[2017] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 19 & 20/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

DARYEON BLAKE AND VAUGHN BLAKE v R

K D Knight QC, Miss Stacey Knight, Miss Bianca Samuels and Able-Don Foote instructed by Knight Junor Samuels for the applicants

Miss Sophia Thomas instructed by the Director of Public Prosecutions for the Crown

3, 6 June 2016, 28 April and 21 July 2017

MORRISON P

Introduction

[1] Each of the applicants seeks leave to appeal against his conviction and sentence for murder, after a trial before Straw J (the judge) and a jury in the Circuit Court for the parish of Saint Elizabeth. On 8 March 2013, the judge sentenced the applicants to life imprisonment, with the stipulation that they should serve 20 years before becoming eligible for parole. Their applications for leave to appeal having been considered on

paper and refused by a single judge of this court on 19 September 2014, the applicants in due course renewed them before the court itself.

[2] The renewed applications for leave to appeal were heard on 3 and 6 June 2016 and, on 28 April 2017, the court announced the following result:

"The applications for leave to appeal are granted. The hearing of the applications is treated as the hearing of the appeals. The appeals are allowed in part and the court makes the following orders:

The first applicant

1. The conviction is quashed and the sentence of life imprisonment is set aside. In lieu of the conviction for murder, a conviction for manslaughter is substituted.

2. A social enquiry report is to be obtained within 60 days of this order and copies are to be provided to counsel for the first applicant and counsel for the prosecution by the Registrar of the Court of Appeal within 14 days of her receipt of the original report.

3. Within 21 days of receipt of copies of the report as aforesaid, counsel for the first applicant and counsel for the prosecution will be at liberty to make such written submissions as to sentence as they see fit.

4. Upon receipt of counsel's submissions, the court will within a further period of 30 days issue a supplemental judgment on sentence, without the need for any further sitting unless specifically requested by the counsel.

The second applicant

1. The conviction for murder is quashed and the sentence of life imprisonment is set aside.

BY MAJORITY (Sinclair-Haynes JA dissenting)

2. In the interests of justice, a new trial is ordered, to take place at the earliest convenient date in the Circuit Court for the parish of Saint Elizabeth, or such other place as the Registrar of the Supreme Court shall determine."

[3] These are the reasons which were promised at the time when this result was announced.

The case for the prosecution

[4] The applicants were charged with murdering Orville Alexander (the deceased), also known as 'Gungo', at a bar at Warminster in the parish of Saint Elizabeth on 9 October 2010.

[5] But the case for the prosecution really began with an incident (the September incident) which took place sometime in September 2010 at a dance in the vicinity of Hopeton District, also in Saint Elizabeth. Among the persons present at the dance were

the deceased's brother, Mr Kimarley Levy, and Mr Vaughn Blake (the second applicant), who was well known to Mr Levy. Mr Levy testified that he attempted to intervene when the second applicant persisted in dancing with a young lady against her will. When the second applicant held on to the young lady, Mr Levy told him to "do betta dan dat", to which the second applicant replied, "Yuh waan a man slap yuh inna yuh face, because yuh a violate". After a further exchange of words, Mr Levy testified, the second applicant punched him in his face just below his right eye, drawing blood and causing it to become swollen and painful. Both the second applicant and Mr Levy then went out onto the road. Mr Levy's sister, Miss Tracey-Ann Dixon, who was standing outside, sought to intervene, but the second applicant also punched her, catching her on the back of the neck. Miss Dixon took Mr Levy into a shop that was close to the road and locked him inside, while the second applicant and his friends remained outside, "licking on the shop". Mr Levy knew that the second applicant was outside because he heard his voice, which he knew and was able to recognise. After about two hours, Mr Levy was able to leave the shop and go home. He made a report to the Nain Police Station the following morning and also went to see a doctor about the injury to his face.

[6] About two weeks after the September incident, on the evening of 9 October 2010, Mr Levy attended a party at a bar known as Valerie's Place in Northampton Mountain, Warminster District. As he stood on the verandah of the bar, he saw the second applicant arrive and go inside the bar. He could see the second applicant and Mr Daryeon Blake (the first applicant), who was also well known to him, having a drink inside. There were about 20 other persons inside the bar and, after about half an hour,

the deceased, who was also at the party, went into the bar. Mr Levy then overheard the deceased speaking loudly to the second applicant about the September incident. Referring to the demeanour of the deceased, Mr Levy said, "I did not see him into a dreadful way" and he appeared, to him, to be "[n]ormal", as he spoke to the second applicant. The deceased and the second applicant were, at that time, about 7½ feet apart from each other and the deceased had nothing in his hands.

[7] According to Mr Levy, the first applicant then approached the deceased and held him by the neck from behind. As they wrestled with each other, the first applicant pulled a knife from his pocket and stabbed the deceased twice in the left side. The second applicant, also armed with a knife, then ran up to the deceased and stabbed him in the chest more than once. The deceased then ran out of the bar, leaving the applicants inside, and fell on his face by a marl heap which was some 25 feet in front of the shop. There was blood on the deceased's clothes and Mr Levy held on to him, "bawling for help". Shortly afterwards, the deceased was put into a car and taken by Mr Levy and others to the Mandeville Hospital, where he subsequently died. The post mortem report would later reveal that the deceased had received a total of four stab wounds in the region of his left chest, with the cause of death being attributed to multiple stab wounds.

[8] In response to counsel for the prosecution's question, whether the deceased was attacking the second applicant, when he was held (by the neck) from behind by the first applicant, Mr Levy said, "I don't know when he was going to him, if he was going to be

attack [sic] and I don't know if [the first applicant] misunderstand [sic] and try to hold him and do what he do".

[9] Mr Levy disagreed with the suggestion put to him by the applicants' counsel in cross-examination that, no arrest having been made by the police in respect of the September incident, after one or two weeks, he and the deceased had "decided to deal with the thing [themselves]". He also denied the suggestion that when he and the deceased saw the applicants in the bar, they saw this as an opportunity to take revenge for the second applicant having punched him in the face during the September incident. In this regard, it was suggested that the deceased "attacked [the second applicant] with a pick-axe stick that night" and Mr Levy denied the suggestion. Mr Levy also denied that the deceased had attacked the first applicant, after the second applicant had pushed him from the shop and that it was during that attack that the deceased was stabbed.

[10] The prosecution's next witness was Miss Tracey-Ann Green, a cousin of both the deceased and Mr Levy. She told the court that, on the evening of 9 October 2010, she was sitting on a stool on the verandah of Valerie's Place. She saw the deceased enter the bar and order a cigarette. Addressing the applicants, who were standing together inside the bar, the deceased said, "[a]fta what really guh on up dere, yuh really have the heart to come down here". When this was said, neither the deceased nor the first applicant had anything in his hands.

[11] At that point, Miss Green testified, the deceased and the first applicant "start to fight". When asked by counsel for the prosecution to state "exactly how this fight started, who did what and then who did what?", Miss Green's answer was that she did not "exactly see who start it", but that she knew that "they were fighting". Members of the crowd started to "run up and down" and Miss Green next saw the first applicant take out a ratchet knife, either from his waist or his pocket, grab the deceased around his neck and stab him somewhere in the chest area. The first applicant then "ease off" the deceased on to the second applicant, who was leaning on a fridge inside the shop, but she did not see the second applicant do anything to the deceased. She next saw the deceased limp out of the bar, then "run and stagger and drop at the marl heap".

[12] In cross-examination, after being shown the statement which she had made to the police on 10 October 2010, the morning after the incident, Miss Green admitted that she had said at that time that it was the second applicant and the deceased who were fighting. But when asked which of the statements was correct, her answer was that "[b]oth of them were fighting", although she maintained that it was the first applicant whom she had seen stab the deceased from behind and that she did not see the second applicant inflict any wound on the deceased. Miss Green denied having seen the deceased enter the bar with a pick-axe stick and attack the second applicant; nor did she see the deceased and the second applicant fighting initially. She disagreed with the suggestion that what happened was that the second applicant pushed the deceased from the shop and that the deceased thereafter attacked the first applicant with a pick-axe stick, at which time the deceased was stabbed by the first applicant.

[13] The prosecution's final witness as to fact was Mr Levy's nephew, Hughroy Blair, who was a schoolboy in grade eight at the material time. On the evening of 9 October 2010, he was in the bar at Valerie's Place assisting with picking up bottles. Both applicants were also there, talking to each other and drinking. Hughroy estimated that there were "fourteen to fifteen" persons in the bar. He saw the deceased, who was also his uncle, enter the bar and order a cigarette from the lady behind the counter. As the deceased was making his way out of the bar, the second applicant said something to him, to which he responded. The second applicant was at that time about an arm's length away from the deceased, as they faced each other, and the first applicant was to the side of them. As the deceased turned to walk away, Hughroy saw the second applicant "hold him from back way…push something inna him side…and turn it". While the deceased was still being held by the second applicant, Hughroy then saw the first applicant "run up pon him and stab him inna him chest". Hughroy did not see the deceased attack either of the applicants, although he could not see the deceased at all times and could not see if he had anything in his hand.

[14] Hughroy denied the suggestions put to him in cross-examination that at the material time (i) the deceased was armed with a pick-axe stick with which he attacked the second applicant; and (ii) the second applicant "never stabbed [the deceased]". He also denied the suggestion that the deceased had attacked the first applicant and that it was at that time that the deceased was stabbed.

[15] When the police were summoned to the scene that same night, both applicants were found barricaded inside the bar. They were placed in handcuffs and taken away and, on 15 October 2010, after separate question and answer interviews had been conducted by the police with them, they were both arrested and charged for the offence of murder. Cautioned after being charged, the first applicant said, "just give me a [sic] early court date"; while the second applicant said, "[m]y lawyer will speak for me".

[16] That was the case for the prosecution.

The case for the defence

[17] The first applicant gave evidence in his defence and also called a witness. His evidence was to the following effect. While inside Valerie's Bar on the evening in question, he saw the deceased approach the second applicant, armed with a pick-axe stick, and hit him "a few times" with it. The second applicant pushed the deceased outside the bar and closed the door. He (the first applicant) tried to run out of the bar through another door, when he came upon the deceased, who used the pick-axe stick to hit him twice. He held onto the deceased, who in turn held on to him, saying, "How unnuh suh bright", while he (the first applicant) tried to tell the deceased to, "just cool". The deceased shouted "[u]nnuh a guh dead ova here"; and the first applicant also saw Mr Levy, who was shouting "pull him out, mek we kill him". At this point, the first applicant told the court, "I could actually see my life flash in front of me". The first applicant then pulled a ratchet knife from his waistband, stabbed the deceased more

than once and felt him "get weak". He then pushed the deceased, causing him to fall backwards into the hands of Mr Levy, who was standing by the door. Then, letting go of the deceased, Mr Levy tried to come through the door with a machete, whereupon the first applicant threw the knife at him, causing him to retreat and thus enabling the first applicant to close the door. At that time, the first applicant said, he could not see the second applicant, who he assumed was at the other door. But he was clear that the second applicant did not stab the deceased.

[18] Under cross-examination, the first applicant maintained that he was the only person who stabbed the deceased and that he did so four times because, he said, "I see my life was in danger". As for the pick-axe stick with which the deceased had been armed, the first applicant was unable to say what had become of it.

[19] Miss Janice Powell, who was the bartender on duty in Valerie's Place on the night in question, gave evidence on behalf of the first applicant. But her evidence was unhelpful. She did not see the deceased there that night, although she did see both applicants. All she could say was that there was a fight in the bar that night and that, when it started, she hid under the counter and remained locked inside the bar with the applicants.

[20] The second applicant opted to remain silent and called no witnesses, closing his case on that note.

The summing up

[21] The judge summed up the case to the jury in great detail, giving standard directions on the subject of inconsistencies and discrepancies, as well as on the law relating to self-defence. However, as regards the question of provocation, the judge told the jury that, although it was for the prosecution to prove that each applicant was not lawfully provoked, there was no need for them to concern themselves with that, since "it does not arise in this case".

The verdict

[22] The jury were invited to retire and consider their verdict. The record discloses that they retired at 2:48 pm and returned to court at 3:37 pm. Upon their return, the following exchange, involving the foreman of the jury, the registrar and the judge, took place:

> "REGISTRAR: ...Madam Foreman and members of the jury have you, as it relates to the first defendant, Mr. Daryeon Blake, have you reached a verdict?
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> FOREMAN: Yes, sir.
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> REGISTRAR: Is your verdict unanimous, that is to say, do you all agree?
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> FOREMAN: Well, not everybody agree.
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> HER LADYSHIP: Okay, you do not need to say anymore. I am going the [sic] have to send you back in for further deliberation. I will not accept such a verdict at this time. By law, you have to retire for a certain amount of time before I can accept. You went in at 2:50 p.m, so you will have to go back in. Is there any assistance I can give you by the way or

> is it just a matter of you sitting - - is there any assistance I can give you on the law.
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> FOREMAN: Well - -
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> HER LADYSHIP: I don't - - I just want to know if there is any assistance or it is a matter of you going back into the room to have more deliberations.
>
> FOREMAN: Go back. No assistance.
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> HER LADYSHIP: All right, I have to send you back then, Madam Foreman and your members."

[23] Accordingly, at 3:44 pm, the jury retired again, returning at 4:24 pm with a unanimous verdict of guilty of murder against both applicants. As we have already indicated[1], each applicant was sentenced to imprisonment for life, the court stipulating that they should serve at least 20 years in prison before becoming eligible for parole.

The applications for leave to appeal

[24] In his notice of application for leave to appeal against conviction and sentence filed on 27 August 2014, the first applicant relied on three grounds of appeal: firstly, that the verdict of the jury was unreasonable and could not be supported by the evidence; secondly, that the judge failed "to properly address the jury on the good character of the accused"; and thirdly, that the sentence was excessive in all the circumstances. In his notice of application for leave to appeal, the second applicant, for his part, relied on the first and third of these grounds.

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[1] At para. [1] above

[25] At the outset of the hearing of the renewed applications before us, Mr Knight QC sought and was granted leave to abandon the grounds advanced by each applicant, save for the ground challenging the sentence as being excessive, and to add seven supplemental grounds of appeal filed on 26 May 2016. Taking the original ground relating to sentence and the supplemental grounds together, therefore, the applicants now challenge their conviction and sentence on the following bases:

i. The judge wrongly withheld the issue of provocation from the jury (the provocation issue).

ii. Counsel who represented the applicants at the trial failed to present their defences, in particular that of the second applicant, adequately (the inadequate representation issue).

iii. The judge failed to ascertain from the jury whether they needed further assistance from her when they returned to court, after less than an hour of deliberation, and indicated that they were not all agreed on a verdict (inadequate assistance to the jury).

iv. From the unusual composition of the jury, five of whom carried the surnames Smith and two of whom carried the surnames Stephenson, the judge ought to have been alerted to the need to conduct an enquiry

and, depending on the results of the enquiry, to take the necessary steps to ensure the fairness and impartiality of the trial (the composition of the jury).

v. The judge erred by allowing prejudicial and inadmissible evidence to go before the jury of an incident involving the second applicant which allegedly took place some two weeks before the incident arising out of which he was charged (the September incident).

vi. The judge failed to explain to the jury, adequately or at all, the nature and or the significance of various inconsistencies and discrepancies which arose in the prosecution's case and to direct the jury how to treat them; and, in any event, the inconsistencies and discrepancies in the prosecution's case materially undermined the case and therefore rendered the verdict unsafe (inconsistencies and discrepancies).

vii. The judge's summation taken as a whole contained several misdirections on the law and the evidence, thereby rendering the verdict unsafe, particularly in relation to the second applicant (the misdirection issue).

viii. The sentences imposed by the judge were manifestly excessive (the sentence issue).

The provocation issue

[26] The starting point on this issue is, of course, section 6 of the Offences Against the Person Act (the OAPA), which provides as follows:

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

[27] That section replicates section 3 of the English Homicide Act 1957. The effect of the section, as Lord Diplock observed in **Director of Public Prosecutions v Camplin**[2], is that —

> "...if there [is] any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he [is] bound to leave to the jury the question, which is one of opinion not of law: whether a reasonable man might have reacted to that provocation as the accused did."

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[2] (1978) 67 Cr App R 14, 19; [1978] 2 All ER 168, 173

[28] Against this background, Mr Knight submitted that, on the evidence in this case, there was a reasonable possibility that both applicants were provoked, by things said and things done, and that this resulted in them losing their self-control. Accordingly, in reliance on section 6 of the OAPA, Mr Knight submitted that the judge erred in not leaving provocation to the jury, whose responsibility it was to determine whether the applicants had lost their self-control. No matter how tenuous was the evidence of provocation, it was submitted, it ought to have been left to the determination of the jury in their capacity as fact-finders, irrespective of whether or not it was raised on the case for the defence. In these circumstances, it was submitted, the applicants were denied of their right to a direction on the issue of provocation and there had therefore been a miscarriage of justice.

[29] In support of these submissions, Mr Knight referred us to various aspects of the evidence of Miss Green, Mr Levy and the first applicant, as well as to a number of authorities, to which we will shortly come.

[30] For the prosecution, Miss Sophia Thomas submitted that, in the light of the totality of the evidence, provocation did not arise in the case and the judge was therefore not obliged to give any direction on it to the jury. She submitted that when the deceased uttered the words "[h]ow unnuh so bright", the first applicant's response, which was to tell the deceased to "just cool", showed that he was still in control and he had not lost his self-control. Miss Thomas pointed out that the prosecution's case was

that the applicants jointly and deliberately carried out an attack on the deceased, while the applicants' case was that they acted in self-defence. In these circumstances, she submitted, where provocation did not arise on either the case for the prosecution or the defence, a direction from the judge on provocation would only have served to confuse the jury.

[31] Before turning to the specific items of evidence to which Mr Knight referred us on this ground, it may be helpful to consider briefly some of the authorities to which we were referred.

[32] First, there is **R v Stephen Clifford Doughty**[3], in which the issue was whether the trial judge ought to have left the question of provocation to the jury. The facts, which we take from the headnote, where these. The appellant's wife gave birth their first child, a son, on 14 January 1985. During the first few weeks of the baby's life, the appellant had full responsibility for his care and the running of the house, his wife having been confined to bed on medical advice. He was a conscientious father and cared for the baby well but, it appeared, he became fatigued. On 31 January 1985, the baby was found dead by the appellant's wife. His death was caused by severe head injuries which had been inflicted by the appellant, who admitted responsibility for the baby's death and was charged with murdering him. His evidence at the trial was that he had become very tired on the night in question. But the baby continued to cry persistently, despite being fed, changed and other attempts being made to settle him.

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[3] (1986) 83 Cr App R 319

As a result, the appellant said, he lost his temper and tried to silence the baby by covering his head with cushions and kneeling on them, in consequence of which the baby died.

[33] The trial judge declined the appellant's counsel's invitation to him to leave provocation to the jury in these circumstances. In the trial judge's view, crying and restlessness were "perfectly natural episodes" in the life of a 17 day old baby. Accordingly, the trial judge concluded, "civilised society dictates that the natural episodes occurring in the life of a baby only days old have to be endured and cannot be utilised as the foundation of subjective provocation to enable his killer to escape a conviction for murder".

[34] In the view of the Court of Appeal, the trial judge fell into error. The court pointed out that the statute[4] placed the responsibility for determining whether a reasonable man would have acted as the appellant did in the circumstances on the jury, and not on the judge. Stocker LJ explained[5] that once there was some evidence which provided a causal link between the crying of the baby and the response of the appellant, as was conceded by the Crown, "the section is mandatory and requires the learned judge to leave the issue of the objective test to the jury".

[35] Next, Mr Knight referred us to the decision of the Privy Council, on appeal from the Court of Appeal of Trinidad and Tobago, in **Burnett v State of Trinidad and**

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[4] Homicide Act, section 3
[5] At page 326

Tobago[6]. In that case, the appellant was a police officer who had been deployed as part of the security detail at a carnival fete. The deceased and a group of friends had been dancing when they bumped into the appellant, whereupon an altercation ensued and the appellant shot the deceased in the chest. At the trial, the main issue was self-defence. As regards provocation, the trial judge took the view that there had been no evidence of loss of self-control and that, therefore, the issue of provocation did not arise on the evidence. On the contrary, the trial judge observed, "there is, on the defence case, evidence of a measured response to an attack by two knife wielding patrons at the fete". The Court of Appeal agreed with the trial judge's assessment, observing that, although there may have been evidence of provoking conduct, "the appellant's response to the attack was indeed a measured one and not the response of someone who has lost his self-control".

[36] The appellant's appeal to the Privy Council succeeded, on the basis that, given the evidence of provoking conduct, there was a reasonable, as opposed to a merely speculative, possibility that the appellant had been provoked by the conduct to lose his self-control. Delivering the judgment of the Board, Lord Saville took as his point of departure the decision of the House of Lords in **R v Acott**[7], in which Lord Steyn had pointed out that "there are three parts to the defence of provocation, namely provoking conduct; causatively relevant loss of self-control; and the objective criterion whether the provocation was enough to make a reasonable man do as the defendant did". In

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[6] [2009] UKPC 42; (2009) 75 WIR 450
[7] [1997] 1 All ER 706, 710

that case (in which the appellant had killed his mother), it was held that the trial judge was right not to leave the issue of provocation to the jury, since, provocation "was not a reasonable possibility arising on the evidence: it was mere speculation"[8]. In **Acott**[9], Lord Steyn also made it clear "that so far as the second part of the defence of provocation was concerned, in the absence of any evidence, emerging from whatever source, suggestive of the reasonable possibility that the defendant might have lost his self-control due to the provoking conduct of the deceased, the question of provocation again does not arise". So in that case, as Lord Saville observed in **Burnett**[10], "there was a reasonable possibility that the appellant had lost his self-control and attacked his mother; but only a speculative possibility that this loss of self-control was due to provoking conduct".

[37] In a passage which warrants full quotation, Lord Saville went on to explain the difference between the facts in **Burnett** and the facts in **Acott** in this way[11]:

> "[19] In the present case (as the Court of Appeal acknowledged) there was evidence of provoking conduct. The question therefore was whether there was on the evidence a reasonable possibility that such provoking conduct caused the appellant to lose his self-control and fire his revolver; or whether such a possibility was merely speculative.
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> [20] It is at this point that the Board departs from the reasoning of the trial judge and the Court of Appeal. Both

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[8] Page 712
[9] At page 710
[10] At para. [18]
[11] At paras [19]-[22]

took the view that there was on the evidence nothing to suggest that provoking conduct caused the appellant to lose his self-control. However, that view was based on accepting as true at least part of the appellant's evidence, which, if true, showed that he had acted in a measured and considered way and that he did not lose his self-control.

[21] In the judgment of the Board, in forming the view that he did the trial judge usurped the function of the jury. It was for the jury to decide whether and to what extent to accept the evidence given by the appellant, in the light of all the other evidence put before them. On the evidence as a whole it was open to them to conclude that the prosecution had failed to establish that the appellant had not fired his revolver in reasonable self-defence. This in the event they obviously did not do. It was also open to them to decide that while the appellant had acted in self-defence, as he said he had done, in a measured and considered way, he had used disproportionate force. It was equally open to the jury to decide not to believe the appellant's evidence that he had acted in a measured and considered way at all. We do not of course know by what route the jury became satisfied that the appellant had not acted in reasonable self-defence and so returned a verdict of murder.

[22] In the circumstances of the present case the Board considers that, given the evidence of provoking conduct, there was a reasonable, as opposed to a merely speculative, possibility that the appellant was provoked by that conduct to lose his self-control. Indeed, in their Lordship's view, this was no less a possibility than that he acted, as he asserted that he had, in a measured and considered way. After all, the appellant was a trained police officer who, if he was actually acting in a controlled fashion, could have been expected to react to the provocation in a proportionate fashion. If, therefore, the jury concluded that his response to the provocation had not indeed been proportionate, then it would have been open to them to infer that, contrary to what he himself might have believed and said in evidence, the provocation had actually caused him to lose his self-control. Preferring one approach rather than the other necessarily involved the assessment of the credibility of part of the evidence given by the appellant. That assessment was for the jury, not for the trial judge. Similarly, it was for the

> jury to draw the appropriate inferences from the evidence. In other words, the Board considers that trial judge erred in failing to leave the issue of provocation to the jury; instead he wrongly took over from them the task not only of assessing the credibility and reliability of a crucial part of the appellant's evidence, but also of drawing the appropriate inferences from the evidence as a whole. In the view of the Board, the Court of Appeal erred in the same respects when it upheld the ruling of the trial judge."

[38] Mr Knight then referred us to the decision of this court in **Dwight Wright v R**[12]. In that case, delivering the judgment of the court allowing an appeal against a conviction for murder on the ground that the trial judge ought to have left the issue of provocation to the jury, McIntosh JA (Ag) (as she then was) referred with approval[13] to the following passages from the oft-cited judgment of Lord Tucker in **Joseph Bullard v R**[14]:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."[15]
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> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of

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[12] [2010] JMCA Crim 17
[13] Ibid, at paras [20] and [27] respectively
[14] [1957] AC 635
[15] Ibid, at page 642

> justice and it is idle to speculate what verdict the jury would have reached."[16]

[39] For her part, Miss Thomas referred us to Archbold Criminal Pleading, Evidence and Practice 2003, in which, under the rubric 'Duty of judge', the learned authors state the following[17]:

> "Section 3 [of the Homicide Act 1957] involves two questions: (a) is there any evidence of specific provoking conduct of the accused, and (b) is there any evidence that the provocation caused him to lose his self-control? If both questions are answered in the affirmative, the issue of provocation should be left to the jury notwithstanding the fact that in the opinion of the judge no reasonable jury could conclude on the evidence that a reasonable person would have been provoked to lose his self-control."

[40] In our view, these authorities provide ample support for the following propositions:[18]

> 1. Where the evidence produced at trial, whether arising on the case for the prosecution or the defence, is such that a jury, properly directed, could reasonably find that the defendant had been provoked to lose his

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[16] Ibid, at page 644
[17] At para. 19-53
[18] See also the judgment of Lord Bingham in **Smalling v R** [2001] UKPC 12, para. [11], from which this summary is in part derived.

self-control and kill the deceased, the jury should be invited to consider and evaluate that evidence.

2. In this regard, the trial judge's obligation does not depend upon whether the defendant advances or relies on the defence of provocation at trial or not, given the fact that, for reasons good or bad, he or she may choose not to advance the defence of provocation as his or her main line of defence.

3. But before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose his or her self-control and act as he or she did.

4. If in the opinion of the judge, there is insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control, then no issue of provocation will have arisen for the jury's consideration. The jury should not be invited to speculate on hypotheses which lack any basis in the evidence.

5. But if there is evidence, no matter how tenuous, fit for the jury's consideration that the defendant might have been provoked to lose his or her self-control and kill the deceased, the judge must leave the defence of provocation to the jury and not withdraw it on the ground that a reasonable jury could not properly find that the provocation was enough to make a reasonable man act as the defendant did.

6. A defendant on a trial for murder has a right to have the issue of provocation left to the jury if there is any evidence upon which such a verdict can reasonably be given and it is a grave miscarriage of justice to deprive him of this right.

[41] In our view, this summary of the legal position, in addition to being wholly uncontroversial, fully validates Mr Knight's submissions on the principles applicable to this case. With these considerations in mind, therefore, we turn now to the specific items of evidence relied on by him on this ground.

[42] First, we were referred to Miss Green's evidence that the deceased accosted the applicants at the bar, saying "[a]fta what really go on up dere [presumably in reference to the September incident], you really have de heart to come down here". Second, there was Mr Levy's evidence that the deceased was talking loudly to the applicants

about the September incident, though, in answer to the question whether the deceased appeared to be upset or calm, he replied that he "couldn't tell that he was really in a dreadful way". Third, there was Mr Levy's answer, when asked if the deceased was attacking the second applicant at the time when the first applicant grabbed him, "I don't know when he was going to him, if he was going to be attack [sic] and I don't know if [the first applicant] misunderstand [sic] and try to hold him and do what he do".

[43] Fourth, there was the first applicant's evidence that (a) the deceased approached and hit the second applicant "a few times" with a pick-axe stick; and, as he (the first applicant) tried to run out of the shop, the deceased hit him twice with the same piece of stick; (b) the deceased then tried to hit him again with the pick-axe stick, they held onto each other and that, while trying to pull him "outside of the bar", the deceased was screaming at him, "[h]ow unnuh suh bright"; and (c) further, in spite of his urging him "cool nuh, 'Gungo', just cool, nuh man", the deceased continued shouting, "[u]nnuh a guh dead ova here, how unnuh suh bright", while Mr Levy shouted "[p]ull him out, pull him out, mek we kill him".

[44] In our view, taken in its totality as Mr Knight urged us to do, this evidence was sufficient to give rise to a reasonable, as distinct from a speculative, possibility that the jury, properly directed, could have found that the applicants were provoked by things done and said into losing their self-control and inflicting the fatal injuries on the deceased. On the prosecution's case, the deceased's expression of surprise that,

following on from the September incident, the applicants could really have had "de heart to come down here", could well have led the jury to consider that, from the outset, the atmosphere inside the bar was hostile to the applicants. And, although the final decision would obviously have been one for the jury to make, we cannot help but be struck by the fact that Mr Levy's answer to the question whether the deceased was attacking the second applicant when the first applicant grabbed him was that, although he could not say, he did not know if "[the first applicant] misunderstand [sic] and try to hold him and do what he do". If this was at all a possibility, as it appears to us it might reasonably have been, then it ought to have been left to the jury for their consideration in the context of a direction on the nature of provocation.

[45] Then, on the applicants' case, the first applicant's evidence that the deceased struck both himself and the second applicant more than once with the pick-axe stick; screamed at him, "[h]ow unnuh so bright"; and shouted "[u]nnuh a guh dead ova here, how unnuh suh bright", might similarly have been considered by the jury to be provoking conduct capable of giving rise to a loss of self-control. And, while there was no evidence that the deceased himself said anything quite as direct as Mr Levy's, "pull him out, pull him out, mek we kill him", it seems to us that, taken in combination with the words which the first applicant testified that the deceased had already spoken, it would have been open to the jury to find that in these circumstances the applicants were provoked into action.

[46] In this regard, we cannot lose sight of the first applicant's evidence that, while the deceased was shouting at him in the manner set out above, he responded, "cool nuh, 'Gungo', just cool, nuh man". But, in our view, Miss Thomas' submission that we should treat this response as evidence that there was no loss of self-control by the first applicant invites us into error of the same kind identified by the Privy Council in **Burnett**. In that case, it will be recalled, the trial judge and the Court of Appeal took the view that there was nothing in the evidence to suggest that the appellant was induced to lose his self-control by the acknowledged provoking conduct. But this was, the Board concluded, a usurpation of the function of the jury, whose responsibility it was to decide whether the appellant had in fact reacted in a measured and considered way to that conduct or whether he had lost his self-control. Similarly, it seems to us that in this case the significance, if any, of the first applicant's exhortation to the deceased to "just cool nuh man" was clearly a matter for the jury to determine.

[47] We therefore conclude that the applicants have made good their contention that, however slight or tenuous the judge might have believed the evidence of provocation to be, they were entitled to have the issue left to the determination of the jury as a matter of fact. We will in due course come to the question of how best to reflect the applicants' success on this point in the disposal of the applications.

The inadequate representation issue

[48] In order to appreciate how this issue arises, it is necessary to set out in its entirety supplemental ground two as formulated by Mr Knight:

"That Counsel for the Appellant [sic] at his trial, did not adequately present the Defence in that:

(a) A no-case submission was not made on behalf of the Applicant, Vaughn Blake, in circumstances where the defence rested;

(b) The Applicant, Vaughn Blake remained silent by the decision of counsel, although a no-case submission was not made;

(c) Although the three options available to the Applicant, Vaughn Blake, were discussed with him, it was counsel's decision that an unsworn statement was unnecessary, as there was no evidence against him;

(d) Counsel failed to object to the purely prejudicial evidence which was led by the prosecution about an incident at Hopeton in St. Elizabeth some two (2) weeks before the subject matter of the indictment and which involved the applicant Vaughn Blake and prosecution witness, Kimarley Levy. The said evidence alleging acts of violence by Vaughn Blake had absolutely no probative value;

(e) Counsel failed to fully suggest the case of Daryeon Blake to the witnesses for the prosecution, having regard to the fact that the testimony of Daryeon Blake, in his defence, was detailed in regards to the circumstances of the attack upon him by Oswald Alexander, thereby leaving the prosecution to justifiably invite the jury to conclude that his evidence was fabricated,

the result being that the Applicant's [sic] were deprived of the opportunity to be acquitted by the jury."

[49] As regards sub-paragraph (d) of supplemental ground two, Mr Knight opted to subsume it under the wider complaint, which we will come to in due course, that the

judge allowed prejudicial evidence concerning the September incident to go before the jury.[19]

[50] At the hearing before us, Mr Knight sought and was given, without objection from Miss Thomas, permission to supplement the record of appeal by reference to an affidavit sworn to by his instructing attorney-at-law, Mr Bert Samuels, on 26 May 2016. In this affidavit, Mr Samuels referred to a telephone conference on 25 May 2016 in which the participants were Mr Knight, Mr Winston McFarlane, the attorney-at-law who had represented both applicants at the trial, and himself. Exhibited to the affidavit was a copy of a letter dated 26 May 2016, written by Mr McFarlane to Mr Samuels' firm at Mr Knight's request. The full text of the letter is as follows:

> "Dear Sir,
>
> **Re: R v Daryeon & Vaughn Blake - Murder**
>
> We spoke concerning my conduct of the abovementioned case in which I was the Defence Counsel for both accused.
>
> There were two issues that you raised:-
>
> Firstly, why is it that I did not make a no case submission on behalf of Vaughn Blake, and in light of not doing so why didn't he at least make an unsworn statement and whether or not the options were explained to him.
>
> Secondly, you asked for a response to the criticism by Crown Counsel that the case for Daryeon Blake was not suggested to the prosecution witnesses.
>
> In relation to Vaughn Blake it is an omission on my part that a no case submission was not made. I explained the three

[19] See paras [92]-[109] below

> (3) options to Vaughn Blake and it was my decision that he would remain silent. My view was that he had nothing to answer and so I made a judgment call for him to remain silent.
>
> I reviewed instructions from Daryeon Blake as to some of the details of the attack, however those were not suggested as I formed the view that once I suggested that there was an attack with a pick axe stick that would have been sufficient without the details."

[51] Mr Knight submitted that counsel's failure to adequately put the applicants' defence was analogous to a judge's failure to fairly put the defence's case to the jury. Accordingly, since in that case such a failure would result in the setting aside of the conviction and sentence, without the application of the proviso, a similar principle ought to be applied in respect of counsel's default.

[52] In respect of the first applicant, Mr Knight's specific complaint was that counsel had failed to suggest his full case to the prosecution's witnesses, along the lines of his detailed evidence of the deceased's attack on him. This failure, it was submitted, made it possible for the prosecution to justifiably invite the jury to conclude his evidence was recently fabricated, thereby affecting his credibility and depriving him of the possibility of an acquittal.

[53] In respect of the second applicant, Mr Knight complained that (i) his counsel failed to make a submission of no case to answer on his behalf when the prosecution's evidence against him was conflicting; (ii) counsel took the decision that the second applicant should remain silent, rather than give evidence or make an unsworn

statement, despite the fact that a no-case submission had not been made; and (iii) counsel failed to object to the purely prejudicial evidence led by the prosecution concerning alleged acts of violence by the second applicant during the September incident.

[54] As regards the issue of conflicting evidence, Mr Knight referred us to the difference between Hughroy's evidence, which was that the second applicant held the deceased around the neck and stabbed him, and Mr Levy's evidence that it was the first applicant who held the deceased around the neck and stabbed him. Then there was Miss Green's evidence that there was a fight between the first applicant and the deceased and that the first applicant stabbed the deceased, but she did not see the second applicant stab the deceased. Thus, Mr Knight pointed out, the evidence of the first applicant, who accepted responsibility for stabbing the deceased four times, is supported by Miss Green's evidence. Therefore, it was submitted, in the light of the first applicant's evidence that the second applicant did not stab the deceased, there was a likelihood that Miss Green's evidence could have been viewed as corroboration and thereby afforded the second applicant the opportunity of an acquittal.

[55] Miss Thomas submitted that the question for this court must be whether the allegedly incompetent conduct of counsel for the applicants resulted in a miscarriage of justice. Miss Thomas submitted that the case presented by the prosecution against both applicants was compelling, notwithstanding the discrepancies and inconsistencies on the prosecution's case. In relation to the second applicant, Miss Thomas made the point

that it was quite unlikely that such a submission would have succeeded, given the fact that two of the prosecution's witnesses testified that he participated in the stabbing of the deceased.

[56] Miss Thomas also submitted that the case for both applicants was adequately put to the prosecution's witnesses by counsel for the defence. In this regard, we were referred specifically to the cross-examination of Mr Levy and Hughroy. However, Miss Thomas urged us to conclude that, in the event that the court considered that the applicants' representation at trial was wanting in any way, this was a proper case for the application of the proviso[20].

[57] In support of their submissions, Mr Knight and Miss Thomas referred us, respectively, to the decisions of this court in **Leslie McLeod v R**[21] and of the Caribbean Court of Justice (CCJ) in **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh**[22]. Both cases were concerned with the proper approach by appellate courts to complaints of incompetence on the part of trial counsel.

[58] In **McLeod**, after a review of a number of modern authorities on the issue, the court considered that the proper approach was "to consider (i) the impact which the alleged faulty conduct of the case has had on the trial and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a

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[20] Judicature (Appellate Jurisdiction) Act, section 14(1)
[21] [2012] JMCA Crim 59
[22] [2014] CCJ 11 (AJ)

denial of due process to the applicant"[23]. And, in **Lashley & Campayne**, in which the appellants complained on appeal of "the flagrant incompetence of their retained counsel" at trial, the majority of the CCJ[24] (from whose judgment there was no dissent on this point) stated the position in this way[25]:

> "... the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather this Court is guided by the principles of fairness and due process. There is no need for any sliding scale of pejoratives to describe counsel's errors...This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider ... that the ineptitude or misconduct may have become so extreme as to result in a denial of due process ..."

[59] The common thread running through both cases is therefore that a court of appeal in considering a complaint as to the quality of the representation which the defendant received at trial will not generally approach the matter on the basis of the extent or degree to which counsel's conduct fell short of acceptable standards, save in those cases — hopefully rare — where counsel's conduct has been so egregiously inept as to have resulted in a denial of due process. But, in general, the court will approach

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[23] Para. [64]
[24] Justices Nelson, Saunders and Hayton; Justices Wit and Anderson dissented on the issue of sentencing.
[25] At para. [11]

the matter by reference to the impact which the alleged default of counsel has had on the outcome of the trial. Against this background, we will consider the specific matters put forward on behalf of the applicants in the following order:

(i) whether the case for the first applicant was adequately put by counsel to the prosecution's witnesses; and

(ii) whether, not having made a no-case submission on behalf of the second applicant at the close of the prosecution's case, counsel acted prudently in taking the decision that the second applicant should remain silent.

Was the case of the first applicant adequately put?

[60] As has been seen, Mr Levy and Hughroy implicated both applicants in the actual stabbing of the deceased. Mr Levy's evidence was that after approaching the deceased and holding him by the neck from behind, the first applicant stabbed the deceased twice in the left side, followed by the second applicant who, also armed with a knife, then ran up to the deceased and stabbed him in the chest more than once. After Mr McFarlane had cross-examined Mr Levy in some detail about this evidence, the following exchange took place between them:

"Q Okay. You said that Vaughn Blake stabbed your brother?

A Yes, sir.

Q How did it happen - - how was Vaughn Blake relative to your brother? Were they face to face, back to back, side to side?

A Face to face.

Q And you remember this incident clearly?

A Yes, sir.

Q Which hand did Vaughn Blake use?

A He use the hand that he use [sic].

Q Which hand, left or right?

A I can't tell you.

HER LADYSHIP: He said he can't tell, Mr. McFarlane

MR. W. MCFARLANE: He said he can't tell.

I didn't hear that.

Q You know, Mr. Levy, I am putting it to you that much of what you are telling this Court, you made up?

A Made up?

Q Yes, sir.

A No, sir.

Q I am putting it to you, sir, that when 'Gungo' and yourself saw Vaughn Blake and Daryeon Blake in the bar, you saw this as your opportunity to take revenge for him punching you in the face. I am putting it to you, sir, that 'Gungo' attacked Vaughn Blake with a pick-axe stick that night.

A No, sir.

Q I am putting it to you further, sir, that Vaughn Blake pushed 'Gungo' out of the shop and slammed the door?

A How come he get a stab?

Q No, no, no, no, Vaughn Blake pushed 'Gungo' out of the shop when 'Gungo' attacked him and slammed the door?

A No, sir.

Q I am putting it to you further, sir, that 'Gungo' went to the other door and attacked Daryeon Blake?

A No, sir.

Q But you saw everything, right?

A Yes, sir.

Q 'Gungo' went to the other door and attacked Daryeon Blake?

A No, sir.

Q I am putting it to you further, sir, that it was during this attack on Daryeon Blake that he was stabbed?

A No, sir, he didn't do any of that.

Q And I am putting it to you further, sir, that Daryeon Blake pushed him out of the bar and blocked the door also?

A I already tell you no, sir.

Q And I put it to you, sir, Daryeon Blake never touched 'Gungo' that night?

A He touch [sic] him.

Q Now, Mr. Levy, after 'Gungo' got stabbed, is it correct that Vaughn Blake and Daryeon Blake were barricaded in the bar? They were locked up in the bar?

A What you mean barricaded.

Q Locked up in the bar?

A Yes, sir."[26]

(Emphasis supplied)

[61] It seems to us that the clear tenor of this aspect of Mr McFarlane's cross-examination of Mr Levy was to suggest that (i) the deceased was the aggressor in relation to both applicants; (ii) the deceased first attacked the second applicant with a pick-axe stick; (iii) the second applicant's response was to push the deceased out of the bar, after which the deceased attacked the first applicant; and (iv) it was during this latter attack on the first applicant that the deceased was stabbed.

[62] In our view, while the actual content of the cross-examination was perhaps, as Mr McFarlane accepted in retrospect, less detailed than it could have been in the light of his instructions, it nevertheless adequately foreshadowed, and was entirely consistent with, the case which the first applicant would subsequently advance in his evidence. That evidence was, it will be recalled[27], that it was the deceased who first attacked both applicants and that it was the first, and not the second applicant who inflicted the stab wounds on the deceased. In the light of this, it further seems to us to be highly likely that, insofar as the transcript reflects a suggestion by Mr McFarlane to Mr Levy that "Daryeon Blake [the first applicant] never touched 'Gungo' that night"[28], this must have been an error in either recording or transcription. In other words, in our

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[26] Transcript, pages 100-103
[27] See paras [17]-[18] above
[28] See highlighted question in para. [60] above

view, taken in the context of the cross-examination as a whole, it is very difficult to make sense of the suggestion unless "Vaughn" (the second applicant) is read for "Daryeon" (the first applicant).

[63] Turning now to Hughroy's evidence, it will be recalled that his account was that the deceased was stabbed first by the second applicant, "hold him from back way…push something inna him side…and turn it", and then by the first applicant, who "run up pon [the deceased] and stab him inna him chest"[29]. When he was cross-examined, it was put to him by Mr McFarlane that (i) the deceased, armed with "a pick-axe stick", attacked the second applicant; (ii) the second applicant "never stabbed [the deceased]"; and (iii) the deceased then attacked the first applicant and that it was at that time that he was stabbed by the first applicant.

[64] Again, these suggestions were entirely in keeping with the evidence which the first applicant would subsequently give. Therefore, in the light of the parts of Mr McFarlane's cross-examination of Mr Levy and Hughroy to which we have referred, we are clearly of the view that it cannot fairly be said that there was any substantial failure on Mr McFarlane's part to put the first applicant's case to these witnesses.

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[29] See paras [13]-[14] above

The omission to make a no-case submission and the decision to remain silent

[65] As Mr McFarlane explained in his letter dated 26 May 2016 set out about above[30], he took the view at the end of the prosecution's case that the second applicant "had nothing to answer and so [he (Mr McFarlane)] made a judgment call for [the second applicant] to remain silent".

[66] While the second applicant's complaint, as formulated in supplemental ground two (a) and (b), implies on the face of it that counsel's error lay in his failure to make a no case submission at the close of the prosecution's case, Mr Knight appeared to accept in his submissions before us that no such submission would have been warranted on the evidence led by the prosecution. And we think he was right to do so; in our view, the evidence of both Mr Levy and Hughroy, which was that both applicants participated in the attack on the deceased, was plainly sufficient to raise a *prima facie* case against the second applicant.

[67] But Mr Knight's essential complaint was that counsel took the decision that the second applicant should remain silent on his behalf without there being any solid foundation to support this bold stance. By reason of this, Mr Knight submitted, the second applicant was deprived of his right to have his account put before the jury for its consideration.

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[30] At para. [48]

[68] We will say at once that, in our view, it was a clear departure from accepted standards of proper professional conduct for counsel for the second applicant to take the decision on his client's behalf that he should neither give evidence nor make an unsworn statement, but should remain silent. It is a long and well-established principle of the Bar that, while an attorney-at-law acting for a defendant in a criminal case is entitled, indeed duty-bound, to advise his client, in strong terms if necessary, whether or not to give evidence in his own defence, the ultimate decision must be taken by the client himself. Explicit guidance to this effect can be found in, for example, the Code of Conduct for the Bar of England and Wales, 1990[31]. While there is no similar provision in the Legal Profession (Canons of Professional Ethics) Rules 1978, Canon VIII specifically provides[32] that, "[n]othing herein contained shall be construed as derogating from any existing rules of professional conduct and duties of an Attorney which are in keeping with the traditions of the legal profession, although not specifically mentioned herein"; and[33] that "[w]here no provision is made herein in respect of any matter, the rules and practice of the legal profession which formerly governed the particular matter shall apply in so far as is practicable".

[69] We therefore consider that, in this case, Mr McFarlane, albeit no doubt with the best of intentions, plainly fell into error by taking onto himself a decision which was the

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[31] Annex H, para. 12.4
[32] At sub-para. (a)
[33] At sub-para. (c)

second applicant's to take. The question which therefore arises is what effect this court should give to this departure from proper practice.

[70] Miss Thomas invited us to apply the **Lashley & Campayne** test: that is, to consider whether the default of counsel complained of was such as to bring about a miscarriage of justice in all the circumstances. She submitted that it was not, reminding us of the case for the prosecution, which she described as compelling. There is, in our view, much to be said in support of this submission. For, once the jury believed the evidence given by Mr Levy and Hughroy, the conclusion that the second and the first applicants were equally complicit in the attack on the deceased would have been inevitable. En route to this conclusion, the jury would also have had to take into account the contrary evidence of the first applicant, in which it was asserted, presumably mirroring what the second applicant might have said had he been given a chance to do so, that he had played no part in the stabbing of the deceased.

[71] While this judgment was in an advanced stage of preparation, the recent decision of the Privy Council on appeal from this court in **Leslie McLeod v R**[34] came to hand. When that matter came before this court, a dispute of fact arose between the appellant and his trial counsel as to what advice he had been given on the question of whether to give evidence or make an unsworn statement. In dismissing the appeal against conviction[35], this court took the view that, even assuming the appellant's

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[34] [2017] UKPC 1, delivered 30 January 2017
[35] [2012] JMCA Crim 59, paras [64]-[67]

version to be true, there had been no miscarriage of justice. However, on appeal to the Privy Council, the Board considered[36] that, if the appellant's assertion that his counsel did not allow him to take his own decision on the question was true, "then the appellant would effectively have been deprived of the opportunity of giving evidence in his own defence...whether or not he would have been wise to enter the witness box". Accordingly, the appeal was allowed and the matter remitted to this court to resolve the factual dispute between the appellant and his counsel.

[72] It is clear that, on its facts, **McLeod** can be distinguished from this case, since there is nothing emanating from the second applicant himself to suggest that, had he been asked, he would have opted to give evidence or make an unsworn statement, instead of remaining silent. But it seems to us that **McLeod** does provide a salutary reminder of the importance which the law attaches to the right of a defendant in a criminal case to make his own decision on the critical issue of whether to give evidence in his own defence, make an unsworn statement or remain silent.

[73] In this case, in which the role played by counsel in substituting his decision for that of the second applicant is conclusively established by Mr McFarlane's admirably candid admission, it seems to us to be impossible to approach the matter on the basis that the verdict of the jury would inevitably have been the same had the second applicant been allowed to exercise his right to place his account of the fatal incident

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[36] At para. 15

before the jury in his own words, whether by way of an unsworn statement or by evidence from the witness box.

[74] The result of the decision taken by Mr McFarlane on the second applicant's behalf was to leave the case to the jury on the footing of the clear *prima facie* case established by the prosecution only, without the benefit of a competing version from the second applicant. Looked at this way, the question of whether the second applicant can be said to have had a fair trial inevitably arises. The upshot of this, in our view, must be to make this case one in which, as it was put in **Lashley & Campayne**[37], "the ineptitude or misconduct may have become so extreme as to result in a denial of due process".

[75] We therefore conclude that the second applicant succeeds on this aspect of the inadequate representation issue. We will in due course consider how best to give effect to this conclusion.

Assistance to the jury

[76] This issue arises out of the exchanges between the foreman of the jury, the registrar and the judge at the time of the jury's return to court after retiring for less than an hour.[38] It will be recalled that, in answer to the registrar's enquiry as to whether the jury had arrived at a verdict, the foreman's reply was that "not everybody

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[37] At para. [11], echoing de la Bastide CJ (as he then was) in **Bethel v The State (No. 2)** (2000) 59 WIR 451, 459. See also this court's decision in **McLeod**, at para. [64]
[38] See para. [22] above

agree". The judge then told the foreman that she need not say anything more; that she (the judge) was going to send the jury back for "further deliberation"; and that she would not "accept such a verdict at this time"[39]. She advised the foreman that the law was that the jury had to have retired for a certain amount of time before a majority verdict could be accepted and asked whether there was any assistance she could give them "on the law". After some initial hesitation, the foreman indicated that there was none and the judge then sent the jury back to the jury room. They returned 40 minutes later with a unanimous verdict against the applicants.

[77] Mr Knight submitted that, although the jury was entitled to assistance from the judge on both the law and the evidence, she had restricted her enquiry about whether they needed assistance to matters of law, thereby probably causing the foreman to conclude that assistance on the evidence could not have been properly sought or obtained. Accordingly, the submission went, the judge's approach to the possibility of assistance was not open-ended, but was instead "cabined, cribbed and confined". Mr Knight submitted further that the judge erred in cutting the foreman short when he attempted to respond to the question whether or not the jury needed assistance on the law. As a result, the court denied itself the opportunity of ascertaining what assistance the foreman was requesting, rendering it impossible to say whether the jury returned to

[39] The judge obviously had in mind, correctly, section 44(2) of the Jury Act, which provides that, on a trial for murder, a verdict of a majority of not less than nine to three of conviction of manslaughter, or of acquittal of manslaughter, may be received by the court.

the jury room harbouring some misconceived or irrelevant notion which played a part in their verdict.

[78] In support of these submissions, Mr Knight relied on the decision of the Privy Council on appeal from this court in **Mears (Byfield) v R**[40]. In that case, some two hours after they had retired to consider their verdict at the appellant's trial for murder, the jury returned to announce that they had a problem relating to the evidence. Rather than ascertain the nature of the problem, the trial judge immediately embarked on a recapitulation of the evidence, repeating some parts of his summing up, which Lord Lane, speaking for the Board, would subsequently describe[41] as going "beyond the proper bounds of judicial comment". Lord Lane considered[42] that, in the light of the judge's "failure to ascertain what it was that was about the evidence which was puzzling the jury and the re-iteration thereafter of some of the questionable parts of the summing-up proper", the conviction could not be allowed to stand.

[79] Lord Lane also referred to **Berry (Linton) v R**[43], another decision of the Board on appeal from this court, in which a question arose as to the obligation of a trial judge to provide assistance to the jury. In that case, Lord Lowry stated the position in this way:

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[40] (1993) 42 WIR 284
[41] At page 289, per Lord Lane
[42] At page 290
[43] (1992) 41 WIR 244, 259

> "The judge ... did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no-one knows what the problem was. Their lordships have already met this difficulty in some other recent cases...The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a 'Guilty' verdict, one cannot tell whether some misconception or irrelevance has played a part."

[80] This is, of course, uncontroversial: a statement to similar effect can be found in the decision of this court, applying **Mears** and **Berry**, in **Machel Gouldbourne v R**[44]:

> "It is clear that a jury is entitled at any stage of the proceedings to the help of the judge on either the facts or the law. In our view, the learned trial judge in the instant case failed to give to the jury any assistance at all, as it did not emerge at any time during or at the end of the exchanges between the judge and the foreman what was the nature of the difficulties that the jury had encountered in their deliberations. If the difficulties concerned issues of law, then it would have been the duty of the judge to provide the necessary guidance; if they had to do with issues of fact, then it might have been possible for the judge to be of some assistance in clearing up any misconceptions of the evidence in the case…"

[81] Miss Thomas did not dissent from these propositions. However, she submitted that, in this case, the judge cannot be faulted for the way in which she dealt with the matter. She submitted that the judge's enquiry of the foreman as to whether the jury

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[44] [2010] JMCA Crim 42, para. [34]

needed assistance was in fact open-ended, and not restricted, as Mr Knight complained; and that the judge's exchange with the foreman made it clear that she was neither withholding assistance, nor in any way preventing the foreman from seeking assistance.

[82] In the light of what the authorities say, it is naturally troubling to note that the judge expressly confined her enquiry as to whether the jury needed any assistance to matters relating to "the law". The jury is entitled to assistance from the judge on matters of both fact and law and, by putting the question to the jury in that restricted way, we consider that the judge plainly fell into error.

[83] However, it seems to us that this case can be distinguished from both **Berry** and **Mears** in at least two respects. First, it seems clear that what prompted the jury's return to court in this case was the fact that they had arrived at a verdict which, as it turned out, was not unanimous and therefore could not be accepted without a minimum of one hour's retirement. Second, there is no indication on the record that, during the brief discussion in which the judge explained to the foreman the reasons why the majority verdict could not be accepted at that stage, the foreman in fact expressed a need for any kind of assistance from the judge. To the contrary, the question of whether assistance was needed, albeit limited to the law, emanated from the judge herself. The highest that the applicants' complaint can therefore be put, in our view, is that, when the judge enquired of the foreman — almost as an afterthought — whether any assistance was needed, she did not allow the foreman sufficient time for a response before interrupting her.

[84] In all the circumstances of this case, we cannot characterise this as an irregularity in any way comparable to the judge's default in either **Berry** (in which the judge failed to ascertain the problem which had brought the jury back to court), or **Mears** (in which, upon an indication from the jury that they had a problem with the evidence, the judge, again without ascertaining the nature of the problem, launched into a rehearsal of the evidence and his earlier — incorrect — directions). We therefore conclude that the applicants have not made good their complaint that the judge's failure to assist the jury on the facts gave rise to a material irregularity sufficient to justify the quashing of their convictions.

The composition of the jury

[85] At the outset of the applicants' trial, five members of the 12 person jury empanelled to try the case carried the surnames Smith and two carried the surnames Stephenson. The result of this, Mr Knight pointed out, was that the Smiths accounted for 41.66%, the Stephensons accounted for 16.33%, and together they accounted for 58% of the jury. He submitted that the judge ought to have been alerted by this "unusual" composition of the jury and to have made some enquiry as to whether the Smiths were related to each other, given that a familial connection between jurors might give rise to "the probability of unfairness and or partiality in deliberations". Had such an enquiry been made, Mr Knight submitted, and depending on its result, the judge could have exercised her powers, either at common law or under section 31(3) of the Jury Act, to discharge a juror based on the compelling need to ensure a fair trial.

Accordingly, the judge having failed to conduct any such enquiry, the applicants' right to a fair trial by an impartial tribunal, as guaranteed by section 16(2) of the Constitution of Jamaica, might have been adversely affected.

[86] Miss Thomas submitted that there was nothing unusual or undesirable about the composition of the jury, the surname Smith is a common name in this jurisdiction and that there was therefore no need for the judge to question its composition, there being no suggestion that the jury was tainted. Miss Thomas also noted that, while the jurors were being empanelled, the judge had enquired of them whether they knew of any reason why they could not "sit on the case". In any event, Miss Thomas submitted, counsel representing both applicants was in attendance to ensure fairness in every aspect of the trial; and the jury selection was done in the conventional manner, in which the defence was at liberty to challenge any juror as they came to be empanelled.

[87] According to Archbold[45], "[i]t is established law that a jury sworn and charged in respect of a defendant may be discharged by the judge at the trial, without giving a verdict, if a 'necessity', that is a high degree of need, for such discharge is made evident to his mind". This is an integral part of the duty of the judge to ensure that a jury trial is fairly conducted and it is open to the judge to exercise his or her

[45] Archbold 2013: Criminal Pleading Evidence and Practice, para. 4-307

discretionary power to discharge the jury where necessary, irrespective of the position of either the prosecution or the defence on the issue[46].

[88] This is a longstanding rule of the common law.[47] But the power of a trial judge to discharge the jury is also implicit in section 31(3) of the Jury Act, which provides that:

> "Where in the course of a criminal trial any member of the jury dies or is discharged by the Court through illness **or other sufficient cause**, the jury shall nevertheless, so long as the number of its members is not reduced by more than one, be considered as remaining properly constituted for all the purposes of that trial, and the trial shall proceed and a verdict may be given accordingly." (Emphasis supplied)

[89] The authorities also establish that, as Morland J put it in **R v Blackwell and others**[48]:

> "If there is any realistic suspicion that the Jury or one or more members of it may have been approached or tampered with or pressurised, it is the duty of the Judge to investigate the matter and probably depending on the circumstances the investigation will include questioning of individual jurors or even the Jury as a whole. Any such questioning must be directed to the possibility of the Jury's independence having been compromised and not the Jury's deliberations on the issues in the case.
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> When the Judge has completed his investigations whether relating to the activities of people outside the Jury or the Jury collectively or individually the Judge is in a position to make an informed exercise of judicial discretion as to whether or not the trial should continue with all twelve

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[46] **R v Azam** [2006] Crim LR 776; [2006] EWCA Crim 161, para. [48]
[47] Among other things, Archbold cites in support **Winsor v R** (1866) LR 1 QB 289, 390
[48] [1995] 2 Cr App R 625, 633-4

> jurors or continue after the discharge of an individual juror, or the whole Jury may have to be discharged."

[90] Where there is a suggestion that a member or members of the jury may be biased, the judge will apply the test laid down in the modern authorities, which is whether, having ascertained all the relevant circumstances that have a bearing on the suggestion of bias, those circumstances would lead a "fair-minded and informed observer" to conclude that there was a real possibility that the juror in question was biased[49].

[91] Against this well-established background of principle, it seems to us that Mr Knight's submission on this issue must founder at the threshold. Simply put, there is absolutely no basis upon which the judge could have formed a "realistic suspicion", even taking into account the coincidence (even if taken to be unusual) of the five Smiths and two Stephensons, that there might be anything amiss in the composition of the jury. Although, as we have indicated, this is ultimately a matter for the judge's discretion, it seems to us that it cannot be entirely without significance that no issue relating to the composition of the jury was taken by counsel representing the applicants at the trial. Accordingly, given the continued absence of any material giving rise to suspicion of any kind, we consider counsel's submissions on it at this level to be no more than an invitation to the court to indulge in pure speculation.

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[49] **In re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700, per Lord Phillips MR, at page 727, propounding the test subsequently approved by the House of Lords in **Porter v Magill Weeks v Magill** [2002] 2 AC 357

The September incident

[92] Mr Knight submitted that the evidence led by the prosecution regarding the September incident[50] was of no probative value and ought not to have been admitted. He pointed out that there was no allegation that either the deceased or the first applicant was involved in the September incident, nor that either applicant was involved in a fight with Mr Levy. Further, there being no evidence of a planned joint enterprise between the applicants to do anything pursuant to the September incident, evidence of that incident could not have been relied on to prove any issue at the trial.

[93] In the alternative, Mr Knight submitted that, even if the evidence of the September incident had any probative value, this was outweighed by its prejudicial effect, in that it depicted the second applicant as having a violent propensity and, at the very least, cast him in an adverse light. He also contended that the judge erred when she (i) treated the September incident as "the background" to the events of 9 October 2010, given that this was a matter for the jury to determine; and (ii) failed to provide the jury with any guidance as to the relevance of the evidence of the September incident.

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[50] See para. [5] above

[94] In support of these submissions, Mr Knight relied on the decision of this court in **Harry Daley v R**[51]; and the decisions of the Court of Appeal of England and Wales in **R v Orgles and another**[52]; and **R v Sawoniuk**[53], to which we will shortly come.

[95] Miss Thomas, on the other hand, submitted that evidence of the September incident was relevant and that its probative value outweighed any prejudicial effect, especially in the light of Miss Green's evidence that, in Valerie's Place two weeks later, the deceased had said to the applicants, "[a]fter what really guh on up dere, yuh really have the heart to come down here". It was submitted that the evidence of the September incident therefore served to provide the jury with background information as an aid to appreciating "the backdrop to the fight which followed almost immediately thereafter". Indeed, Miss Thomas pointed out, this background information was potentially more helpful to the applicants rather than to the prosecution, in that it could be seen as characterising the deceased as the aggressor. In the circumstances, Miss Thomas submitted, the jury were entitled to consider the September incident to enable them to assess the evidence in the case in its totality.

[96] In addition to **Sawoniuk**, to which Mr Knight had referred us, Miss Thomas also drew to our attention the unreported decision of the English Court of Appeal in **R v Pettman**[54] and the decision of this court in **Bruce Golding and Damion Lowe v R**[55].

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[51] [2013] JMCA Crim 14
[52] [1993] 4 All ER 533
[53] [2000] 2 Cr App R 220; [2000] All ER (D) 154

[97] We will consider briefly a few of the authorities to which we were so helpfully referred by counsel. First there is **Pettman**, in which the court stated the following[56]:

> "…where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding that evidence."

[98] In **Sawoniuk**, the appellant was charged with and convicted of murdering two Jewish women during the Second World War, contrary to the laws and customs of war[57]. On appeal, it was held that the trial judge had correctly allowed the prosecution to lead evidence describing the Nazi policy towards Jews under Adolf Hitler which had led to the mass slaughter of very large numbers of Jewish men, women and children. Approving **Pettman**, Lord Bingham CJ said this[58]:

> "Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to have been committed."

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[54] [1985] Lexis Citation 1520 (unreported judgment delivered on 2 May 1985).
[55] SCCA Nos 4 & 7/2004, judgment delivered 18 December 2009
[56] Approved in **R v Sidhu** (1994) 98 Cr App R 59, 65; and **R v Fulche**r [1995] 2 Cr App R 251, 258
[57] The prosecution was mounted by virtue of the War Crimes Act 1991
[58] At page 234

[99] But Mr Knight also brought to our attention the manner in which the trial judge left this evidence to the jury in **Sawoniuk**:

> "All these matters are relevant for your consideration as part of the steps leading up what the Crown say occurred and what the defendant, as the Crown say, did during the search and kill operation, but it does not follow that because he was a local policeman, he shot the Jews in question. He disputes that. You can only convict him on either count if you are satisfied that that count is made out to the requisite standard of sureness."

[100] In **Golding and Lowe**, applying the authoritative dicta from **Pettman** and **Sawoniuk**, this court confirmed[59] that it may sometimes be necessary and permissible for the prosecution to place before the jury evidence relating to the background to or history of the offence charged in the indictment, for the purpose of establishing a context within which to assess the evidence in the case.

[101] Though on significantly different facts, the English Court of Appeal came to the opposite conclusion in **Orgles**. In that case, the evidence upon which the prosecution sought to rely related to matters which had arisen some three days after the incident which was the subject of the charge. The appellants, who were brother and sister, were charged with threatening to damage or destroy property contrary to statute. The case for the prosecution was that they threatened to burn down the house and damage the cars of a family living in the same locality as they did, there being bad blood between

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[59] See in particular paras 82-84

the two families. The trial judge admitted evidence to the effect that, some days after the threats were allegedly made, three cars belonging to the same family were damaged, though it was not known by whom.

[102] On appeal, it was held that this evidence was wrongly admitted. Delivering the judgment of the court, Holland J said this[60]:

> "The essential issue for the jury was whether the appellants, or either of them, made the threats on 16 August with the necessary intent. The fact of criminal damage different from that threatened and perpetrated some few days later by a person unknown could have had no materiality to that issue and without such materiality, the evidence was plainly inadmissible. Further, if, contrary to our view, there was any materiality at all, such was manifestly outweighed by the prejudicial effect. The ruling by the recorder appeared to have as its premise an assumption that the damage done on 20 August was perpetrated by those who made the threats on 16 August: in truth there was no foundation at all for that premise. There was no evidence to connect the appellants with that damage;..."

[103] And finally, we should mention this court's decision in **Harry Daley v R**[61], in which Panton P made the incontrovertible point that "[f]airness involves the exclusion of inadmissible evidence especially when such evidence is prejudicial".

[104] It seems to us that, taken together, the decisions in **Pettman**, **Sawoniuk** and **Golding and Lowe** provide ample support for the proposition that the prosecution

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[60] At page 536
[61] At para. [52]

may in a proper case lead evidence relating to matters which occurred before the incident which forms the subject matter of the charge, for the purpose of showing background or establishing context. On its facts, **Orgles**, which points the other way, is clearly distinguishable in that, firstly, the evidence upon which the prosecution sought to rely in that case related to matters which took place after the incident upon which the charge was based, thus altogether ruling out any question of background; and, secondly, in any event, there was absolutely no evidence in that case connecting the accused persons to the later incident.

[105] We therefore think that evidence of the September incident was on the face of it clearly admissible for the purpose of providing the jury with some background to the unfortunate events which took place at Valerie's Place a couple weeks afterwards. As Miss Thomas correctly pointed out, much of the evidence of those events would have been unintelligible to the jury without the benefit of evidence relating to the September incident (for example, the remark attributed to the deceased by Miss Green: "Afta what really guh on up dere, yuh really have the heart to come down here").

[106] In summarising the evidence in respect of the September incident in her summing up to the jury, the judge more than once characterised it as "background":

> "First of all, you understand that there was a background to this incident that took place at this party, 'Ba-Ba' Gayle's party, on the 9th of October? You heard about the background from Kimarley Levy, who is the brother of the deceased. Kimarley Levy told you that an incident took place one to two weeks before that date, where Vaughn Blake punched Kimarley Levy in the region of his right eye, causing

> it to bleed and he also hit Tracey-Ann Green, Kimarley Levy's sister. Kimarley Levy told you that he had made a report to the police, but up to the 9th of October, the police had not yet acted and he told you that he had told Orville about it, but he said that he was not angry, as it was in the hands of the law and although the police had not yet acted, he was not upset about the police not acting, he has not yet given up on it being in the hands of the law. He told you, he, Kimarley Levy, felt away [sic] when he was hit and when his sister was hit, but he told you that he would not retaliate at that time, because he was concerned with his injured face. It was bleeding and he needed to get himself into a safe environment, because, remember, he told you that they had to lock him up and his sister in the shop, because Vaughn Blake was out there telling them to let the boy out, let the boy out. So, he had to make sure he was safe and he does believe that Vaughn Blake should be punished because he said he took it to the police and he is telling you that he and Orville Alexander did not plan to deal with it themselves, because it is being suggested to them that they came when they saw Vaughn Blake there. The plan was to deal with it themselves.
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> He told you that he explained the situation to Orville, but Orville was not angry --- Orville was not angry. So that is the background. So this thing happened, a report was made to the police and this incident that took place related only to Vaughn Blake, only to Vaughn Blake."[62]

[107] It will be seen that, in this passage, the judge was careful to emphasise that the September incident related to the second applicant only, and she was obviously right to do so. However, we agree with Mr Knight that it might also have been helpful for the judge to have warned the jury explicitly, as was done in **Sawoniuk**, that evidence of the September incident had absolutely no bearing on the question whether the second

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[62] Transcript, pages 326-328

applicant was guilty of the murder committed at Valerie's Place two weeks later. Given the relative closeness in time between the two incidents and the clear linkages between them in some of the evidence in respect of the events at Valerie's Place, it seems to us that a suitable direction from the judge would have served to remove any danger that the jury might lump them together in determining the guilt of the second applicant.

[108] But, at the end of the day, we consider that it is necessary to consider the impact which the judge's summing up as whole would have had on the jury. Close to the end of it, after giving the jury full and accurate directions on the evidence given by the first applicant and the law relating to self-defence, the judge directed the jury's attention to the case of the second applicant in the following terms:

> "Now, Madam Foreman and your members, the second [applicant], Mr. Vaughn Blake rested. In other words, the law gives him three choices. He can give sworn evidence just like how Daryeon did. In which case, he can be cross examined like other witnesses or give unsworn statement from where he stands in which case, he would not be questioned or he can decide to say nothing at all. In which case again, he cannot be asked any questions. And it is a [sic] choice to make one of those choices. And he said nothing at all. He just sit [sic] back and see for the Prosecution to prove the case against him. He did not have to say anything. One thing you must not do is to say that he is guilty because he did not say anything. What you have to do is to go back, look at the Prosecution case so [sic] see whether the Prosecution has made you feel sure that the accused is guilty. What Vaughn is saying to you and the defence is saying to you through the evidence of Daryeon Blake is that Vaughn did not take part in the stabbing. So what the defence is saying to you, Vaughn was not part of any joint common design or common - - joint enterprise.

...any joint plan with Daryeon Blake to stab 'Gungo', Vaughn Blake did not take part. So, Madam Foreman and your members, it is very simple, if you believe what Daryeon Blake said that Vaughn Blake did not take part in the stabbing, then Vaughn Blake will not be guilty of murder. If you don't believe Daryeon Blake, and you believe that Vaughn Blake was part of this joint attack on 'Gungo', then you will have to now consider whether Vaughn Blake also was acting in self-defence at the time. Because remember, the evidence of Daryeon Blake is that they [sic] attacked Vaughn Blake first, Vaughn pushed him out, he came back and attacked Daryeon Blake and he was also actually pulling Daryeon Blake out with Kimarley Levy waiting in the wings with a machete. And remember, I told you what self-defence is, so the first thing you are going to have to decide in relation to the case against Vaughn Blake is, did he take part in the attack? If you say yes, he took part in the attack, then you go onto consider also whether he believed it was necessary to defend himself or even to defend Daryeon Blake. Did he believe or may he honestly believed [sic] that it was necessary to defend himself or to defend Daryeon Blake. If the Prosecution has made you feel sure that he did not stab 'Gungo' in the honest belief that it was necessary to defend himself or to defend Daryeon Blake, then self-defence does not arise and he would be guilty. If you decide that Vaughn Blake, if you accept that he was part of the stabbing, was or may have been acting in that belief that it was necessary for him to stab 'Gungo' to defend himself or to defend Daryeon Blake, then you go onto ask yourselves the second question that you ask in relation to Daryeon Blake, having regard to the circumstances, was the amount of force used reasonable, and I already explained to you about reasonable force ...

So Madam Foreman and your members, you are going to consider all the evidence that you have heard, as I outlined it to you. You are going to consider the law on murder and you are going to look at the issues, first of all, the case in relation to Daryeon Blake. You are going to consider Daryeon Blake first, he is the first on the indictment. You are going to consider the issue of self-defence, was Daryeon Blake acting in lawful self-defence?...So, having looked at the case for Daryeon Blake, you then go onto [sic] look at the case for Vaughn Blake, because you have to deal with

> each of them separately. You are going to look at the case and the evidence. You are going to ask yourselves was Vaughn Blake part of the attack on 'Gungo'? Did he also stab 'Gungo', as the Prosecution's witnesses have said? Two of them at any rate, Kimarley Levy and Hughroy Blair, that's the first thing you're going to ask in the case against Vaughn Blake. If you said yes or you say no or you are not sure, then he's not guilty. If you said yes that he did stab 'Gungo' too, that he and Daryeon Blake stabbed 'Gungo', then you are going to look at self-defence. Was Vaughn Blake acting in self-defence or may have been acting in self-defence, at the time when he stabbed 'Gungo'? Bear in mind the directions of law on self-defence. If you are not sure that he was acting in self-defence, or you say he was, then he would be not guilty. If you reject it, you say, "No way, he was not acting in any self-defence at all," bearing in mind the directions I have given you about what self-defence is, then he would be guilty. So remember, there are two accused and you have to consider each case for and against each of them, as I have directed you."[63]

[109] In our view, notwithstanding the absence of a specific caution as regards the significance to be attributed to the September incident, the very careful way in which the judge left the second applicant's case to the jury in the passage set out above could have left them in no doubt as to what were the relevant considerations to be applied in determining the case against him.

The inconsistencies and discrepancies issue

[110] Mr Knight submitted that, on every material particular, the case for the prosecution was fraught with inconsistencies, conflicts and discrepancies. Our attention was drawn in particular to Mr Levy's evidence that he saw the incident from the

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[63] Transcript, pages 363-369

beginning to the end, but that he did not see Hughroy amongst the people inside the shop. Further, on Mr Levy's account, after the first applicant held the deceased by the neck from behind and stabbed him, the second applicant ran up to the deceased and also stabbed him. But Hughroy, on the other hand, testified that it was the second applicant who held the deceased from behind and stabbed him, while the first applicant stabbed him in the chest. Then there was Miss Green's evidence that she saw the first applicant stab the deceased, but that she did not see the second applicant stab him.

[111] Mr Knight complained that while the judge in summing up specifically identified two inconsistencies to the jury, she gave no indication of their importance, the need to resolve them or their possible effect on the determination of the applicants' guilt or innocence. It was further submitted that the judge fell into grievous error by omitting to mention to the jury Miss Green's evidence that she did not see the second applicant stab the deceased. This error, it was submitted, was compounded when the judge told the jury[64] that the evidence of Mr Levy and Miss Green was that "Daryeon stabbed [the deceased] from behind put his hand around his neck and pushed a knife into his side - - stabbed him into his side, eased him over on Vaughn and Vaughn stabbed him again". In fact, as Mr Knight pointed out, Miss Green gave no such evidence. Mr Knight submitted that the evidence of Miss Green called for "a most careful approach" by the judge in the light of the agreement on her evidence and that of the first applicant on the issue of the second applicant's involvement in the incident. Proper assistance to the

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[64] Transcript, page 324

jury on this issue, it was submitted, if the jury believed Miss Green, would have led to the acquittal of the second applicant.

[112] Miss Thomas submitted that the judge's treatment of the major inconsistencies and discrepancies in the evidence was adequate. She pointed out that the judge did explain to the jury what is meant by inconsistencies and discrepancies, highlighting for them the major ones on the evidence and reminding them to consider any explanation given by the witnesses in assessing their credibility of the witness. Further, the judge also highlighted the major inconsistencies on the evidence and directed the jury to consider any explanation given by a witness in respect of a previous statement. Miss Thomas concluded that it was clear that the jury, in assessing the evidence, accepted Mr Levy and Hughroy's evidence that the second applicant participated in the stabbing of the deceased.

[113] In support of these submissions, Miss Thomas referred us to the decisions of this court in **R v Fray Diedrick**[65] and **R v Omar Greaves and others**[66].

[114] In **Diedrick**, considering the trial judge's duty in relation to inconsistencies and discrepancies in the evidence at the trial, Carey JA said this[67]:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should

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[65] SCCA No 107/1989, delivered 22 March 1991
[66] SCCA Nos 122, 123, 125 and 126/2003, delivered 30 July 2004
[67] At page 9

> comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[115] And in **Greaves**, making an essentially similar point, K Harrison JA (Ag), as he then was, quoted with approval the following passage from the judgment of Sharma JA, as he then was, in **Naresh Boodram and Ramiah (Joey) v The State** (a decision of the Court of Appeal of Trinidad and Tobago)[68]:

> "... Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that jurors today are intelligent and enlightened; and by the same token the same appellate courts must not seem ready to erode that approach. It all depends on how a case is conducted, what are the salient issues; and the judge has to be very astute to ensure that the juror's attention is not diverted from the live issues by exhaustive and copious directions."

[116] The trial judge is therefore obliged to discuss the question of inconsistencies and discrepancies with the jury, explaining to them their potential impact on the credibility of the witnesses, while providing them with assistance, suitable to the circumstances of the particular case, on how to approach them. While it will usually be helpful to the jury for the trial judge to give some examples of the material inconsistencies and

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[68] (1997) 55 WIR 304, 335

discrepancies which have arisen in the particular case, there is no obligation on a judge to identify every single instance of them to the jury.

[117] In this case, after explaining to the jury that they were judges of the facts, the judge sought to give them some assistance as to how they should approach the task:[69]

> "… How do you judge the fact? Well, Madam Foreman and your members, when you are assessing the evidence to decide what facts you believe, you consider, one of the factors you consider is the demeanour of the witnesses. The Prosecution called several witnesses including the three eyewitnesses, Kimarley Levy, Tracey-Ann Green and Hughroy Blair. The Defence called Mr. Daryeon Blake and Miss Janice Powell. So, you had the opportunity to observe all these witnesses as they gave evidence. How did they strike you?…Did they strike you as believable, credible, reliable, honest? How did they react when being cross-examined by opposing counsel?"

[118] Then, turning specifically to what she described as "inconsistencies and contradictions", the judge went on to say this:[70]

> "…You are also judges of the facts, the facts are for your consideration and you alone. In determining the facts of the case, you will find what we term inconsistencies and contradictions in the evidence of these witnesses. I will now have to direct you on what these are and how you treat with them.
>
> In most trials, it is possible to find inconsistencies and contradictions in the evidence of witnesses, especially when the facts about which they speak are not of recent occurrence. So you are going to bear in mind when you are

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[69] Transcript, pages 303-304
[70] Ibid, at pages 305-307

assessing the evidence of these witnesses that they are telling you about an incident that took place on the 9th of October -- no -- yes, the 9th of October, 2010, and they are giving evidence before you in, well, we are now in February -- February and March, 2013. So, you bear in mind the passage of time that has past.

Now, the inconsistency or contradiction in the evidence of the witnesses might be slight or serious; material or immaterial, if they are slight, you, the jury, may think they do not really affect the credibility of the witnesses or the witnesses concerned, on the other hand, if they are serious, you may say that because of them, it would not be safe to believe the witnesses or witness on that point or at all.

It is a matter for you to say, in examining the evidence, whether there are any such inconsistency [sic] and if so, whether they are slight or serious and bear in mind the principles above. You should take into account the witness' level of intelligence, his or her ability to put accurately into words what he or she has seen, the powers of observation of the witnesses and any defect that the witness might have.

Now, Madam Foreman and your members, in dealing with these inconsistencies, you bear in mind that where a witness has made previous statements inconsistency with his evidence at the trial, the previous statement, whether sworn or unsworn, whether it was in a police statement or given at another court hearing, does not constitute evidence on which you can act, unless the witness has admitted that what was said on the previous occasion was the truth. However, if what was said on the previous occasion conflicts with the witness' sworn evidence before you, you are entitled to take it into account, having regard to any explanation which the witness may offer for the inconsistent statement for the purpose of deciding whether the evidence of the witness are to be regarded as unreliable, either generally or on the particular point. And I want you to remember that you are free to accept all of what a witness says, some of what a witness says or none of what a witness says, depending on your view of the witness' credibility."

[119] The judge next invited the jury to consider "one or two inconsistences":[71]

> "Now, there were just one or two inconsistencies that I will point out to you, I will deal first with Miss Tracey-Ann Green.
>
> Tracey-Ann Green, in her evidence before you, told you that it was 'Gungo', the deceased, and Daryeon Blake who were fighting. Under cross-examination by Mr. McFarlane, it was put to her that in her statement to the police, she had actually said that it was 'Gungo' and Vaughn Blake that were fighting. She agreed that her statement to the police did not say that 'Gungo' and Daryeon were fighting, but her explanation to you was that both of them, both 'Gungo' and Daryeon Blake first, then 'Gungo' and Vaughn Blake were fighting after.
>
> So that is her explanation to you for that inconsistency. Now, Miss Powell who was called on behalf of the defendant, Mr. Daryeon Blake, told you that she was the only bartender in the shop on the night of the incident. She told you that JD was not there but under cross-examination, she said she told the police that JD and others was [sic] around the counter. And her explanation, she said that it is true she did tell the police that but she couldn't recall JD serving any customers. That's an inconsistency."

[120] The judge then went on to explain to the jury that they also needed to consider the matter of discrepancies:[72]

> "Apart from inconsistencies, there is what we call discrepancies between what one witness said and what another one said. In most cases, differences in the evidence of the witnesses are to be expected. The occurrence of disparity in testimony recognizes that in observation,

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[71] At pages 307-309
[72] At pages 309-311

> recollection and expression, the ability of individuals vary. Indeed, when the testimony of two witnesses coincide [sic] exactly, as judges of the facts, you will be entitled to become suspicious of the veracity. On the other hand, discrepancies between witnesses on the facts are also a warning of falsehood or error but can also be an honest mistake between one witness or the other due to human frailty. It is a matter for you to determine. You have seen and heard the witnesses and it is for you to say whether the discrepancy is profound and inescapable and whether the reasons given in the evidence to these discrepancies are satisfactory. Bear in mind, when you are dealing with issues of discrepancies between witnesses that you are entitled to accept the evidence of one witness on a particular point and reject what another witness said on the same point, if you find one witness to be more reliable than the other. Now, Madam Foreman and your members, as I said, the law recognizes that the power of observation of witnesses differ [sic] and the power to recollect also differ [sic]. For instance, all twelve of you could leave the jury box and go outside and witness a car accident. Because our abilities vary in expression, recollection and observation, some of you may say one thing about the accident and some of you may say something else. Some of you may say it is a red Cressida and some may say a scarlet Corolla because the recollection of witnesses differ [sic]...."

[121] And then, in a passage which we cannot avoid quoting in its entirety, the judge reminded the jury of some of the discrepancies in the evidence, telling them that it was for them to decide whether they were "indicative of falsehood":[73]

> "Let us look at Kimarley Levy -- because there were three witnesses called for the crown. Kimarley, Tracy-Ann and Hughroy and you will remember that you heard variations between what they told you. I am going to remind you of these discrepancies. Let me start with Hughroy, the young man, 'Gungo's" [sic] nephew. He told you that when 'Gungo'

[73] At pages 311-315

went into the shop it is Vaughn who held him from back way and push something into his side. And then he told you that Daryeon faced him front way and stab him in his chest. He told you that after Vaughn held him and stab him in the side, Vaughn let him go and Daryeon face him and stab him. So do you recall that Kimarley and Tracey-Ann on the evidence told you that it was Daryeon who held 'Gungo' from back ways and stabbed him and then that Daryeon - - Kimarley told you that Daryeon eased him off on to Vaughn and then Vaughn was facing him and stabbed him. Tracy-Ann told you that Daryeon hold him and stab him and push him off. She can't tell you whether or not Vaughn stabbed him because Vaughn was by the fridge and she couldn't see around it. Because Daryeon do it and push him off but she can't say whether or not Vaughn stabbed him. Kimarley told you he can't say what hand Daryeon used to hold and which to stab him. Tracey-Ann told you that Daryeon used his left hand to hold him. You know she demonstrated it to you, right hand to stab him. Hughroy told you that Vaughn used his right hand to hold 'Gungo' round the neck. So the person Hughroy is saying, he held 'Gungo', used the right hand and then stabbed him with the left hand. Kimarley and Tracey-Ann told you that when 'Gungo' came into the shop, having ordered something, he was walking and then he 'Gungo' said something to Vaughn. Hughroy actually said that 'Gungo' came in the shop and ordered a cigarette and he was coming out the shop and Vaughn said something to him. So that's the discrepancy. Tracey-Ann told you that she was by the window looking into the shop. Hughroy told you that Tracey-Ann was in the shop and run out when 'Gungo' got stabbed and in relation to whether Hughroy and Kimarley had spoken about the circumstances of 'Gungo's" [sic] death, this is what Kimarley told you. He hold [sic] you that -- Kimarley said he had spoken to Hughroy about 'Gungo's" [sic] killing because he is a family member. He says we talk this year but not really about what happen because it is sad and he also told you he never advise Hughroy what to say. I don't actually talk to him about the case. I don't need to. That's what he told you. And what Hughroy told you is that he never discussed the circumstances of 'Gungo's" [sic] death with Kimarley. So these are some of the discrepancies.

> Now, Mr. Blake, Daryeon in relation to the witnesses from [sic] the defence, told you that 'Gungo' came into the shop with a pick-axe stick and hit Vaughn and attacked him. Jen told you she did not see 'G' come into the shop. Bear in mind 'Gungo' came into the shop. When I say G, I mean 'Gungo'.
>
> So, Madam Foreman and your members, these are some of the discrepancies and you must pay attention to them, because you have to decide whether the discrepancies show human frailty or honest mistake or whether you believe that the witness is making it up, because remember that Mr. McFarlane said that Hughroy said that Vaughn held him and stabbed him first and the other two witnesses said that it was..."

[122] And finally on this score, returning to the question of discrepancies in the context of her review of the evidence of the witnesses, the judge reminded the jury again of the conflict between the evidence of Mr Levy and Miss Green as to what transpired in the bar that evening:[74]

> "… Tracey-Ann told you when the incident started she was by the window. She told you 'Gungo' ordered the cigarette from Jen and 'Gungo' was coming out of the shop and Vaughn said something to him. It was pointed out to you that's the discrepancy Tracey-Ann is saying it was actually 'Gungo' who said something to Vaughn. But 'Gungo' had nothing in his hand only the cigarette and he did not attack Vaughn or Daryeon.
>
> Well, Vaughn Blake said something to 'Gungo', Vaughn Blake was within arm's length of 'Gungo', Daryeon was about 1 feet from him, Vaughn Blake and 'Gungo was [sic] face to face, Daryeon Blake to the side of them, Vaughn Blake held him from back way and pushed something in his side and

[74] At pages 333-337

turned his hand. I did not see what Vaughn Blake used or where it came from, Daryeon Blake turned front way and stabbed him in his chest. Daryeon Blake faced him and stabbed him.

Now, I pointed out to you that there was a discrepancy as to who did what. Whether Vaughn [sic] stabbed him with his left hand or Vaughn stabbed him with his left hand. He said his uncle had turned to go out of the shop and Vaughn Blake held him back way, Daryeon Blake in front of him and he told you that the incident was a long time ago. He told you that Jen was serving drinks and according to him, no one else was serving drinks but Jen. He never saw 'Gungo' with a pick axe stick, he said he could not see 'Gungo's hand at all times. So he can't say if 'Gungo' had anything in his hand, but he never saw 'Gungo' with a pick axe stick. Remember when you go to deliberate, remember what Daryeon Blake said that 'Gungo' was using the pick axe stick swinging at him and hit him with it. If 'Gungo' had a pick axe stick swinging as Daryeon Blake said, do you believe that Hughroy did not see that? But that is a matter for you and if you believe what Hughroy had told you. So he is saying that he did see "Gungo' at all times, but he could not see 'Gungo' with anything, but the only thing that 'Gungo' had, was put in 'Gunqo's hand was a pick axe stick that he was swinging and hitting with. So, Madam Foreman and your members, in terms of the eyewitnesses for the Crown, that is what is before you, I remind you again, Kimarley Levy said Daryeon Blake held 'Gungo' back way, stabbed him, pushed him off on Vaughn, who stabbed him front way. Tracey-Ann Green said Daryeon Blake held him back way, stabbed him, pushed him off, he [sic] can't say if he had anything in his hand because he could not see Vaughn Blake. So, that was about the three witnesses I told you about, so you have to decide what you make of them, their reliability. You have to decide whether you accept one of them or two of them, as being more reliable than the other, whether you reject what one or two of them had [sic] said about a particular point and accept that [sic] the others have said about that same point, it is a matter for you."

[123] In our view, based on the extracts from the summing up to which we have referred above, the judge's approach to the question of inconsistencies and discrepancies can hardly be faulted. In keeping with established principle, the judge explained to the jury the meaning of inconsistencies and discrepancies, their significance to the witnesses' credibility, and how they should be approached. She then highlighted for the jury's attention some examples of the inconsistencies and discrepancies on the evidence; pointed out what explanations, if any, were given for them by the witnesses; and left it to them to decide on their impact on the witnesses' credibility. The fact that other examples of inconsistencies and discrepancies, not mentioned by the judge, may have emerged on the evidence cannot by itself render a summing up deficient, so long as it has been made clear to the jury that the ultimate decision as to what evidence, or what parts of the evidence, to reject or accept was entirely a matter for them.

[124] We have not lost sight of Mr Knight's complaint that the judge misstated the evidence when she told the jury that the evidence of Mr Levy and Miss Green was that, "Daryeon stabbed [the deceased] from behind put his hand around his neck and pushed a knife into his side - - stabbed him into his side, eased him over on Vaughn and Vaughn stabbed him again".[75] We agree that what Miss Green in fact said was that she did not see the second applicant (Vaughn) stab the deceased and that the judge fell into error in suggesting otherwise. But it is in our view necessary to take what the

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[75] See para. [111] above

judge said in its full context, as well as to take the summing up as a whole. In the passage of which Mr Knight complains, the judge was discussing the concept of common intention with the jury. Having given general directions on the point, she then sought to relate the principle to the particular circumstances of this case:[76]

> "If you say that Daryeon Blake and Vaughn Blake did an act or acted as part of this joint intention to commit the offence, both of them become guilty. It does not matter who struck the first blow or who struck the last blow. If you find that both of them joined in this attack on [the deceased] which led to his death, each using a knife as the Prosecution [sic] witnesses described to you, each of them would share joint responsibility for the death of [the deceased]. It does not matter whose knife went down further than the other. It would not matter. If you find that each of them did these acts by stabbing [the deceased], then you can infer that they had this common intention to kill him or to cause him serious bodily harm. And you bear in mind that it is exactly what the Prosecution is saying to you. The Prosecution is not saying to you these young men made up a plan to kill 'Gungo'. The Prosecution is saying that it happened on the spur of the moment. 'Gungo' came into the shop, words were said and according to the Prosecution, if you accept what Tracey-Ann and Kimarley is [sic] telling you, Daryeon stabbed him from behind put his hand around his neck and pushed a knife into his side - - stabbed him into his side, eased him over on Vaughn and Vaughn stabbed him again. That's what the Prosecution is saying to you. Hughroy is telling you that both of them also stabbed him. But Hughroy changed who did what. That's what the Prosecution is telling you."

[125] It is clear that what the judge was principally concerned to bring home to the jury in this extract from the summing-up was that the prosecution's case was not that

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[76] At pages 323-324

the applicants had, by pre-arrangement, made a plan to kill the deceased: rather, it was that, if the jury found that both applicants joined in the attack on the deceased, each using a knife, they could infer that they had a common intention to kill or cause him grievous bodily harm. As has been seen, it was the evidence of both Mr Levy and Hughroy, but not of Miss Green, that, in addition to the first applicant, the second applicant also stabbed the deceased. Therefore, as Miss Thomas quite properly conceded, the judge made a clear error when she suggested at this point in the summing up that Miss Green's evidence supported the prosecution's case that both applicants stabbed the deceased.

[126] But at an earlier stage of the summing up, as has been seen, during her directions on some of the discrepancies in the evidence[77], the judge had stated the position correctly when she told the jury that:

> "…Tracy-Ann told you that Daryeon hold him and stab him and push him off. She can't tell you whether or not Vaughn stabbed him because Vaughn was by the fridge and she couldn't see around it. Because Daryeon do it and push him off but she can't say whether or not Vaughn stabbed him."

[127] And subsequently, when the judge came to her review of Miss Green's evidence, she said this:[78]

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[77] See para. [121] above
[78] Transcript, at pages 331-332

> "…According to her, 'Gungo' and Daryeon started to fight. She didn't see who started it. He and Daryeon were fighting. Daryeon tek out a weapon and stabbed him in his the [sic] chest. And then she went on, you remember I asked her to demonstrate how the stabbing took place and she demonstrated it to you. Daryeon behind 'Gungo' with one hand around his neck and taking a knife and stabbed him. She demonstrated that to you.
>
> Now, in the account of the story, she told you at one stage, both Daryeon and Vaughn were behind 'Gungo'. Daryeon grabbed him, pulled a knife from the [sic] his right side. He would have used his right hand to stab him and left to hold him. He eased him off and push [sic] him toward Vaughn. **She did not see Vaughn stab 'Gungo'…She did not see if Vaughn did him anything when Daryeon eased him off. Vaughn was standing behind the fridge. She said she could not see Vaughn at the position where he was at the time. But she saw the easing off**."[79]

[128] And then, upon completion of her review of the eyewitness evidence upon which the prosecution relied, the judge said this:[80]

> "So, Madam Foreman and your members, in terms of the eyewitnesses for the Crown, that is what is before you, I remind you again, Kimarley Levy said Daryeon Blake held 'Gungo' back way, stabbed him, pushed him off on Vaughn, who stabbed him front way. Tracey-Ann Green said Daryeon Blake held him back way, stabbed him, pushed him off, he [sic] can't say if he had anything in his hand because he [sic] could not see Vaughn Blake...so you have to decide what you make of them, their reliability. You have to decide whether you accept one of them or two of them, as being more reliable than the other, whether you reject what one or two of them had said about a particular point and accept

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[79] Emphasis supplied
[80] At pages 336-337

> that [sic] the others have said about that same point, it is a matter for you."

[129] And finally on this point, after reviewing the evidence of the first applicant and his witness, Miss Powell, the judge reminded the jury of how to approach the first applicant's evidence that he acted in self-defence:[81]

> "… Two issues, did Daryeon Blake honestly believe it was necessary to defend himself? Was he defending himself? If you say yes, the second question, was the use of force necessary? Was the use of force reasonable? And bear in what he had told you about the situation. Bear in mind, when you [sic] assessing him, that in the crown [sic] witnesses' evidence, there are discrepancies because Hughroy said something else from what Kimarley and Tracey-Ann said **and I ask you to bear in mind also when you assess his evidence that Tracey-Ann never see Vaughn stab anybody**[82] but - - Tracey-Ann tells you that she did not see. A matter for you." (Emphasis supplied)

[130] So, in these passages, the judge told the jury clearly—and correctly—that Miss Green's evidence was that she did not see the second applicant "stab anybody" that evening. It therefore seems to us that any chance that the jury might have been misled by the judge's earlier error, made in the context of her directions on common intention, would have been completely dispelled by the judge's clear and repeated statements of the correct position. In other words, taking the summing up as a whole, we are

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[81] At pages 361-362
[82] Emphasis supplied

satisfied that the second applicant would not have suffered any prejudice as a result of the judge's momentary lapse.

The misdirection issue

[131] In his oral submissions before us, Mr Knight was content to invite reference to the written submissions filed on behalf of the applicants on this issue. In those submissions, several complaints were made, in an effort to make good the submission that:

> "The [judge's] summation taken as a whole contained several misdirections on the law and the evidence and the cumulative effect was to the prejudice of the applicant Vaughn Blake and which rendered the verdict unsafe."

[132] In this regard, the applicants made a number of points. First, that the judge gave a "flawed" direction on how the jury should approach the question of inferences; second, that the judge misdirected the jury on the effect of a discrepancy in the evidence; third, that the judge misdirected the jury on self-defence; fourth, that the judge failed to make it clear to the jury that it was open to them reject all three prosecution witnesses and to accept the evidence of the first applicant; fifth, that the judge failed to assist the jury as to how to treat with discrepancies and inconsistencies; and sixth, that in telling the jury that Miss Green's evidence was that the second applicant also stabbed the deceased, the judge materially misrepresented the evidence and usurped the fact-finding function of the jury.

[133] In response to these submissions, Miss Thomas maintained that the judge's directions were "comprehensive and comprehensible". While accepting that the judge did not invite the jury in terms to accept or reject the evidence of all three witnesses for the prosecution, Miss Thomas submitted that it was clear from their verdict that the jury accepted the evidence of Mr Levy and Hughroy that the second applicant participated in stabbing the deceased. In this regard, Miss Thomas also pointed out that Miss Green's evidence was, merely, that she did not see the second applicant stab the deceased, rather than that he did not do anything.

[134] We have already considered Mr Knight's fifth and sixth points (concerning, respectively, the judge's treatment of inconsistencies and discrepancies and misrepresentation of Miss Green's evidence) in some detail. As regards the other points, it suffices to say that we consider that the judge's directions were in the main appropriate in all the circumstances of the case. No real complaint can in our view be made about the judge's directions on inferences, discrepancies and self-defence, and it may not be without significance that, apart from the general complaint in respect of the judge's treatment of inconsistencies and discrepancies, these matters have not given rise to any substantive ground of appeal.

The sentence issue

[135] As will be recalled, the applicants were each sentenced to imprisonment for life, with the stipulation that they should serve at least 20 years before becoming eligible for parole. Despite the fact that the question of sentence was raised by both applicants in

their original grounds of appeal, we heard no submissions on this issue. It accordingly suffices to say that, on the assumption that the applicants' convictions for murder were to be allowed to stand, we would have seen no basis for disturbing the sentences imposed by the judge.

Conclusion and disposal of the applications

[136] In the result, we consider that, as we have indicated, the applicants are both entitled to succeed on the provocation issue; while the second applicant is entitled to succeed on the inadequate representation issue.

[137] As regards the first applicant, given his success on the provocation issue, he is in our judgment entitled to have his conviction for murder quashed and a conviction for manslaughter substituted in its place. As Brooks JA pointed out in the recent decision of this court in **Shirley Ruddock v R**[83], "[t]his court, where it is satisfied that a conviction for a particular offence is wrong in law or on the facts, is authorised by section 24(2) of the Judicature (Appellate Jurisdiction) Act to substitute a verdict of guilty for another offence for which the jury could have convicted the appellant". The relevant provision of the Act states as follows:

> "Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been

[83] [2017] JMCA Crim 6, para. [20]

> satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[138] The further question which therefore arises is what sentence this court should impose on the first applicant in the circumstances. We have received no submissions from counsel on this matter and it does not appear from the record that the judge had the benefit of a social enquiry report as an aid to sentencing in the court below. We are therefore minded to order that a social enquiry report on the first applicant be obtained. In adopting this course, we bear in mind that, as McDonald-Bishop JA observed in **Michael Evans v R**[84], "obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice". Once the report is at hand, the Registrar will be directed to send a copy to counsel, who will be at liberty to make such written submissions on sentencing as they see fit. Upon receipt of these submissions, the court will issue a supplemental judgment on sentence without the need for any further appearance in court unless specifically requested by the counsel.

[139] As regards the second applicant, we will first consider whether this is a fit case, as Miss Thomas submitted, for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act (the Act). That section provides that the court

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[84] [2015] JMCA Crim 33, para. [9]

may, "notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred". As Lord Hope of Craighead observed in **Stafford (Giselle) and Carter (Dave) v The State**[85], in relation to the Trinidad and Tobago equivalent to section 14(1)[86], "[t]he test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence".

[140] **Stafford and Carter** was, of course, a case in which the point which fell to be decided in the appellants' favour had to do with a misdirection, but it seems to us that the principle is equally applicable to a case such as this, in which the point relates to a default on the part of counsel. In our judgment, given our conclusion that counsel's default may have deprived the second applicant of the opportunity to give evidence or to make an unsworn statement in his defence, we find it impossible to say with any confidence that the jury would inevitably have convicted him had he been given that opportunity. We do not therefore think this is a suitable case for the application of the proviso.

[141] Section 14(2) of the Act empowers this court, if it decides that an appeal against conviction should be allowed, to —

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[85] (1998) 53 WIR 417, pages 422-423
[86] Section 44(1) of the Supreme Court of Judicature Act, Ch 4:01

> "...quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[142] In any consideration of which of these two courses to adopt, the court is obliged to weigh a number of factors in seeking for a solution that is appropriate to the facts of each case. At one end of the scale, as the Privy Council observed in the oft-cited case of **Dennis Reid v R**[87], the power to order a new trial should not generally be exercised "where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed". But[88], "where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso to s 14 (1) [of the Act] and dismiss the appeal".

[143] In our view, the second applicant's case falls comfortably between these two extremes: on the one hand, as we have indicated[89], there was plainly sufficient evidence to go to the jury at the end of the prosecution's case; but, on the other hand, as we have also concluded, it is not possible to apply the proviso in this case.

[144] For cases falling in between the two extremes, the Board in **Reid** considered that, among the factors to be considered in determining whether or not to order a new

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[87] (1978) 27 WIR 254, 257
[88] Ibid, at page 258
[89] See para. [66] above

trial, would be (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; and (f) the strength of the case presented by the prosecution. This is hardly an exhaustive list and it is therefore necessary in every case to give consideration to what the interests of justice requires on its particular facts.

[145] Basing herself on **Reid**, Sinclair-Haynes JA takes the view that, although the offence for which the second applicant is charged is undoubtedly serious, an order for a retrial is not in the interests of justice in this case. The points she makes are obviously substantial points calling for serious consideration. But, in the view of the majority of the court, taking into account the factors referred to in **Reid**, including in particular the seriousness and prevalence of the offence, the time between the events in question and the date when any new trial is likely to take place[90], and the relative strength of the case for the prosecution, the most suitable course to adopt in relation to the second applicant was to order that there be a new trial in the interests of justice.

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[90] The events out of which the charge arose occurred in 2010, the trial took place in 2013 and it should be hoped that the new trial can be embarked upon before the end of 2017.

SINCLAIR-HAYNES JA (DISSENTING IN RELATION TO ORDER FOR RETRIAL)

[146] But for the disposal of the matter in respect of Vaughn Blake, the second applicant (who will be referred to as "Vaughn" for ease of reference where necessary), I concur with the learned president's very commendable and erudite treatment of most issues raised in this appeal. Although the offence for which Vaughn has been convicted is undoubtedly serious, the evidence against him, in my view, is not of the quality that warrants a retrial. The appropriate course ought to be an acquittal.

[147] That view is influenced by Lord Diplock's statement in **Dennis Reid v The Queen** (1978) 16 JLR 246 at pages 250-251 that:

> "...It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the Accused.
>
> At the other extreme, where the evidence against the Accused at the trial was so strong that any **reasonable jury is properly directed would have convicted the** accused, *prima facie* the more appropriate course is to apply the proviso to s. 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.
>
> In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. **The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused**

ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the Accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. **On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from that course**. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, '**it is in the interest of the public, the complainant, and the applicant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery**'. This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk Kin v Regina* (1955) 39 H.K.L.R. 49 at p. 60. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone." (Emphasis supplied)

[148] Scrutiny of the evidence of the eyewitnesses against Vaughn reveals significant conflicts which undermined the case against him. Kimarley Levy, the brother of the deceased Orville Alexander (also called "Gungo" and whom I will refer to as Gungo for ease of reference), was an eyewitness to his death. On his evidence, it was Gungu who entered the shop and accosted Vaughn about a prior incident. In fact, he was unable to say whether Gungu was going to attack Vaughn. His evidence was that both applicants stabbed the deceased.

[149] Like Kimarley, Tracey Ann Gordon, Gungu's cousin, testified that it was Gungu who accosted the applicants. Her evidence however was that it was Dareyon and Gungu who fought while Vaughn leaned against a fridge. Under cross examination she said Gungu also fought with Vaughn behind the fridge but she was unable to see. She did not see Vaughn inflict any wound. She was however insistent that it was Dareyon who stabbed Gungu.

[150] Hughroy's (Gungu's nephew) evidence and both Tracey Ann's and Kimarley's was starkly divergent regarding how the incident occurred. Not only was Hughroy's evidence entirely at variance with Tracy Ann regarding how the incident occurred, it conflicted with hers as to where he, Tracey-Ann, Dareyon and Vaughn were at the material time.

Disposal

[151] Notwithstanding the seriousness of the offence and the prevalence with which such offence is committed, in my view, it is not in the interests of justice, given the

particular circumstances of this case, that Vaughn should be subjected to the ordeal of a retrial. Nor, in my view, does it warrant the further utilization of the court's scarce and already over burdened resources.

[152] It is true that Vaughn did not speak in his defence. The burden however rested squarely on the prosecution to prove its case. Although credibility was entirely within the purview of the jury and they accepted the prosecution's case, there remains the possibility that if the jury had been properly directed, Vaughn might have been acquitted. An important consideration also is that the circumstances of this case certainly are not the kind which warrant, "in the interest of the public, the complainant, and [Vaughn] himself", that Vaughn's guilt or otherwise be determined by a jury in order to prevent the evocation of public outcry. Apart from the inconsistencies and discrepancies, on the prosecution's case, it was Gungo who approached the applicants with aggression.

[153] Almost eight years have elapsed since the commission of the offence. This incident occurred in 2010. Three years after, in 2013, the applicants were convicted. Retrials in this jurisdiction are not heard within what ought to be a reasonable period of time. Even matters which are ordered to be heard speedily are not. In fact, the authorities reveal that the "shortest possible time" is likely to be four years. In the case of **Noel Campbell v R** [2011] JMCA Crim 48 this court ordered a retrial of the matter "in the shortest possible time". His retrial was on 8 November 2016. In the case **Shabadine Peart v R** (unreported) Court of Appeal, Jamaica, Supreme Court

Criminal Appeal No 131/2000, judgment delivered 11 April 2008, this court ordered a retrial of the matter. The retrial of the matter was on 23 April 2012. In both cases a *nolle prosequi w*as entered.

[154] Given the length of time between the incident and the hearing of this appeal, a retrial in this matter cannot be in the interests of justice given the quality of the evidence adduced by the prosecution against this applicant. This matter is therefore, in my view, not deserving of the tax-payers of this country expending further sums on a retrial.

[155] Another consideration is the ordeal the applicant Vaughn will have to undergo as he awaits another trial while significantly, the applicant, Dareyon, who admitted administering the wounds to the deceased, will be sentenced for the offence of manslaughter. The range of sentences in this court for such an offence starts at 15 years. He has already spent more than five years imprisonment. A social enquiry report has been requested for Daryeon. The presence of mitigating factors might well result in an even earlier release for Daryeon, while Vaughn, against whom the evidence is undermined by conflicts, might still be awaiting the re-hearing of his matter and likely a further appeal years after the release of Daryeon.

[156] A further significant consideration is that at a retrial, the material conflicts in the evidence might be obliterated or diminished because of unavailability of witnesses, thereby strengthening the case for the prosecution and affording the prosecution the opportunity to "cure evidential deficiencies in its case against" Vaughn.

[157] Even more significant is the fact that an order for retrial will be on the original indictment for murder. The failure of the learned trial judge to direct the jury on the issue of provocation resulted, on appeal, in the applicants' convictions for murder being quashed and a verdict for manslaughter being substituted in respect of Dareyon. At a retrial, the presiding judge, having been alerted, would properly direct the jury on the issue of provocation thereby exposing Vaughn to the risk of a conviction for murder.

[158] In **Nicholls (Everard) v R** (2000) 57 WIR 154, Lord Steyn, in delivering the advice of the Board, noted the six year period which had elapsed since the commission of the offence and, at page 162, opined as follows:

> "Counsel for the prosecution invited your lordships to remit the matter to the Court of Appeal to consider whether a retrial should be ordered. It is no bar to such an order that more than six years has elapsed since the killing; or that there has already been a retrial; or that about three years have elapsed since the matter was before the Court of Appeal. Cumulatively, these factors do, however, raise the question whether the matter ought to be remitted to the Court of Appeal to consider a retrial. There is, however, another factor. **It is an error in principle to give the prosecution a second chance to make good deficiencies in its case; see *Reid v R* (1978) 27 WIR 254 at 258, per Lord Diplock**. In the present case the failure of the prosecution to adduce expert evidence on the significance of the bullet wounds is an integral and essential part of the reasoning of their lordships which justified the quashing of the conviction. **It would be wrong to permit the prosecution through Dr Bascombe-Adams or another expert to make good this deficiency**. And a new prosecution without such evidence would in all probability fail either at trial or on appeal to the Court of Appeal or to the Privy Council. In these circumstances the Court of Appeal ought not to be troubled with a remission.

> The application by the prosecution is dismissed." (Emphasis supplied)

Lord Bingham, in delivering the Board's advice in **Bowe (Forrester) v R** [2001] UKPC 19, noted at paragraph 38 that:

> "There may of course be cases in which, on their particular facts, a second retrial may be oppressive and unjust."

At paragraph 39 he said:

> "Whether a second retrial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the defendant's interests, particularly where there has been long delay..."

In **Seeraj Ajodha v The State** (1981) 32 WIR 360, Lord Bridge of Harwich in delivering the advice of the Privy Council said (at pages 373, 374):

> "Their lordships were invited by the State, if minded to allow the appeals, to remit them to the Court of Appeal of Trinidad and Tobago to enable that court to consider whether to order new trials, as it has power to do under section 6(2) of the Criminal Appeal Ordinance. Their lordships were satisfied that it would be inappropriate to order new trials in cases in which so long a time has elapsed since the commission of the alleged offences, scilicet over eight years in Seeraj Ajodha's case and nearly seven years in the case of the other three appellants."

[159] Also in **Barrow (Terrence) v The State** (1997) 52 WIR 493, the Privy Council considered the question of a retrial where credibility was an issue and the trial judge had failed to give the requisite credibility warning. In refusing to order a retrial Lord Lloyd, at page 499, said:

> "Mr Knox nevertheless submitted that the case against the appellant was overwhelming. Not only was there the evidence of the four eye-witnesses, but other indications also pointed to the appellant's guilt. It would therefore be an appropriate case to apply the proviso.
>
> Their lordships are unable to agree. **It is true that the case was a strong one. But everything turned on credibility**. Apart from the central issue, there were other issues on which the appellant's evidence differed from that of the prosecution witnesses. ...
>
> Their lordships were invited to consider the question of retrial. But having regard to the passage of time since 1989, all of which has been spent by the appellant in custody, and having regard to the fact that the appellant has already been tried twice, a third trial would not, in their lordships' view, be appropriate." (Emphasis supplied)

[160] The Guyanese Court of Appeal in **Swamy (Jennifer) v The State** (1991) 46 WIR 194, in determining whether a retrial was appropriate, considered the time a retrial was likely to take and the strength of the State's case. Kennard JA, in allowing the appeal, expressed court's view thus at pages 199-200:

> "So the time element is one of the factors to consider in deciding whether or not to order a new trial. In this case when one considers the time when a retrial would be likely to take place if one were ordered, and bearing in mind also that the only real evidence against the appellant, who had access to the apartment, is the palm print which (according to the expert) could have been there as long as two weeks prior to its discovery, coupled with the fact that from the nature of the injuries it would seem that more than one person was involved in the commission of the offence, we feel that to order a retrial is likely to be oppressive.
>
> In so deciding we find support in the case, *The State v Gajraj* (1978) 27 WIR 119 at page 138 where Haynes C said:
>
> 'This court does not sit to determine whether a convicted man is 'Guilty' or 'Not Guilty' of the crime for which he was

> charged and convicted. That was the jury's function. What we usually sit here to do, in our criminal jurisdiction, is to review what happened at the trial and determine whether it was a fair one. If it was, we may dismiss the appeal.
>
> If it was not, we may quash the conviction. A trial in law may be unfair if it is not conducted in accordance with those cardinal rules of law and procedure laid down by judges for centuries, and I would add, by Parliament, to ensure that no-one shall be found guilty of a crime he did not commit or to reduce as much as practicable the risk of this happening. Because these rules are made to protect the innocent, they place a fundamental and inescapable duty on this court, a duty we will never hesitate to perform. In this sensitive area the appearance of justice is part of the substance of it. And if because we have to insist that trials be conducted according to law guilty men may go free, this is an adversity society must bear if the innocent are to be protected.'
>
> And then again there is the further statement of Haynes C in *Baichandeen's* case (26 WIR at page 228):
>
> 'When a trial is not conducted according to law this court may be obliged to use the description of Byrne J in *R v Patel* (1951) 35 Cr App Rep 62 at page 66 to steer between the Scylla of releasing to the world unpunished an obviously guilty man and the Charybdis of upholding the conviction of a possibly innocent one. In such a case the court would lean to the more merciful course, since it is better to release the guilty than to run the risk of convicting the innocent.'
>
> The end-result of all of this must be that the appeal is allowed and the conviction and sentence are set aside."

[161] Ibrahim JA in **Fuller (Winston) v The State** (1995) 52 WIR 424, on behalf of the Court of Appeal of Trinidad, considered the delays in having a retrial heard in that jurisdiction and the likely prejudice to the appellant. At pages 438-439 he said:

> "In our opinion, the long delays in the system in having the retrial heard and the matter listed for hearing in the Court of Appeal (in the event of appeal), and the prejudice that is to be presumed from such delays and the failure of the State to

offer any reasonable explanation to account for such delays have caused us to come to the conclusion that, since ten and a half years have elapsed since the commission of the alleged offence, we should refuse to order a retrial in this case. We acknowledge however, that the practice has been that an accused person may be ordered to stand trial on three occasions upon the same indictment. The order of the court is that the appeal is allowed and the conviction and sentence is quashed."