A man called Bob was handcuffed and me and him was in the police car and we drove to the station, police station. Later that evening Mr. Mullings said I needed to give a statement, further on, at least 11 o'clock.

I met Mr. Bailey, my mother was also in the C.I.B. Room with me and Mr Bailey. I heard my mother saying to him that she was going to get her own lawyer and Mr. Bailey took a telephone number from her and cell number from her. I was handcuffed behind sitting down and my mother had to feed me, then Mr. Bailey put me in a jail lock-up. I remember that Monday, the 30th, Mr. Bailey took me from the cell and carried me to the C.I.B. room where there I meet Mr. Callum in the room.

Mr. Callum told me I was going to Area 2 to give a statement. About 10 o'clock – about 4:30 in the morning Mr. Bailey took me from out of the cell, then about 10 o'clock in the morning Mr. Bailey took me from the cell again, I was coming from hospital that morning and I was very stressed. I didn't eat I was stressed. That morning I asked Mr. Bailey about a lawyer. The lawyer told me must just go down and give the statement. He placed me in the jeep, Mr. Pyke was driving the jeep Mr Callum was in the front and me and Mr Bailey was [sic] in the back of the jeep and I was handcuffed behind me. We drove down to Area 2. I was hungry and thirsty. I did not get anything to eat. In the jeep I asked Mr. Bailey, ask if him want to call the lawyer fi mi. He said to me seh me must just go down. I must just go down and give him the statement and him wi soon let mi goh to see him soon. Let me go to – say him soon let mi goh to see him because the morning when Mr. Bailey took me out of the cell it was the office where Mr. Callum was there, Mr. Callum told me, Mr. Callum told me that Sheldon hide in bushes and see me lik him down and me going to give a statement. When we reach down to Pompano Bay Area 2, Mr Bailey told me that I must just give the statement when I go he point his finger and say I must just give the statement. When I went up the office I met Mr. Kelso Small, him introduce me to a man name Bill Salmon, the man only said, hi, to me. He sat down, Mr. Small, Mr. Bailey, Mr. Callum, asked me questions. Mr. Callum and Mr. Bailey, they suggest some questions to me. Mr. Small told me I must sign it and I have to sign it. I didn't get it because I didn't want Mr. Bailey to hit me. I remember when Mr. Callum seh mi lik down the man and say, yeh man, yeh man, and tell Mr. Bailey, he told Mr. Bailey to write it down. Mr. Bill Salmon, he was in and out of the room, so he wasn't paying attention he was in and out of the room. He also pulled the handcuff to – they pulled the handcuff of when I am supposed to sign. We went down – actually me and Mr. Pyke went down at the jeep and we were waiting down there for a long while till Mr. Callum and Mr. Bailey came down from town at the office. I said to him, to Mr. Bailey, I said to Mr. Bailey, "Like how me duh wha yuh tell me fi duh, yuh a guh let mi guh now" Him look pan mi and seh, "You mad, let yuh guh weh?" I went up back to Port Antonio and after leaving we reached and was back in the cell and that night they release Bob, known as 'Lincoln Chambers'. That's my story."

[60] That was Mr Berbick's case.

[61] Mr Gordon's unsworn statement was as follows:

> "My name is Kenton Gordon, I am nineteen years of age. I live at Norwich District in the parish of Portland. On the 28th of October 2006, some time in the night, I was at a party at Top Norwich, Berbick playing his laptop and I was in the bar with him and Trevor came into the bar and look at Berbick and draw his finger across his neck like this and came out later.
>
> Later on in the night, Berbick asked me to follow him somewhere. I had no intention of hitting Trevor or harming him in any way. And on the 29th at about 1 am in the morning, three police men from the Special Squad came to my house; one who was known as Brent, he's a Sergeant on the Special Squad. He told me that Mr. Bailey need to speak to me so I will have to come to the station. They took me to the station and I went into the C.I.B. office and Mr. Callum and Mr. Bailey was [sic] there. We went into an office and Mr. Bailey told Mr. Callum and Sergeant Brent, that he need [sic] to speak to me alone, and he and Brent went outside, and after they went outside, Mr Bailey told me that Berbick told him that I kill Trevor and I must tell him what happen so that he could see what he can do for me. I told him what took place and after I finish [sic] telling him what took place he said that it look like Berbick was trying to save me and defending himself and he also told me not to say anything to anyone about what Trevor did. And after that he told me to show him where Berbick throw the instrument that he used to hit Trevor, and I did. After that they took me back to the police station. Mr. Bailey told me that my mother was outside. I asked him if I could go home now, he said, no, I will have to stay with them until the information is finished, and he said to Mr. Callum that he will have to send me to Castle because he don't want me and Berbick to be at the

> same place. And Mr. Callum said, yes, you can send me to Castle. They took me and take me [sic] to Castle Police Station in handcuffs where I was put in the lock-up. On the 31st of October 2006, some officers came to Castle Police Station and took me to the Port Antonio Police Station where I went into an office and I saw an Inspector and I saw Mr. Bailey. He asked Mr. Callum to go and call Mr. Bailey for him and Mr. Bailey did came [sic] into the office where we were and he said to me, whisper to me, 'Remember seh, don't say anything about what Trevor did, just tell the Inspector about what Berbick did.' I did give the Inspector the same story that I gave to Mr. Bailey before. After giving him the same story, he asked me to sign the paper and I looked at Mr. Bailey. He released the cuff, that's Mr. Bailey, and said to me, 'You can sign, it's nothing for you to worry about.' And after that they put back the cuffs on my hands and send me back to Castle Police Station. On the 2nd of November 2006, I was brought to the Port Antonio Police Station where I went into the C.I.B. office, the police who brought me to the Port Antonio Police Station took me to the C.I.B. office and Mr. Callum and Mr. Bailey was [sic] in the office, and Mr Bailey told me that he will have to charge me because Berbick said that I have hit Trevor twice, and I have nothing to worry about because those little hit that Berbick speak about has nothing to do with Trevor's death and he has doctor's report to prove it. And I was charged, m'Lady, and was taken to the Port Antonio cell blocks. That's what I have to say."

[62] And that was Mr Gordon's case.

[63] McDonald J completed her summing up on 20 December 2007. After deliberating for an hour and a quarter, the jury returned a unanimous verdict of guilty of murder against Mr Berbick. They were also unanimous in finding Mr Gordon not guilty of murder, but guilty of manslaughter. Sentencing was deferred to 11 January 2008, on

which date antecedent and social enquiry reports on both applicants were read to the court. After pleas in mitigation of sentence from counsel for both applicants were made, the learned judge pronounced the sentences already set out at para. [3] above.

The applications for leave to appeal

[64] On 19 April 2012, a handwritten affidavit sworn to by Mr Berbick on 16 April 2012 was filed in the registry of this court on his behalf. At paragraphs five and six of that affidavit, Mr Berbick said this:

> "5. I did not give evidence on oth [sic] at the trial. Before the trail [sic] Mr. McDonald my lawyer ask if I had convictions and I told him I had no convictions. He know [sic] I have good character and good recommendations.
>
> 6. I wish this affidavit to be considered by the courts."

[65] The applications for leave to appeal came on for hearing before this court on 23 April 2012. At that time, counsel for Mr Berbick, Dr Randolph Williams, applied for and was granted an adjournment to allow him time to obtain a comment on Mr Berbick's affidavit from Mr Carl McDonald, who had represented Mr Berbick at the trial. However, as would subsequently appear from an affidavit sworn to by Dr Williams on 6 March 2013, Mr McDonald proved to be of no assistance. Dr Williams reported that, when contacted, Mr McDonald stated that "he would not comment on the applicant's complaint as he no longer remembers the interview".

The grounds of appeal and counsel's submissions

[66] At the outset of the hearing before this court on 1 July 2013, Dr Williams for Mr Berbick sought and was given permission to rely on the following supplemental grounds of appeal:

> "1. The learned trial Judge erred in admitting in evidence incriminating statements made by [Mr Berbick] in answer to questions by the police. These statements were made in circumstances which were not only involuntary but also unfair.
>
> 2. [Mr Berbick] was denied a good character direction and a chance of acquittal by the failure to put his character in issue at the trial.
>
> 3. The learned trial Judge misdirected the jury by instructing them that they could convict [Mr Berbick] of murder if they found that an ordinary reasonable person would have known that death or serious injury would result from his action towards the deceased.
>
> 4. The period of 20 years before eligibility for parole is manifestly excessive in the circumstances."

[67] In support of these grounds, Dr Williams submitted, first, that it was not clear that, in her ruling on the admissibility of the Q and A, the judge had taken into account the fact that the objection to its admissibility was based, not only on involuntariness, but also on the unfairness of the circumstances in which the answers were obtained (*viz*, Mr Berbick's state of health; the fact that he was deprived of food or other refreshment for a considerable period; and the psychological pressure brought to bear on him by his having been told – untruthfully - that Mr Gordon had given a statement implicating him and had been released from custody). Second, that in the light of Mr

Berbick's good character, and the fact that the only evidence implicating him in the murder of the deceased came from the Q and A (in which he gave both incriminating and exculpatory answers), he was entitled to both the credibility and the propensity limbs of the good character direction; in this case, it could not be said that the jury would have convicted him of murder, had the direction been given. Third, in directing the jury on the question of intention, the judge erred in inviting them to apply an objective rather than a subjective test of intention: what was important was not the knowledge of the ordinary reasonable person of the consequences of his actions, but that of Mr Berbick. Further, the degree of knowledge required to convict him of murder as opposed to manslaughter was not clarified by the judge. And fourth, having regard to the "domestic background" to the murder and Mr Berbick's previous good character, a sentence prescribing a minimum period for parole closer to the statutory minimum of 15 years would have been a more appropriate punishment in this case.

[68] In response to Dr Williams' submissions, Miss Burrell for the Crown submitted as follows. As regards the admissibility of the Q and A, there was no need for the judge to expand her ruling by referring specifically to the question of fairness. The issue before the court at that stage was purely one of credibility and, having resolved that issue in favour of the witnesses for the prosecution, all that was required was for the judge to give appropriate directions to the jury, which she did. As regards the question of good character, if in fact a good character direction ought to have been given, the failure to give one did not result in any – or any substantial – miscarriage of justice. On the totality of the evidence, even if a good character direction had been given, the jury

would have convicted; alternatively, if the court is of the view that there ought to have been such a direction in this case, then this would be an appropriate case in which to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the proviso') and to dismiss the appeal. And lastly, the judge's directions on the issue of intention were adequate in the circumstances of the case.

[69] Mr Bishop relied on the original grounds of appeal filed on Mr Gordon's behalf, which were (i) that the sentence of the court was manifestly excessive in all the circumstances; and (ii) that the learned trial judge erred in admitting the caution statement into evidence.

[70] Taking the second ground first, Mr Bishop submitted that the trial judge ought to have excluded Mr Gordon's caution statement. As Dr Williams had done, he queried whether the judge had given any consideration at all to the question of fairness. In this regard, he referred us to the legal aid regulations and directed our attention to Mr Gordon's evidence that he was not informed of his right to a lawyer. Given his age, Mr Bishop submitted, Mr Gordon ought to have been treated "with greater care". Mr Bishop also referred us to the conflict in the evidence as to whether Mr Gordon (a) remained in handcuffs during the taking of the caution statement; and (b) was offered any refreshments before or during the taking of the statement, pointing out that the Judges' Rules (*Practice Note (Judges' Rules)* [1964] 1 All ER 237) require that the comfort and refreshment of an accused person should be addressed during questioning. Finally, on the matter of sentence, Mr Bishop stated that he had "no major complaint", but invited the court to consider "even a slight reduction".

[71] In response to Mr Bishop's submissions, Miss Burrell submitted that the judge had been justified in admitting the caution statement into evidence, not only on the strength of the evidence given by the prosecution's witnesses, but also on the basis of Mr Gordon's own answers in the voir dire. All of the prosecution's witnesses testified that the statement had been given voluntarily and without oppression. There was therefore no basis for concluding that there was any unfairness to Mr Gordon in the process of collecting the statement, the probative value of which in any event outweighed any prejudice to him.

The admissibility issue

[72] As will have become clear, the case for the prosecution against both applicants rested primarily on the evidence of what they were alleged to have said to the police. Therefore, in the light of the grounds of appeal and the submissions made on their behalf, the first issue for consideration is whether the learned judge's rulings on the admissibility of that evidence were correct.

[73] But first, a few matters of principle. The starting point in any discussion on the admissibility of a confessional statement is the oft-cited dictum of Lord Sumner in ***Ibrahim v R*** [1914] AC 599, 609:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

[74] In ***Wong Kam-Ming v R*** [1979] 1 All ER 939, 946, Lord Hailsham provided the rationale for the rule:

> "…any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions."

[75] Dr Williams invited our attention in particular to ***Peart v R*** (2006) 68 WIR 372, para. [23], a decision of the Privy Council on appeal from this court, in which Lord Carswell stated that "…the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence".

[76] In ***Peart v R***, the court was concerned with the admissibility of a statement obtained in breach of the Judges' Rules, rule 3(*b*) of which reads as follows:

> "It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement."

[77] The Judges' Rules, as is well known, were designed to secure that only answers and statements of accused persons which are voluntary are admitted in evidence, as

well as to provide guidance to police officers in the performance of their duties. Rule 3(*b*) was relevant in ***Peart v R*** because the police had subjected the defendant to a question and answer session after he had been arrested and charged for the offence of murder. In explaining the rationale underlying the prohibition in rule 3(*b*) of questioning after a suspect has been charged, Lord Carswell quoted with approval (at para. [20]) the following passage from Lord Devlin's 'The Criminal Prosecution in England' (1960) (page 26):

> "The inquiry that is conducted by the police divides itself naturally into two parts which are recognisably different, although it is difficult to say at just what point the first part ends and the second begins. In the earlier part the object of the inquiry is to ascertain the guilty party and in the latter part it is to prove the case against him. The distinction between the two periods is in effect the distinction between suspicion and accusation. The moment at which the suspect becomes the accused marks the change."

[78] Thus, Lord Carswell concluded, "the basic fundamental reason for the prohibition is the principle that to interrogate the prisoner at this stage tends to be unfair as requiring him possibly to incriminate himself". The applicable principles were therefore summarised as follows (at para. [24]):

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted, notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

> (iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.
>
> (iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

[79] On the facts of ***Peart v R***, the Board was satisfied that the questioning of the defendant in that case was a breach of rule 3(*b*) and that there were no exceptional circumstances to justify it. The Board acknowledged that, notwithstanding the breach of the Judges' Rules, the trial judge was entitled to exercise his discretion to admit the evidence consisting of the questions and answers; and that, if he had directed his mind to the correct considerations in doing so, it would not readily review the exercise of his discretion. However, in this case, the Board concluded, on the facts, that it was obliged to interfere (paras [26]-[27]). In its review of the judge's exercise of his discretion to admit the evidence, the Board considered the defendant's age (18 years at the time of his arrest), the fact that he had not had the services of a lawyer before the interview at which the questions were asked and the fact that he was in custody and had already been charged, as relevant factors. In the result, the Board could not be satisfied that the defendant's answers were given voluntarily and concluded that, even if the judge's

finding that the answers were given voluntarily could be upheld, the circumstances in which they were obtained "made it unfair to admit the evidence of the questions and answers" (para. [29]).

[80] No issue arises in this case about the procedure adopted by the trial judge to test the voluntariness of the statements attributed to the applicants: in both cases, the attack on the statements was extensively examined on the voir dire in the absence of the jury. But the applicants both complain that, in her ruling that the Q and A and the caution statement were admissible, there was no indication that the judge had considered the issue of unfairness in addition to voluntariness.

[81] ***Wallace & Fuller v R*** [1996] UKPC 47, upon which Miss Burrell relied, was a case in which the trial judge, in announcing his decision that the statements challenged on the voir dire in that case were admissible, gave no reasons beyond saying that he found that they were given voluntarily. On appeal to the Privy Council, taking a point which had not been raised in this court, the appellants contended for a rule of general application that a judge should always express his reasons for any procedural ruling given during a trial. Rejecting the submission that there was any such general rule, the Board held (at paras 26-27) that in every case the question whether reasons should be given depends on the particular circumstances:

> "26…undoubtedly there will be occasions when good practice requires a reasoned ruling. For example, where the judge decides a question of law sufficient, but no more, must be displayed of his reasoning to enable a review on appeal. Again, on a mixed question of law and fact the judge

should state his findings of fact so that the law can be put in context. Similarly, the exercise of a discretion will often call for an account (however brief) of the judge's reasoning, especially where the issue concerns the existence of the discretion as well as the way in which it should be exercised. These are no more than examples. In every case it will depend on the circumstances whether reasons should be given, and if so with what particularity. Frequently, there will be everything to gain and little to lose by the giving of reasons, even if only briefly. But other situations are different, as the present case well shows.

27. Here, the trial judge was faced with an irreconcilable conflict of evidence between the police officers and the defendant, turning on credibility alone. No principles of law were in issue, and there was no discretion to be exercised. The only question was whether the judge believed one set of witnesses or the other. His ruling leaves the answer in no doubt. Simply to announce that he accepted the account given by the officers and the Justice, and found the appellants' story unworthy of credit would not have advanced an appeal. Furthermore, although in cases where reasons are given it is prudent for the judge to say no more than strictly necessary, it is hard to see how a mere summary would have been appropriate in the present case; for there was always the risk that if anything was omitted in the interests of brevity the defendants would argue on appeal that the judge had overlooked it. In practice, he could scarcely stop short of a fully reasoned analysis. Their Lordships can see nothing to recommend such a course, and good reason not to follow it. In a case hinging on confessions the tasks of the judge and of the jury, although technically distinct, are in reality very much the same. The decision of the jury is announced in a non-speaking verdict at the end of the trial. For the judge to expound in detail almost at the beginning of the trial his reasons for preferring one story to the other would wholly unbalance the proceedings. His reasons, which would be given in the presence of the public, the advocates and the defendants would inevitably leave their mark not only on the future conduct of the trial but also on its atmosphere. Furthermore, although a jury may well have a general inkling of what happens on a voir dire the risk that a lapse in security would allow the jury to learn why the judge considered the defendants' evidence unworthy even to raise a

> serious doubt as to the voluntary nature of the evidence was too serious to justify whatever gain, if any, there might be at the appellate level. In truth, nobody in the present case who had heard the evidence, the cross-examination and the submissions of counsel could have doubted why the judge decided as he did. It is not surprising that none of the counsel asked the judge to explain his ruling."

[82] This analysis remains unaffected, in our view, by the subsequent observation of the Board in ***Thongjai and Another v R*** [1998] AC 54, para. [8], which is a case in which the trial judge ruled the statements inadmissible after a voir dire, that "it is desirable that a trial judge should give brief reasons for ruling that a confession is inadmissible, as his reasons may assist in clarifying issues if there should be an appeal". Ultimately, in our judgment, each case will turn on its own facts. While brief reasons for the judge's decision to admit a confession may be appropriate in cases involving issues of law or the exercise of a discretion, they will generally be unnecessary and even unhelpful in cases in which the decision turns solely or substantially on the resolution of disputed evidence.

[83] Finally under this head, we should mention the legal aid regulations. These regulations, which were made under the provisions of section 28(1)(a) of the Legal Aid Act, establish a scheme for the provision of legal aid to persons detained at police stations, lock-ups, correctional institutions or other similar places. They call for the establishment by the Legal Aid Council of a roster of duty counsel, who are required by regulation 11(1) to, among other things, "(a) attend at a police station, lock-up, correctional institution or other place where a person is detained"; and "(b) give legal advice to a person detained or accused of an offence".

[84] Regulation 12 provides for the assignment of duty counsel:

> "12.---(1) Where a person is detained at or charged with an offence and brought to a police station or lock-up, the officer detaining the person or making the arrest shall inform him of his right to legal aid and to representation by a duty counsel.
>
> (2) A person referred to in paragraph (1) who is unable to afford an attorney-at-law of his choice may request the services of a duty counsel.
>
> (3) Where a person requests the services of a duty counsel, the police officer to whom the request is made shall contact the first available duty counsel on the roster, and where a duty counsel cannot be contacted, the police officer shall contact the Council which shall assign a duty counsel.
>
> (4) There shall be placed in a conspicuous position in every police station or lock-up a sign to the effect that any person who is unable to afford an attorney of his choice may request the services of a duty counsel under these Regulations."

[85] It will be seen that the obligations placed on the police authorities by regulation 12 are (i) to inform a person detained at or charged with an offence and brought to a police station or lock-up of his right to legal aid and to representation by a duty counsel; (ii) upon a request for the services of duty counsel being made by a person detained or charged, to contact the first available duty counsel on the roster, or the Legal Aid Council; and (iii) to place in a conspicuous position in every police station or lock-up a sign informing persons detained or charged that, if they are unable to afford the services of an attorney of their choice, they may request the services of duty counsel.

[86] Against this background, we therefore turn to the question whether the admission in evidence of the Q and A and the caution statement was unfair to the applicants.

(a) The Q and A

[87] It is clear on the evidence that, when the interview with Mr Berbick was convened on 30 October 2006, he had not yet been charged with the deceased's murder. There was nothing in the statement given to him by Sergeant Mullings on 28 October 2006 (see para. [34] above) to implicate him in the deceased's murder in any way and there was no evidence that he had been informed by the police that he would be prosecuted. While it was no doubt the case, as Superintendent Small accepted (see para. [36] above), that Mr Berbick was a suspect in the matter from 29 October 2006, it seems to us that the line between suspicion and accusation had not yet been crossed. These circumstances did not, in our view, attract the prohibition in rule 3(*b*) against putting questions relating to the offence to an accused person after he has been charged or informed that he may be prosecuted. It is no doubt for this reason that, despite the fact that much was made at the trial of rule 3(*b*), Dr Williams did not press this point on appeal.

[88] Dr Williams' major complaints were, it will be recalled, that the circumstances in which the Q and A were taken were unfair to Mr Berbick, because of his poor health at the time, the fact that he was deprived of food or other refreshment for a considerable period and the fact that, on his evidence, he was told by Detective Sergeant Bailey that

Mr Gordon had given a statement implicating him and had been released from custody. All three complaints raised questions of fact in respect of which there was a sharp divide in the voir dire between the evidence of the police witnesses and Mr Berbick.

[89] Firstly, as regards his health, Mr Berbick's evidence was that he suffered from "stress" and that, while he was in custody, the police had had to take him "several times" to the hospital for treatment. Miss Facey's evidence on this point was that Mr Berbick suffered from what she described as "a stressed out problem, he stress out easily", a condition which she had first discovered about six months before and for which Mr Berbick had received treatment. On the other hand, none of the police officers who gave evidence was aware of either Mr Berbick's "medical condition" or his several visits to the Port Antonio Hospital between 28 and 30 October 2006. In particular, Detective Sergeant Bailey, who, on Mr Berbick's account, had accompanied him to the hospital on the morning of 30 October, specifically denied doing any such thing.

[90] Without knowing what the learned judge made of this evidence, the conflict in which it was entirely for her to resolve, we are bound to say that the evidence of Mr Berbick and Miss Facey as to the state of his health can only be described, even at its best, as sketchy and unspecific. In the light of this evidence, we are quite unable to say that the judge erred in failing to take the state of Mr Berbick's health into account in determining the admissibility of the Q and A.

[91] It may be convenient to deal with Dr Williams' third complaint, which naturally attracts a similar comment, in the same breath. The allegation that Detective Sergeant

Bailey told Mr Berbick that Mr Gordon had given a statement implicating him, and had been released from custody, was denied by Detective Sergeant Bailey. It was therefore a matter for the judge to determine on the voir dire whose evidence to accept on the point.

[92] Lastly, as regards the availability of food and refreshment, we were referred to the guidance provided in para. 3 of the 'Administrative Directions on Interrogation and the Taking of Statements', which is set out in note c to the Judges' Rules, page 240: "Reasonable arrangements should be made for the comfort and refreshment of persons being questioned." We readily accept that this guidance describes a standard to which it is reasonable to expect that the police authorities will adhere in the questioning of suspects.

[93] It will be recalled that the evidence on the voir dire was that Mr Berbick was taken from the Port Antonio Police Station in the early afternoon of 30 October 2006 and that the Q and A session at Pompano Bay, which commenced at around 3:15 pm, lasted until after 7 o'clock that evening. The police witnesses were unable to recall whether there had been any refreshment breaks during the interview, while Mr Berbick's evidence was that he had not had anything to eat since the evening of 28 October 2006, when his mother had brought him some food. The conflict of evidence in this instance was not quite as stark, but it nevertheless remained a matter for the judge to assess whether reasonable arrangements had in fact been made for the provision of refreshments to Mr Berbick during the interview. While the inability of the police officers

to recall specifically whether there had been any refreshment break during the four hour session certainly seems to us to suggest that there may have been none, Mr Berbick's assertion that he had not been offered anything at all to eat for close to two days might equally have been viewed with some skepticism by the trial judge. Again, these were matters for the judge and there is nothing in the Q and A to suggest that the long answer which Mr Berbick gave in response to question eight (see para. [33] above), which is where the full details of his involvement are stated, was anything other than spontaneous.

[94] In our view, the essential problem with these complaints is that they invite this court to proceed entirely on the basis of the position taken by Mr Berbick in his evidence on the voir dire, without regard to the fact that, in what was a pure contest of credibility, the learned judge by her ruling obviously accepted the evidence of the police witnesses over that of Mr Berbick. The resolution of these conflicts in the evidence was entirely a matter for the judge, who saw and heard the witnesses; and, accordingly, such findings of fact as are clearly implicit in her rulings in respect of both applicants are in our view plainly entitled to the usual deference that is paid to a jury's findings of fact after a trial. No basis has been shown, in our judgment, for this court to differ from the judge on matters that fell squarely within her province.

[95] We cannot leave this aspect of the matter without a comment on the matter of legal representation. It seems clear from the evidence that the arrangement for Mr Salmon to be present at the interview with Mr Berbick, ostensibly for the purpose of

watching over and protecting Mr Berbick's interests, was made entirely at Superintendent Small's initiative. There is no reason to doubt that, as Superintendent Small testified on the voir dire, he made these arrangements out of the purest of motives, "because we respect the rights of the accused" (para. [22] above). Later, in the presence of the jury, Superintendent Small would return to this theme, saying that he acted "in the interest of justice for everybody including [Mr Berbick]…in accordance with the guidelines of the law, to the best of my knowledge" (para [36] above). But it is clear that, in doing so, Superintendent Small proceeded without any input whatever from Mr Berbick. Although no point was taken on appeal about this arrangement, it seems to us that by proceeding as they did in this case Superintendent Small and his colleagues left themselves open to precisely the kind of criticism which was so forcefully directed at them by Mr Berbick's counsel at the trial.

(b) The caution statement

[96] Mr Bishop's principal complaints on behalf of Mr Gordon, related to (i) the failure to inform him of his right to representation by an attorney; and (ii) the question of his comfort during the interview with Detective Inspector Moore, with particular reference to the fact that he remained handcuffed and was offered no refreshments throughout.

[97] As regards the issue of legal representation, the evidence before the judge on the voir dire came firstly from Detective Inspector Moore, who said that, before taking the statement from Mr Gordon on 31 October 2006, he had informed him of his right to an attorney and that, if he could not afford to engage the services of an attorney, one

"could be provided for him under the Legal Aid Act" (para. [40] above). Then there was Detective Sergeant Bailey, who also maintained that he had told Mr Gordon of his right to request an attorney "through the Legal Aid Council,…[but] he did not request any" (para. [45] above). And thirdly, there was the evidence of Mr Gordon himself, who agreed under cross-examination on the voir dire that he made no request for a lawyer at any time on that day, nor did he ask for any family member to be present.

[98] In the light of this evidence, we consider that it was clearly open to the judge to find that there had been no breach of the legal aid regulations in relation to Mr Gordon. In these circumstances, we can see no basis to suggest that the learned trial judge erred in principle in deciding to admit Mr Gordon's caution statement in the face of the complaints made on his behalf.

[99] As regards the question of Mr Gordon's comfort during the interview with Detective Inspector Moore, Mr Gordon's own evidence was that, having had breakfast at the Castle Police Station at around 8 o'clock in the morning of 31 October 2006, he had declined to have the second meal that was offered to him for the day. The interview at the Port Antonio Police Station, which commenced at about 5:15 pm, continued until a few minutes after 7:00 pm and Mr Gordon's evidence was that he was not offered anything to eat during that period. It therefore appears that he was without food or other refreshment for a large part of the day.

[100] We have already indicated (at para. [92] above) that we consider it to be the duty of the police authorities to make reasonable arrangements for the provision of

suitable refreshments to persons being questioned. But the impact of the absence of any such arrangements on the overall fairness of the process was, in our view, a matter for the learned trial judge to assess in the light of the evidence on the voir dire. In this regard, the judge would clearly have been entitled to take into account Mr Gordon's own evidence that the decision not to partake of the second meal provided at Castle Police Station was his and that he had made no complaint of hunger at any time. In the light of all of the evidence, we have therefore come to the conclusion that there is no basis upon which this court can interfere with the judge's conclusion on this issue.

[101] Mr Bishop also invited our attention to the question of whether Mr Gordon remained handcuffed for the duration of the interview with Detective Inspector Moore, as he said he had. But again, as with the complaints made on behalf of Mr Berbick, this was an area of sharp division in the evidence. On the one hand, there was the evidence of Mr Dunstan, who also said that Mr Gordon's handcuffs were not removed during the interview (para. [43] above). And, on the other hand, there was the evidence of Mrs Mitchell-Forrester, who was supported in this by Detective Sergeant Bailey, that, on the instructions of Detective Inspector Moore, the handcuffs were removed from Mr Gordon's hands before he gave the statement (paras [44]-[45]). So this was, again, a pure contest of credibility and as such a matter for resolution by the judge.

Conclusion on the admissibility issue

[102] In the light of the decision in ***Wallace & Fuller v R***, we are of the view that nothing at all turns on the fact that the learned trial judge gave no reasons for her

decision to admit either the Q and A or the caution statement. As in that case, McDonald J was faced with "an irreconcilable conflict of evidence between the police officers and [the applicants], turning on credibility alone" and, by her rulings, the manner in which she resolved that conflict was left in no doubt. Accordingly, for all the reasons which we have attempted to state, we have come to the conclusion that the applicants' challenge to McDonald J's decision on the admissibility of the Q and A and the caution statement has not been made good.

The good character issue (Mr Berbick's ground two)

[103] In ***R v Vye*** [1993] 3 All ER 241, 248, the Court of Appeal laid down the following rule:

> "(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements."

[104] And in ***R v Aziz*** [1995] 3 All ER 149, 156, explaining this development, Lord Steyn said this:

> "…in recent years there has been a veritable sea-change in judicial thinking in regard to the proper way in which a judge should direct a jury on the good character of a defendant. It has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be

> posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. Hence there has been a shift from discretion to rules of practice. And ***R v Vye*** was the culmination of this development."

[105] The standard good character direction therefore contains two limbs, (i) the credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character; and (ii) the propensity direction, that is that such a person is less likely to commit a crime, especially one of the nature with which he is charged (see ***Teeluck and John v The State of Trinidad & Tobago*** (2005) 66 WIR 319, 329 and ***Michael Reid v R***, SCCA No 113/2007, judgment delivered 3 April 2009, page 13). While there continues to be some doubt expressed in the cases as to the value of a credibility direction to a defendant who gives an unsworn statement (see ***Michael Reid v R***, where some of the authorities are mentioned at paras 33-35), there is no doubt that such a defendant would generally be fully entitled to the benefit of the propensity limb of the direction (***Michael Reid v R***, para. 44 (iii) and ***Muirhead v R*** [2008] UKPC 40, paras 26 and 35).

[106] But the necessity for a good character direction of any kind only arises where the defendant puts his character in issue at the trial. As Lord Hoffmann said in ***Muirhead v R***, para. 34 –

> "…where the defendant is entitled to such a direction and likely to benefit from it, it is the affirmative duty of his counsel to ensure that the court is made aware of his character, through direct evidence given on his behalf or through cross-examination of the prosecution witnesses. The judge's duty to give the direction only arises when such evidence is before the court: *Thompson v The Queen* [1998] AC 811."

[107] In this case, Mr Berbick, through his counsel, did not put his character in issue. No complaint is – or can – be made about the fact that he did not have the benefit of a good character direction from the learned trial judge. Dr Williams' complaint therefore focuses on the failure of counsel to put Mr Berbick's character in issue. The clear implication of Mr Berbick's affidavit (see para. [65] above) is that, had he been properly advised by his counsel, who was aware that he had no previous convictions and was of good character, he would have given evidence on oath.

[108] When invited to comment on Mr Berbick's affidavit, as we have seen, his counsel is reported to have declined to do so, on the ground that he could not remember what had transpired at the interview with his client. This was, to put it mildly, a surprising response, given the several pronouncements of the highest authority on the duty of counsel, particularly in a murder case, to make and keep a record of his client's instructions in writing, signed by the client. In this regard, it is only necessary to refer (as the Board did in ***Muirhead v R***, para. 27) to ***Bethel v The State*** (1998) 55 WIR 394, 398, in which the appellant complained that he had wanted to give evidence and his counsel had prevented him from doing so:

> "[Their lordships] are bound to say that they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future."

[109] But, be that as it may, the authorities also strongly suggest caution on the part of an appellate court in approaching statements or assertions made by convicted persons as regards the conduct of their counsel at trial, bearing in mind that such statements "are obviously self-serving, are easy to make and not always easy to rebut" (per Lords Carswell and Mance, concurring, in ***Muirhead v R***, at para. 37). However, in this case, in the absence of any contrary indication from Mr Berbick's counsel, we consider ourselves bound to approach the matter on the basis of the uncontradicted evidence contained in his affidavit.

[110] That evidence reveals that Mr Berbick was not advised by his counsel of the value and utility of his giving evidence asserting his good character. Mr Berbick had no previous convictions and was therefore of presumptively good character. Had he given evidence, he would plainly have been entitled to both limbs of the standard good character direction. Further, and quite apart from that, no attempt was made by his counsel – either through cross-examination of the prosecution witnesses or by calling witnesses on Mr Berbick's behalf – to put his character in issue, in which event he would have been entitled at the very least to the propensity limb of the direction.

[111] In these circumstances, it seems to us that although, as was the case in the recent decision of the Board in ***Robie v R*** [2011] UKPC 43, para. 10 (which was brought to our attention by Dr Williams), "no criticism can properly be directed at the judge", we must, as was done in that case, approach the matter on the basis that a good character direction should have been given in respect of Mr Berbick.

[112] The question which next arises is therefore whether, even if Mr Berbick had enjoyed the benefit of a good character direction, the jury would nevertheless have convicted him. Dr Williams' position on this was that, there having been no evidence implicating Mr Berbick other than his incriminating answers to the police, it cannot be said that the jury would have convicted in the face of such a direction, while Miss Burrell took the view that the nature of the evidence against Mr Berbick was such that, even if a good character direction had been given, the jury would have convicted.

[113] In ***Michael Reid v R***, after reviewing a number of the modern authorities on this issue, this court concluded (at para. 44 (v)) that the effect of the omission of a good character direction in a case in which one should have been given depends on the circumstances of the particular case under consideration:

> "The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be

> whether the jury, properly directed, would inevitably or without doubt have convicted."

(Reference might also be made to ***Jagdeo Singh v The State*** (2005) 68 WIR 424, para. [30], in which Lord Bingham said that, "The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence.")

[114] Thus, the absence of a good character direction is not necessarily fatal to the ensuing conviction. In ***Balson v The State*** (2005) 65 WIR 128, for instance, the Board considered (at para. [38]) that, on the facts of that case, any assistance that a good character direction might have given was "wholly outweighed by the nature and coherence of the circumstantial evidence". Similarly, in ***Patricia Henry v R*** [2011] JMCA Crim 16, an appeal from the decision of a Resident Magistrate in which this court considered that a good character direction should have been given, it was held that the evidence was such that the outcome would have been the same had the learned Resident Magistrate directed herself appropriately.

[115] The evidence against Mr Berbick in this case consisted entirely of his own incriminating answers in the Q and A, in which he revealed that (i) he and Mr Gordon made a plan to "beat [the deceased] and frighten him"; (ii) he armed himself with a piece of iron and then took up a crow bar, which he gave to Mr Gordon; (iii) aiming for the deceased's neck and shoulder, he used the piece of iron to hit the deceased from behind, "in his head back twice"; (iv) while he was hitting the deceased from behind,

the deceased was not attacking him or Mr Gordon; (v) after the deceased had fallen to the ground, he then went back to his house for two T-shirts, one of which he gave to Mr Gordon, who used it "to hold [the deceased's] shirt and lift it up", looking for a pocket to search for money but found none; (vi) he then went with Mr Gordon to the deceased's house, to which they gained entry by Mr Gordon "using the crow bar to force open the grill to the back door", but left after an unsuccessful search for money; (vii) going back to his house, he used the other white T-shirt to wash off the crow bar under the outside pipe at the front of the yard, before putting it inside the house; and then (viii) he threw away the white T-shirt in the bushes in front of the yard.

[116] The version of the events described by Mr Berbick's Q and A was in some respects, though not all, contradicted by him in his unsworn statement. On that account, it will be recalled, he and Mr Gordon were sitting at his gate talking, when he saw the deceased coming, along with "two big stones in his hand". After the deceased flung one of the stones at him, he ran, the deceased in pursuit with the other stone in his hand, and he thought that the deceased was going to kill him. Mr Gordon picked up a stone and flung it at the deceased, who then started chasing after him. Fearing for Mr Gordon's life, he looked "in the pass", where he saw a "pipe iron". He took it up, went towards the deceased and hit him with it. He did not mean to kill the deceased.

[117] Although in answer to a specific question in the Q and A he had said that, at the time when he was hitting the deceased, neither he nor Mr Gordon was under attack from him, Mr Berbick's unsworn statement accordingly raised the issue of self-defence.

It was therefore a matter for the jury to determine which of the two versions was correct and, on that basis, whether the case for the prosecution satisfied them that, in his attack on the deceased, Mr Berbick did not act in Mr Gordon's defence. This is how McDonald J put it to the jury in her summing up:

> "Now once self-defence is raised in a case, it is not the accused man who is to show that he was acting in self-defence, it is the prosecution, who is to show to you that he was not acting in self-defence, the prosecution has to satisfy you, on the evidence, that which [sic] has been presented, that what the accused man is saying is untruth. The burden remains on the prosecution."

[118] So the question is, would the jury inevitably have convicted Mr Berbick, in the face of a full good character direction from the judge, covering both the aspects of Mr Berbick's credibility and his propensity to commit murder in the circumstances described by the prosecution's case? In order to answer this question, it is necessary to look at all the evidence in the case and, in this regard, two matters appear to us to be particularly significant.

[119] The first emerges from the evidence of Mr Shawn Bishop, which was not seriously challenged in cross-examination, that he had seen Mr Berbick and Mr Gordon, both shirtless, together in the yard of the Church of God sometime between 1:30 and 2:00 am on 28 October 2006 (para. [11] above), and that, later that morning, at about 7:00 o'clock, Mr Bishop saw the body of the deceased lying on the steps of the church, in "actually the same place [the applicants] were standing the night I left them" (para [13] above). In the Q and A, Mr Berbick did mention the fact that, while he and Mr

Gordon waited on the deceased in the churchyard, armed with the "pipe iron" and the crow bar respectively, Mr Bishop had passed by and they had exchanged brief words with him. Yet, in the unsworn statement, although Mr Bishop was mentioned briefly in passing, Mr Berbick said nothing at all about the encounter which Mr Bishop had described in his evidence. That evidence, though consistent with Mr Berbick's Q and A, was significantly different from the version of the events put forward by him in the unsworn statement and, in our view, strongly implicated Mr Berbick in the deceased's murder in the manner described by him in the Q and A. Because it remained completely unexplained, it was therefore for the jury to determine which version to accept.

[120] In our view, the factors favouring acceptance of Mr Bishop's evidence, hardly least among them the fact that it was never put to him that he was not speaking the truth about the early morning encounter in which he had seen the applicants in the churchyard, would have been unaffected had Mr Berbick's character been put in issue and the judge given a good character direction.

[121] The second matter has to do with the defence put forward by Mr Berbick in the unsworn statement, that is, that he acted in the belief that the deceased was going to kill Mr Gordon. The judge – correctly - invited the jury to consider whether they believed that Mr Berbick acted to protect Mr Gordon from death or serious injury at the hands of the deceased. Further, that if they concluded that Mr Berbick "did no more than he honestly and instinctively thought was necessary in the defence of [Mr] Gordon, you may think that would be strong evidence that the amount of force used by

him was reasonable". Again, for the purpose of making this determination, the jury would have been entitled – indeed required – to take into account, not only what Mr Berbick said, but all the other evidence in the case.

[122] In this regard, a relevant consideration for the jury would obviously have been, it appears to us, Mr Gordon's own defence, given that he and Mr Berbick were jointly charged for murder arising out of the identical set of facts. The jury may well have been struck by the fact that in, his own unsworn statement, Mr Gordon made no mention at all of the deceased having been armed with two stones, of himself throwing a stone at the deceased, or of the deceased running after him. Neither had he done so in the largely exculpatory statement taken from him by Detective Sergeant Bailey on 29 October 2006, evidence of which was elicited from the officer during his cross-examination by Mr Gordon's counsel (see para. [53] above). It was therefore no part of Mr Gordon's defence that he was under attack from the deceased at any time. (Although Mr Gordon did say in his unsworn statement that, after he had given his version of the events to him, Detective Sergeant Bailey had said that it seemed that Mr Berbick was trying to save him, Mr Gordon, and defend himself, this aspect of his statement was not echoed elsewhere in the evidence and remained unexplored.)

[123] An assessment by the jury along these lines, which might have reflected on the honesty and sincerity of Mr Berbick's belief that Mr Gordon's life was in danger, would equally have been unaffected, in our view, by Mr Berbick's character having been put in issue and his having had the benefit of a good character direction.

[124] By their verdict, it is clear that the jury rejected Mr Berbick's defence that he acted out of fear for Mr Gordon's life and it appears to us that this is a case in which such benefit as Mr Berbick might have derived from a good character direction was outweighed by the other evidence in the case. The jury would, in our view, inevitably have come to the same conclusion, even had such a direction been given.

The misdirection issue (Mr Berbick's ground three)

[125] In her general directions to the jury, McDonald J said this:

> "Now, the prosecution has to prove the intention of the accused men, that is Harold Berbick and Kenton Gordon, to either kill Trevor Berbick or to inflict serious bodily harm to him. This intention has to be proved like any other facts in the case. Now, this intention that the prosecution has to prove is not capable of positive proof, so how do you prove intention? The only practical way of proving a person's intention [sic] to infer it from the words that the person used, if any words were used and the conduct of the person, in the absence of evidence to the contrary.
>
> You are entitled to regard these accused men as ordinary, responsible persons, that is, somebody who has the capacity to reason. Find out their intention in the absence of any expressed intention by each of them. You look at what each did and you ask yourselves, whether as ordinary reasonable persons, they must have known that death or real serious bodily injury would have resulted to Trevor Berbick from their action and if you find that they must have so known, then, you may infer, members of the jury, that they intended the results of their action and that would be satisfactory proof of the intention that is necessary to establish the charge of murder.
>
> Now, it is the actual intention of the accused which you are trying to discover. You must take into account any evidence given by each of them or anything each accused said

> explaining his actions and stating what his intention was or perhaps speaks about the absence of his intention, then on the totality of the evidence, all the evidence in the case, you decide as to whether the required intention has been proved.
>
> So, as well thinking people with common sense, you will say to yourselves, if someone armed with a weapon, such as an iron pipe or a crowbar strikes another, what would have been their intention? Motive could not either be to kill that person or to cause real serious injury, you will have to ask yourselves that question."

[126] Then, near to the end of the summing up, the judge added this:

> "If you believe the accused inflicted the wounds but did not intend to kill the deceased or if you have a doubt that he had the necessary intention required by law, it would be opened [sic] to you to convict the accused of manslaughter, because lack of intention would reduce Murder to manslaughter. Remember, I told you, intention, is an essential ingredient in the charge of Murder."

[127] Dr Williams submitted that the first direction, which imported an objective criterion, was wrong, while the second, though correct, was not sufficient to cure the first. In support of this submission, Dr Williams referred us to the decision of the House of Lords in ***R v Woollin*** [1998] 4 All ER 103, 112, in which Lord Steyn said that:

> "A misdirection cannot by any means always be cured by the fact that the judge at an earlier or later stage gave a correct direction. After all, how is a jury to choose between a correct and an incorrect direction on a point of law? If a misdirection is to be corrected, it must be done in the plainest terms: *Archbold's Criminal Pleading, Evidence and Practice* (1998 edn) para 4-374, p 411."

[128] In ***R v Woollin***, the court was also concerned with the proper direction on intention on a charge of murder. Lord Steyn's judgment contains a valuable account (at pages 108-109) of the development of the law relating to the mental element required for the offence of murder, starting with the much unloved and long since discredited decision of the House of Lords in ***DPP v Smith*** [1960] 3 All ER 161. In that case, it will be recalled, the defendant, a motorist, tried to avoid arrest, killing a policeman in the process, by driving off with the policeman clinging to his car. The House of Lords ruled that (1) the defendant committed murder because death or grievous bodily harm was foreseen by him as a 'likely' result of his act and (2) he was deemed to have foreseen the risk a reasonable person in his position would have foreseen.

[129] Widespread and severe criticism of the second part of this decision led to its reversal in England by section 8 of the Criminal Justice Act 1967, to make it clear that the mental element of murder is, as Lord Steyn put it (at page 108), "concerned with the subjective question of what was in the mind of the man accused of murder". But, statute apart, it is now generally accepted that ***DPP v Smith*** represented a misstep in the common law. In ***Frankland v R, Moore v R*** (1988) 86 Cr App R 116, 128, after a full review of the relevant authorities, the Privy Council, on appeal from the High Court of the Isle of Man, concluded that insofar as ***DPP v Smith*** laid down an objective test of the intent in the crime of murder it did not accurately represent the English common law, which at that time governed the question of intention in the Isle of Man (as is still the case in Jamaica). It was therefore held that the judge at the trial of each of the

appellants was in error in directing the jury that they were entitled to ascertain the intent of the accused by reference to an objective test.

[130] In the result, in ***R v Woollin*** it was held (substantially confirming the earlier decision of the Court of Appeal in ***R v Nedrick*** [1986] 3 All ER 1) that, having regard to the mental element of murder, the critical question for the jury is whether the defendant intended to kill or do serious bodily harm to the deceased. In the rare cases where this simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions, and that the defendant appreciated that such was the case. The decision is one for the jury to be reached on a consideration of all the evidence.

[131] ***R v Woollin*** was discussed and approved by this court in ***R v Briston Scarlett*** (SCCA No 153/99, judgment delivered 6 April 2001). That was a case in which, upon his apprehension in connection with a murder committed by setting the house occupied by the deceased on fire with a gasoline bomb, the appellant, after caution, told the police, "mi never mean to hurt nobody". The trial judge directed the jury in these terms:

> "If, the accused man knew that by the act of setting fire to the dwelling house it was highly probable that death, it was highly probable that an occupant in that dwelling would have suffered death or grievous bodily harm, that is really serious bodily harm, then…it would be open to you to infer that he…would have had the necessary intention to commit the murder."

[132] In a judgment delivered by Walker JA, it was held that these directions were "plainly wrong". The court approved the model direction on intention, based on ***R v Woollin***, reproduced in [1998] All ER Annual Review 122. While observing that the trial judge was best placed to determine whether a simple direction on intent will suffice in a particular case, Walker JA expressed the hope (at page 10) that, "in cases of this nature, trial judges will heed the guidelines to which attention has been drawn in this judgment".

[133] In the instant case, it was therefore necessary for the jury to be told plainly that, before they could convict the applicants of the offence of murder, they had to be satisfied from the evidence that their intention was to kill or inflict grievous bodily harm on the deceased; and that in this regard they should bear in mind the assertions attributed to Mr Berbick, in the Q and A, that the plan was to beat and frighten the deceased, and, in his unsworn statement, that "we didn't intend to kill him". If the judge considered that any further direction was needed in the light of the evidence, then the jury might also have been told that they were not entitled to find the necessary intention unless they felt sure that death or serious bodily harm was a virtual certainty as a result of the applicants' actions and that the applicants appreciated that such was the case.

[134] Against this background, we return to McDonald J's directions on intention. In the extract reproduced at para. [125] above, the learned judge started out conventionally, telling the jury that the prosecution had to prove that the applicants

intended either to kill the deceased, or to inflict serious bodily harm on him. This was the "simple direction" referred to in the model direction and approved by this court in ***R v Briston Scarlett***. The judge then went on to make the point, unexceptionably, that "[t]he only practical way of proving a person's intention [is] to infer it from the words that the person used, if any words were used and the conduct of the person, in the absence of evidence to the contrary".

[135] But the judge then proceeded to tell the jury that they were entitled to regard the applicants as ordinary, responsible persons, with the capacity to reason. After telling the jury to "[f]ind out their intention in the absence of any expressed intention by each of them" the judge then invited the jury to ask themselves the question which attracted the brunt of Dr Williams' criticism; that is, "whether as ordinary reasonable persons, [the applicants] must have known that death or real serious bodily injury would have resulted to [the deceased] from their action and if you find that they must have so known, then, you may infer…that they intended the results of their action and that would be satisfactory proof of the intention that is necessary to establish the charge of murder". The judge then went on to say again that "it is the actual intention of the accused which you are trying to discover", and that the jury could take into account any evidence given by them explaining their actions. But the judge then ended by inviting the jury, "as well thinking people with common sense", to consider what would be the intention of someone who, armed with a weapon such as an iron pipe or crowbar, strikes another person.

[136] At first blush, it might indeed appear that, as Dr Williams complained, some of the language used by the judge - her references to "ordinary responsible persons", "ordinary reasonable persons", and the question "what would have been their intention" - was capable of importing objective criteria into the jury's consideration of the question of intention. But it seems to us that a distinction can be drawn between, on the one hand, inviting the jury to consider whether an ordinary reasonable person, as some kind of abstraction, would have known that death or serious injury would result from the applicants' actions towards the deceased; and, on the other hand, inviting the jury to consider whether the applicants, assuming them to be ordinary, responsible persons, gifted with all the usual instincts and feelings of such persons, intended by their actions towards the deceased to kill or to inflict grievous bodily harm. In our view, on a close analysis of the judge's directions taken as a whole, they fall into the latter, rather than the former, category.

[137] Thus, having said that the prosecution had to prove their intention, the judge went on to tell the jury to "find out" their intention. The judge then reiterated that it was their "actual intention" that the jury should be concerned to discover. And finally, returning to the issue at the end (see para. [126] above), the judge told the jury that it was open to them to convict of manslaughter rather than murder, if "you believe the accused inflicted the wounds but did not intend to kill the deceased or if you have a doubt that he had the necessary intention required by law". In these circumstances, we have come to the conclusion that, at the end of the summing up, the jury would have been left in no doubt that what they were being directed to do was to ascertain

whether the applicants intended to kill the deceased or to cause him grievous bodily harm.

[138] But if, contrary to the view we have expressed above, it is open to question whether, in the light of the judge's earlier directions, the jury would inevitably have understood her reference to the "necessary intention required by law" to be a reference to the applicants' actual intention, rather than to what they must be taken to have intended as ordinary responsible or reasonable persons, the question of what should be the outcome of Mr Berbick's appeal in these circumstances remains. By his own admission, which the jury obviously accepted, Mr Berbick, armed with a piece of iron, having provided his companion, Mr Gordon, with a crowbar, lay in wait for the deceased in the early morning of 28 October 2006, hit him twice in the head with the piece of iron, and, after the deceased had fallen to the ground, led the way in the cleaning up and disposal of the piece of iron and the crowbar. The medical evidence confirmed that the attack on the deceased, of which Mr Berbick was clearly the initiator and in which he was an active participant, was one of the utmost severity, resulting in death shortly after the event. In these circumstances, it appears to us that the jury must inevitably have come to the conclusion that Mr Berbick's intention, despite his insistence to the contrary, was to kill or to inflict serious bodily harm to the deceased.

[139] In the light of this conclusion, we are therefore of the view that, if we are wrong in our conclusion that the judge's directions on intention were unobjectionable, this would be an appropriate case in which to apply the proviso, which provides that "the

Court may, notwithstanding that they are of the 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".

[140] But we cannot leave this issue without commending to trial judges – again – the simple direction on the mental element of the offence of murder approved by the House of Lords in ***R v Woollin*** and endorsed by this court in ***R v Briston Scarlett*** (paras [130]-[133] above). A direction that the jury must be satisfied from the evidence that the defendant intended to kill or to inflict grievous bodily harm on the deceased is in our view clear and should be readily intelligible to jurors. Elaboration is rarely necessary, but if the judge considers that it will be helpful, he/she should err on the side of economy rather than expansiveness.

The sentence issue

[141] On Mr Berbick's behalf, Dr Williams urged us to consider substituting a minimum period for parole closer to the statutory minimum of 15 years (Offences Against the Person Act, section 3(1C)(b)(i)). However, Mr Bishop did not feel able to ask for anything more than "a slight reduction" in respect of Mr Gordon's sentence. But in neither case were we shown anything to suggest that the sentence imposed by the learned trial judge was manifestly excessive. In these circumstances, therefore, we do not consider that there is any basis upon which to disturb either sentence.

Disposal of the applications

[142] In the result, the applications for leave to appeal against conviction and sentence are refused. The sentences imposed by McDonald J are to run from 11 January 2008.