[2010] JMCA Crim 77

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 76/2007

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE M^{C}INTOSH JA (Ag)

STEVEN GRANT v R

Patrick Atkinson and Mrs Jacqueline Samuels-Brown for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Loxley Ricketts for the Crown

16, 18, 22 & 24 February, 30 July and 20 December 2010

HARRIS JA

[1] The applicant was, on 1 June 2007, convicted in the Home Circuit Court for the murder of Kymani Bailey. He was sentenced to life imprisonment. It was ordered that he would not become eligible for parole until he had served 17 years. On 30 July 2010, we refused an application by him for leave to appeal, ordered sentence to commence on 7 September 2007 and promised to put our reasons in writing. We now fulfill our obligation.

[2] In the early hours of 18 April 1999, Bailey was shot and killed in New Kingston. On three occasions, the applicant was put on trial for his murder. A conviction which was recorded at the first trial was quashed by the Privy Council and a new trial ordered. The second trial was aborted. The third trial resulted in a conviction.

[3] The prosecution placed reliance on several witnesses but the evidence from three witnesses, namely, Detective Sergeant Warren, Michael Kinglock and Constable Mark Williams was not adduced by way of oral testimony. Mr Kinglock's and Constable Williams' evidence was admitted by way of written statements pursuant to the provisions of section 31D of the Evidence Act. Sergeant Warren's evidence was in the form of depositions taken at the preliminary inquiry.

[4] On 7 May 1999, Michael Kinglock, a truck driver, who was employed on weekends as a night watchman at the Jamaica Football Federation Building, gave a statement to the police. He stated that on the morning of the incident, he was in the building which overlooks a car park and that at about 4:15 he proceeded to the balcony on the third floor from which he was afforded a bird's eye view. Activity in the car park was negligible. There, he saw a man walking towards the Jamaica Football Federation Building. The man stopped at the side of the building and urinated. Thereafter, he observed another man approaching that

man who was urinating, pointing to him and said "Pussy hole don't move." The man who was urinating appeared to be pulling up his zipper but instead drew a gun and fired several shots in the direction of the man who had approached him. The man, in whose direction the shots were fired, ran. The man who fired the shots also ran in the same direction. He did not see either of them after they left his view.

[5] He went on to say that he noticed that something fell but was unable to say from whom it had fallen. He then said he saw several persons running into the car park. After the man who fired the shots ran, he saw a van which was parked in front of the federation building reverse and then it sped away.

[6] Corporal Llewellyn Wynter testified that sometime between 3:30 and 4:30 on the morning of 18 April 1999, he was walking from the Asylum nightclub towards the City Bank Building on Knutsford Boulevard when he heard explosions which sounded like gunshots, and which appeared to have been coming from the vicinity of the City Bank Building. He hastened towards the direction from which the explosions came. He ran to the end of the City Bank Building to an area between a fast-food establishment and the City Bank Building.

[7] This area leads to a car park which the Jamaica Football Federation Building overlooks. He disclosed that he observed what he

believed to be a white pick-up truck driving out from the area to the right of the Jamaica Football Federation Building. It went across to St. Lucia Avenue. He was unable to see who was in the vehicle. However, he saw a man in a crouching position near to the side of the Jamaica Football Federation building. He got into the police service vehicle and pursued the vehicle but without success. He gave up the chase and returned to the area where he saw a man lying on the piazza breathing heavily, covered with what appeared to be blood. The man was soon after taken away by other policemen.

[8] Corporal Marvis Haughton testified that he came to the scene at about 4:30 a.m. and saw the deceased lying in the car park, covered in blood with his arms extended outwards from his body. He said there was nothing in the deceased's hands, nor did he see a firearm close to his body or anywhere. With the assistance of the policemen, the man was taken to hospital. He said a crowd had gathered but the scene was not secured.

[9] Xavier Newton Bryant stated that on the morning of the incident he was on an assignment to the Jamaica Football Federation Building as a security guard. He related that, between 4:00 and 4:30 on the morning, he was seated at a desk in the reception area when he heard about four to five gun shots. He walked to a window, and looked to the front of the

building where he saw a young man stagger and fall on the sidewalk about six feet away from where he was standing. He went on to assert that he was able to see him with the aid of lights from an overhang covering the sidewalk.

[10] He then saw another man coming from the direction from which the first man came, walking closely to that first man. The first man was unarmed. The second man was armed with a firearm which he used to fire seven or eight shots in the back of the man on the ground, who was trying to creep away. He described the man with the gun as tall, fair-skinned and of Indian extraction. He said that about 20 minutes to a half an hour after the shooting ended, he went outside where he saw a small crowd of 20 – 25 persons and the young man still on the ground groaning. When the police arrived, some bystanders and himself picked up spent shells which they handed over to the police.

[11] In cross-examination he stated that he joined the police force in 1979 and left in 1985 as a constable. He admitted however that his service was terminated in 1980 and not 1985 due to the fact that it was discovered that he had a criminal record which he had not disclosed upon enlisting in the constabulary force. He admitted being convicted in 1979 for stealing a tin of sardines. He admitted that he lied in his curriculum vitae in respect of his qualifications in order to secure a job as

a security officer. He admitted that his reconstruction as to what transpired that morning was partly what he had seen and partly what he had heard.

[12] Dr Ere Sheshaiah conducted a post-mortem examination on the body of the deceased. His examination revealed the presence of 13 gunshot wounds on the body. There were two gunshot entry wounds to the trunk, without any gunpowder markings, one of which was to the back. A corresponding exit wound was found on the right side of the chest.

[13] A gunshot wound was found at the root of the scrotum, without gunpowder residue present. Two gunshot wounds were found on the upper parts of the gluteal area. Eight gunshot wounds were present on the thigh, one on the front of the left thigh and seven on the back of the left thigh, without gun-powder markings.

[14] It was his opinion that death was caused by multiple gunshot wounds. He also opined that the shooter would have been standing behind the deceased when the shots to the back were discharged. However, in cross-examination, he said that he was unable to determine the exact position of the shooter in relation to the deceased when the shots were fired.

[15] Daniel Wray, retired Assistant Commissioner of Police and government ballistic expert, testified that on 19 April 1999 he received from Sergeant Warren two sealed envelopes, one containing a 9mm Sauer model #p226 semi automatic pistol bearing serial number U533370 and the other containing three 9mm luger unexpended firearm cartridges. On 6 May 1999 he also received from Sergeant Warren an envelope containing four 9 mm bullets and fragments of bullets.

[16] The firearm carries a magazine which is capable of holding 18 cartridges. When fired, each succeeding shot, after the first shot, is carried out by a single action. In order for 13 shots to be expended from the firearm, he said, the shooter would have to pull the trigger 13 times. He stated that a person may accidentally pull the trigger of a firearm by reason of fright or panic and the degree of reaction by that person would vary depending on the extent to which the person had been frightened or had panicked.

[17] Constable Mark Williams' evidence was that the applicant, on the morning of the incident, attended the Half Way Tree Police Station, made a report to him and handed over a 9mm pistol with a magazine containing three live rounds of ammunition. Following this, he recorded a statement from the applicant. In this statement, the applicant asserted that at about 4:15 am on Sunday 18 April 1999, he was in the parking lot

adjoining the Halftime Sports Bar on Knutsford Boulevard, which he had just left, and was proceeding to his vehicle in the parking lot. He stopped to urinate against a wall and while zipping up his trousers, he heard someone from behind, say, "Pussy hole, don't move." On turning around he observed a man pointing a gun at him. He immediately drew his firearm which was loaded with a magazine containing approximately 13 rounds of 9mm cartridges and one round in the chamber. He pointed the firearm in the man's direction and began squeezing the trigger.

[18] He further stated that the man ran out of his sight to the other side of the wall. He walked towards the direction in which the man ran and saw the man, with gun in hand, facing him. He again pointed the gun in the man's direction and squeezed the trigger. He said on both occasions he was unaware of how many rounds of ammunition were discharged or if any had caught the man.

[19] After discharging the firearm on the second occasion, he observed a group of people running from Knutsford Boulevard towards his direction and in an effort to avoid the crowd he went to his vehicle and proceeded to the police station.

[20] Pilmar Powell, a detective corporal of police stated that on the morning of the incident she went to the scene where she saw Sergeant Warren. He introduced her to Kinglock and told her that he, Kinglock, said

he wanted to have his statement recorded. In examination in chief she said that, at the car park Sergeant Warren questioned Kinglock while she recorded his answers.

[21] It was also her evidence that in 2006, she made checks to find Kinglock. These checks proved futile as he was unknown at the addresses given by him as his place of residence and at the place where he said he worked.

[22] The applicant made an unsworn statement. He stated that he was not a criminal. He did not commit an offence in 1999 but had been in custody for years and had been unable to see his son for eight years. He said that when he was 12 years old he was held up by men. Other members of his family had been robbed and killed and he made an application for a firearm for his protection. He further stated that he had no intention of killing anyone and that when he heard the words, "Pussy don't move", he spun around to face the barrel of a gun. He said he thought that he would have been killed. He, honestly believing that he should have acted promptly to save his life, fired at his assailant. He then drove to the police station immediately and made a report.

[23] The following original grounds of appeal were filed:

"(a) Unfair trial, abuse of process

(b) Verdict unreasonable having regard to evidence

(c) Judge should have allowed a no case submission

(d) Evidence wrongly admitted

(e) Sentence manifestly harsh and unjust."

Leave was granted to argue 22 supplemental grounds. These grounds are as follows:

"1 This third trial of the Applicant/Appellant on this charge amounts to an abuse of the process of the court having regard to:

i. The extensive delay which amounts to prejudice per se.

ii The real and actual prejudice to the Applicant/Appellant arising from evidence becoming unavailable and/or the Appellant being deprived of the opportunity of cross-examining or calling witnesses on his own behalf including, inter alia:

(a) The unavailability of Constable Warren who first interviewed the Applicant/Appellant for cross examination.

(b) The unavailability of Constable Warren who had initial contact with the witness Kinglock. (Pommels p. 323, p. 332)

(c) The changes to the locus which the witness testified to P. 70 – 71

(d) The unavailability of the contemporaneous notes of the Forensic Expert Assistant Commissioner Daniel Wray.

iii. The deprivation to the Applicant/Appellant of the jury's verdict on the second trial in circumstances where as a matter of law it was unfair and/or unjustifiable.

In the premises the Applicant/Appellant was not and could not have been afforded a fair trial, his prosecution ought to have been stayed and his consequent conviction ought to be set aside.

2. The Applicant/Appellant was deprived of (sic) constitutional right to trial within a reasonable time. Accordingly there has been miscarriage of justice and the Applicant/Appellant's chances of acquittal impaired.

3. The Learned Trial Judge erred in rejecting the no case submission of the Applicant/Appellant as the prosecution failed to establish a prima facie case and/or the credibility of the main witness for the prosecution Xavier Newton Bryant was entirely destroyed and the remaining evidence was not, as a matter of law, sufficient to establish a prima facie case whereupon there has been a miscarriage of justice.

4. The Verdict is unreasonable having regard to the evidence.

5. The learned trial Judge failed to give the jury adequate directions as to the legal consequences of the witness Xavier Newton Bryant having been totally discredited and having admitted that his evidence as to what occurred that day does not consist of matters within his knowledge but rather conjecture. The Learned Trial Judge ought to have directed the jury to place no reliance on his evidence and/or to specifically warn the jury of the dangers of acting on his evidence.

6. The learned trial judge failed to adequately direct the jury as to self defence and inappropriately emphasized the aspect of

Kinglock's statement that the deceased pointed a finger at the Applicant/Appellant thereby misleading the jury to believe that if there was no gun there was no self defence. This was misdirection in law. Further the learned trial judge's directions on self defence were confusing especially as it relates to the duty to retreat and honest belief and the Applicant's/Appellant's state of mind throughout.

7. The Learned Trial Judge left the evidence of Michael Kinglock to the jury in terms that excluded the deceased having had a gun and as being unsupportive of the defence when in fact it was supportive and corroborative of the Applicant's/Appellant's honest belief that he was defending himself from the threat of deadly force.

8. The learned trial judge's directions relative to self defence (see P. 867 Lines 23, P. 868 Lines 1-5) were at a minimum confusing as when she came to deal with the statement of (sic) Applicant/Appellant which formed part of the crown's case.

9. The learned trial judge misstated the Applicant's/Appellant's defence at pg 935 RT L11-22 by suggesting that the Applicant pursued his Attacker and fired additional shots at him when there was no longer any honest belief of imminent danger and this was a misdirection operating to the prejudice of the Applicant/Appellant.

10. The Learned Trial Judge misdirected the jury when without explanation she characterized the statement of the Applicant/Appellant as having "incriminating parts and explanations" P. 895 - 896. This direction was misleading and cast an unduly and impermissibly negative slur on the Applicant's/Appellant's defence and in effect usurped the jury's function.

11. The Learned Trial Judge cast doubt on the sincerity of the Applicant's/Appellant's unsworn evidence by erroneously presenting it to the jury as "reciting" what he had said to the police thereby conveying that it was a concocted defence, P. 928.

12. The learned trial judge failed to assist the jury as to what parts of evidence amounted to provocation and left them only with a broad and generalized statement as to the law relating to provocation.

13. The Learned Trial Judge failed to direct the jury of the right in law to restrain a fleeing felon and to apply this aspect of the law to the facts of the case.

14. That the learned trial judge effectively withdrew (sic) statement of Michael Kinglock from the jury as she

    a. Directed them that only two people, the deceased and the Applicant/Appellant knew exactly what happened

    b. Failed to correctly instruct the jury as to the law relating to admission of statements in evidence.

This was a non-direction amounting to a mis-direction in law

15. The Learned Trial Judge failed to give the jury adequate or the appropriate directions in law as to how to treat with and assess the statement of the Applicant/Appellant which formed part of the prosecution's case suggesting instead that it did not do so. P. 845 Lines 18 – 25.

16. The Learned Trial Judge presented the evidence of Michael Kinglock in an unduly unfavourable light compared to e.g. the evidence of Cons.

Mark Williams and Sgt. Warren. The Learned Trial Judge for example failed to point out to the jury that in relation to all three witnesses the Applicant/Appellant had been deprived of the opportunity of cross examining them at the trial.

17. The Learned Trial Judge failed to point out to the jury that if they accepted Michael Kinglock's evidence it was supportive of the Applicant's/Appellants defence.

18. The Learned Trial Judge invited the jury to consider the evidence of Michael Kinglock in the context of the doubt cast on it by the evidence of Cpl. Pilmar Powell without at the same time referring to the evidence of Cons. Warren which contradicted the evidence of the said Pilmar Powell; thus inferentially inviting the jury to reject, disregard or place less weigh on Kinglock's evidence.

19. The Learned Trial Judge failed to adequately direct the jury in relation to the law of circumstantial evidence and to relate any such direction to how the jury should act in the event they rejected (sic) evidence of Bryant and (sic) statement of Kinglock and the Applicant/Appellant this was a non-direction amounting to a misdirection in law.

20. The Learned Trial Judge's summation in its totality was unfair and/or unbalanced whereby the Applicant's/Appellants chances of acquittal was impaired and the Appellant has been deprived of a verdict in his favour.

21. The Learned Trial Judge misdirected the jury as to how to deal with previous inconsistent statements.

22. The Learned Trial Judge's direction to the jury on character evidence was incomplete as the judge omitted any reference to the impact of the character evidence on the

> Applicant's/Appellant's unsworn evidence and rather limited herself to the impact on his statement to the police pre-trial."

[24] It will be convenient to address grounds 1 and 2 simultaneously:

> **Ground 1 - abuse of the process of the court**
> **Ground 2 - constitutional right to a fair trial**

It was Mrs Samuels Brown's submission that the first trial of the applicant was unfair or unwarranted, based on the conduct of the prosecution. She further argued that the applicant's deprivation of a jury's verdict in the second trial was unfair and unjustifiable. The third trial of the applicant, she contended, amounts to an abuse of the process of the court. She argued that the extensive delay and the unavailability of evidence operated to deprive the applicant of the opportunity of cross-examining or calling witnesses and this resulted in severe prejudice to him.

[25] Mr Ricketts submitted that there was no serious prejudice to the applicant to the extent that he had not or would not have received a fair trial, nor was there any miscarriage of justice or abuse of the process of the court. The delay was neither inordinate nor oppressive to have warranted a claim for an abuse of process, as due diligence was observed by all parties and the trial proceeded with expedition, he argued. Alternatively, he submitted that the principles as to assessing delay are clearly distilled in the case of **R v Dalton Reynolds** SCCA No 41/1997 delivered on 25 January 2007. The manner in which the second

trial ended would eliminate any prejudice due to the fact that when the jurors were asked whether they could have returned a true verdict, they indicated that they could not, he contended.

[26] At common law, the court is empowered to prevent an abuse of the court's process, particularly in circumstances of delay. An abuse of the process of the court is described as something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding - see **Hui Chi Ming v R** [1992] 1 AC 34.

[27] Where an abuse of process is established, the court will stay the prosecution. The power to order a stay will only be applied in extremely exceptional circumstances and is exercisable where either one of two events occurs. In **R v Derby Crown Court ex parte Brooks** (1984) 80 Cr App Rep 164, at page 168 – 169 Sir Roger Ormrod said:

> "In our judgment, bearing in mind Viscount Dilhorne's warning in **Director of Public Prosecutions v. Humphrys** [1977] A.C. 1, 26, that this power to stop a prosecution should only be used in "most exceptional circumstances," ... the effect of these cases can be summarised in this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or

> (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service....
>
> The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in **Sang** [1980] A.C. 402, 437: "the fairness of a trial ... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."

[28] The fundamental rights and freedoms of every individual in Jamaica are guaranteed by the Constitution. Section 13 provides inter alia:

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) …
>
> (c) …
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording

> protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The foregoing offers protection to every individual. The rights granted to each individual can only be alienated in circumstances as permitted by the Constitution.

[29] The rights and freedoms promulgated by the Constitution are broad in scope. The protection accorded to every person includes a right to a fair trial in criminal proceedings as designed by section 20(1) of the Constitution. The section reads:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[30] The spirit and intent of section 20(1) is to guard against unreasonable delay by affording an accused a fair trial by an independent and impartial tribunal. The right to a fair trial within a reasonable time is an all-encompassing protection. In **Bell v D.P.P & Anor** (1985) 22 JLR 268, Lord Templeman said that under section 20 (1), a right to a fair trial within a reasonable time is not a separate constitutional guarantee. It is an all embracing form of protection, "namely, a fair

hearing within a reasonable time, by an independent and impartial court, established by law".

[31] In **Bell**, the appellant was convicted in the Gun Court in October 1977. His appeal having been allowed, the Court of Appeal ordered a new trial. The appellant was released on bail in March 1980 due to delays in the prosecution of the retrial. In November 1981, the appellant was discharged, the Crown having offered no evidence against him. He was rearrested in February 1982 for the same offences and a retrial was ordered. He unsuccessfully sought redress under section 20(1) of the Constitution in an application to the Full Court and on appeal to the Court of Appeal. On appeal to the Privy Council it was held, inter alia, that by reason of the delays the appellant's right to a fair hearing within a reasonable time had been infringed.

[32] The constitutional provisions do not only supply an avenue which permits the imposition of the stay of an indictment in circumstances where there is unreasonable delay, but also extend to a case in which no actual proof of prejudice to an accused has been established. Accordingly, a court may, in a proper case, stay an indictment if it is of the opinion that a subsequent trial is oppressive. In giving consideration as to whether an accused can benefit from the protection offered by section 20 (1), the issue as to whether he has been afforded a fair hearing

within a reasonable time is critical. Excessive delay may operate to show that a fair trial is not achievable. In **Bell** Lord Templeman said:

> "The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by section 20 (1) have been infringed although he is unable to point to any specific prejudice."

[33] In the case of **Darmalingum v The State** [2000] 1 WLR 2303, the Board declined to follow **Bell**. The Board, in giving consideration as to whether post trial delays bore any relationship to the question of the appellant being denied a fair trial, was of the opinion that the reasonable time requirement was not part of the general right to a fair trial within a reasonable time but a separate guarantee and not a concept offering an all-embracing form of protection as stated in **Bell**. In **Darmalingum**, the Board's considerations were centered on the question of the right of the appellant to a fair trial within a reasonable time, within the context of section 10 (1) of the Constitution of Mauritius, the provisions of which are essentially that the right to a fair trial is applicable where "a person is charged with a criminal offence". The Board, relying on article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, held that the reasonable time guarantee extended to appellate proceedings. Despite the finding of guilt, the appellant's convictions and sentences were set aside.

[34] In assessing the criteria by which the court should be guided in determining the question of the infringement of section 20(1), in **Bell**, the Board adopted the approach of the Supreme Court of the United States in the case of **Barker v Wingo** [1972] 407 US 514. In that case the Supreme Court of the United States gave consideration to the sixth amendment to their Constitution which provides, inter alia, that an accused is entitled to a speedy and public trial in all criminal prosecutions. The applicable factors for considerations are:

(a) the length of the delay,

(b) the reasons advanced by the prosecution for the delay,

(c) the responsibility of the accused for asserting his rights, and

(d) the prejudice to the accused.

[35] In dealing with the foregoing factors Powell J., in **Barker v Wingo**, at page 530, said:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance."

[36] At page 531, he stated:

> "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence could be weighed heavily against the government. A

> more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

[37] At page 528 he stated:

> "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right."

[38] He went on to declare at pages 531 – 532:

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

[39] Later, he continued, by saying:

> **"**Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past."

[40] In giving effect to the prescriptions of section 20(1) of the Constitution, the court must carry out a balancing exercise between the fundamental rights of an accused to a fair trial within a reasonable time and the interest of the public. This therefore enjoins the court to decide whether the degree of the delay would justify a stay of prosecution. The right of an accused to be tried within a reasonable time is not absolute as such right must be balanced against his rights and the interest of the public in achieving justice. This has been acknowledged by Lord Templeman in **Bell** when at page 274, he said:

> "…In giving effect to the rights granted by sections 13 & 20 of the Constitution of Jamaica the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with

a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover an injudicious attempt to expand an existing system of courts, judges and practitioners could lead to deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed by the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances of Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognize the need to take all reasonable steps to reduce the period of delay wherever possible."

[41] He went on to state at page 275 that the courts of Jamaica are best equipped to determine whether in any particular case delay contravenes the fundamental rights of an accused.

[42] There is little doubt that a retrial demands some degree of urgency. It is also undeniable that the constitutional protection is applicable to pretrial as well as post-trial delays**.** This proposition holds good not only in circumstances of delays between trials but also delays between trials and the appellate process - see **Darmalinaum v The State**.

[43] A case must be considered in the round. In considering the question of a fair trial, an individual's rights should not be considered as if they are enjoyed in a vacuum. There must be fairness "on all sides taking into account the triangulation of interests on all sides", (see **Attorney General's Reference** (**No 3 of 1999**) [2001] 2 AC 91). The real question therefore, is whether in a particular case the delay is unjustified and warrants the court's intervention.

[44] The **Barker v Wingo** approach which was adopted in **Bell,** was also considered and approved in **Flowers v R** [2000] 1 WLR 2303, subsequent to the decision in **Darmalingum**. In that case, the appellant was tried for the offence of murder in the course of armed robbery. Two trials in 1992 and 1994 ended in hung juries. The appellant was retried and convicted in January 1997. His appeal to the Board, in reliance on section 20(1) of the

Constitution, was dismissed. It was held that notwithstanding a lengthy delay between the charge being laid and the third trial, the conviction ought not to be quashed for reason of the delay, or on the ground of oppression, or abuse of process.

[45] We will now turn to the issue relating to the passage of time which culminated into the delay. Did the lapse of time amount to an abuse of the process of the court? The answer demands a brief review of the events leading up to the third trial. The applicant was arrested on 4 May 1999. On 30 April 1999 the witness Constable Mark Williams, who recorded the statement given by the applicant, migrated to the United States of America. A statement was taken from Michael Kinglock on 7 May 1999. The preliminary enquiry commenced on 5 June 2000 and concluded on 30 July 2001, just over two years and two months after the arrest. The investigating officer Sergeant Warren who gave evidence at the preliminary inquiry, died on 24 April 2002. Sergeant Pilmar Powell was assigned to continue the investigative process.

[46] The first trial commenced on 18 February 2003 and ended on 28 February 2003. An appeal was filed on 18 March 2003 and the judgment of the court was delivered on 12 July 2004. A further appeal was made to the Privy Council. The advice of the Board was delivered on 16 January 2006 when the matter was remitted to the Court of Appeal for it to decide

whether a retrial should be ordered. The judgment of the Court of Appeal, ordering a retrial, was delivered on 7 March 2006. The retrial began on 1 November 2006 and was aborted on 7 November 2006. On 16 May 2007 the second retrial commenced and ended on 1 June 2007. Attempts to locate Kinglock in 2006 and 2007 proved futile and the statement given by him was admitted in evidence. The applicant was found guilty and was sentenced on 7 June 2007.

[47] It was submitted by the Crown that the delay was neither excessive nor exceptional nor was it attributable to any serious misbehaviour by the Crown and that there was a lapse of four years after the first trial due to the applicant's pursuit of an appeal. It was contended by the Crown that the following factors contributed to the delay: extensive searches for the witnesses; the complexity of the case in order to satisfy the court of the witnesses' unavailability; the unavailability of the transcript of the aborted trial; the lack of jurors; the unavailability of the pathologist; the failure to have the applicant brought before the court on several occasions; and bail applications made by the applicant.

[48] We are not in agreement with the Crown that the delay was not excessive. A delay of 11 years is in fact inordinate. The prosecution cannot with all sincerity say that it did not contribute to the delay. The case is not a complex one. The prosecution could have done more to expedite the

process although, understandably, they would have spent some time to locate the witnesses, especially Kinglock in light of the decision of the Board in the earlier appeal. During this period, the applicant had a very serious charge hanging over his head and would have suffered emotionally. However, all of this must be balanced against the right of the applicant and the public interest. The offence with which the applicant was charged is one which the interests of justice demand should be discouraged. The right of the public to justice would demand that a message be sent that the commission of murders is highly unacceptable. We shall say more about this later.

[49] We now turn to the issues designated as real prejudice to the applicant. The complaint of prejudice by reason of the unavailability of Sergeant Warren at the trial is without justification. Death prevented him from appearing at the trial. This is a circumstance over which the prosecution had no control. His depositions were admitted in evidence as prescribed by the requirements of section 34 of the Justice of the Peace Jurisdiction Act. The learned trial judge informed the jury of the reason for his unavailability. She clearly directed them that he was not subject to cross examination for them to have tested his credibility and warned them as to the manner in which they should treat his evidence. Although Sergeant Warren was not available to be cross-examined, this would not

have been a ground for excluding his depositions: see **Scott v R; Barnes v R** [1989] 1 AC 1242.

[50] There is no merit in the complaint that the applicant suffered prejudice due to the unavailability of Sergeant Warren. The jury had before them Sergeant Warren's deposition in which he stated that Kinglock had given a statement to him concerning the incident. Kinglock's statement was also in evidence. It was for the jury to decide whether they believed that Kinglock had given the statement to Sergeant Warren and for them to determine what they made of the statement.

[51] The applicant's complaint of the changes in the locus about which the witness Corporal Wynter testified is also clearly devoid of merit. The witness gave evidence as to the state of the locus at the time of the incident. In cross examination counsel for the applicant inquired of him whether there was an open lot on either side of the Jamaica Football Federation Building to which he answered in the affirmative. He was further asked if they were still there. His reply was that he was unsure. The answer elicited from him concerning any changes in the locus would be of no relevance to the issues before the court. The pertinent issue is whether the evidence from the witness had in fact established the state of

the locus at the material time and this requirement, the witness had satisfied.

[52] It was also a concern of the applicant that the contemporaneous notes of Assistant Commissioner of Police Daniel Wray (retired) was not available at the trial. Assistant Commissioner Wray (retired) gave evidence at the trial. He was examined, extensively cross examined and was re examined. The fact that his notes were absent, did not in any way detract from his competence to testify to his findings relative to his examination of the firearm and the ammunition and to give his opinion in relation to his findings.

[53] A further complaint of prejudice is in the applicant's assertion that he was deprived of the verdict in the second trial. This, he declared, was unfair and unjust. The complaint was launched from two plinths. Firstly, on the ground that the learned trial judge who presided over the second trial discharged a juror when there was no necessity so to do. Secondly, that he promptly discharged the jury and ordered a new trial upon a juror's report of an attempt to interfere with the proper conduct of the trial by way of telephone calls and threats received by that juror.

[54] Mrs Samuels Brown contended that there ought to be strict compliance with the law. Accordingly, the applicant ought not to be deprived of the view of any member of the jury. During the deliberation of

the 11 jurors, she argued, the applicant was denied the input from that juror who was discharged. As a matter of law, the threshold, she contended, is a high degree of necessity or evident necessity and the learned trial judge discharged the juror in the absence of any of these factors. In support of these submissions she cited, among others, the cases of**: R v Goodson** (1975) 1 WLR 549, **Yasseen and Thomas v The State** (1990) 44 WIR 219, **R v Hambery** [1977] 3 All ER 561, **The State v Baichandeen** (1979) 26 WIR 213 and **Spence v R** (1999) 59 WIR 216.

[55] There can be no dispute that at common law, a juror or a jury cannot be discharged save and except in circumstances where there is evidently a high degree of need. Notwithstanding the common law position, by statutory authority, a judge is also empowered to discharge a juror. Section 31(3) of the Jury Act confers upon a judge a discretion to discharge a juror if he or she becomes ill or for other sufficient cause. The Act further stipulates that the jury remains properly constituted in the absence of a discharged juror and, by virtue of section 31(4), the verdict of 11 jurors is deemed a unanimous verdict.

[56] A trial judge is required to take control of a trial and in the management of the trial, proceed in a direction, not only in the interests of the parties to the proceedings, but also in the interest of the public. In so doing, there are times when the circumstances dictate that he or she

must invoke his or her discretionary powers as to the discharge of a juror. The authorities have often demonstrated that an appellate court is loathe to interfere with a judge's exercise of the discretionary powers conferred upon him, save and except in extreme cases. So then, an appellate court will not intervene in the manner in which a trial judge exercises his or her discretion unless it is shown that the learned judge was palpably wrong.

[57] How then should a trial judge exercise this discretion? The cases of **Spence v R**, **R v Goodson**, **Yaseen and Thomas v The State**, **R v Hambery** and **The State v Baichandeen** offer useful guidance as to the court's approach to this question. They show that in the discharge of a juror or jury a high degree of necessity is a requisite and material consideration. Where a trial judge wrongly discharges a juror or members of the jury, the conviction may be quashed. Consequently, in the exercise of the discretion touching the discharge of a juror or the entire jury, the true test is said to be " whether an evident necessity had arisen". In **Spence v R**, Satrohan Singh JA, in dealing with the applicable test, at pages 221 and 222, said:

> "However, as a matter of good practice, the judge should ask the parties for their views before discharging either a single juror or the entire panel. In **R v Richardson** [1973] 3 All ER 247, it was held that even this consultation was not absolutely essential. The test whether or not to discharge a juror, or two jurors, or the entire panel, was whether an evident necessity had

> arisen. Trial by jury depended on the willing co-operation of the public and, if the administration of justice could be carried on without inconveniencing jurors unduly, it should be. An aggrieved and inconvenienced juror would not be likely to be a good one.
>
> The paramount principle that informs judicial intervention at any stage in a criminal case, must be formulated in the pursuit of the goal of fairness of the trial. And this must be applied also in relation to the excusing or the discharging of a juror. The interests of justice and a fair trial should be the only relevant considerations in executing the aforementioned test. However, these views must not be allowed to be whittled down to mean that jurors should be excused because they whimsically express an unwillingness to serve. Jurors owe a civic duty to their country and their duty is an integral part of the administration of justice (***Abdool Salim Yaseen*** *and* ***Thomas v The State***) (1990) 44 WIR 219). The test should be whether there was a real danger that an accused's position would be compromised by what was to happen (**R v Sawyer** (1980) 71 Cr App Rep 283). There must be a real danger of prejudice to the accused in continuing to try the case (see **R v Spencer** [1987] AC 128). The court should think in terms of the possibility of that real danger rather than its probability (**R v Gough** [1993] AC 646)."

[58] It is of importance to state that in discharging a juror or panel of jurors, the failure of the judge to take into consideration material factors or his taking into account immaterial factors, are not necessarily grounds for overturning his decision (see **Spence v R**).

[59] In the instant case, at the commencement of the second trial of the applicant, a juror reported ill. Mrs Samuels Brown stated that, at the time, enquiries made of the Registrar revealed that the juror was suffering from something in the nature of a belly-ache. The learned trial judge discharged that juror and continued the trial with the remaining 11 jurors. It would have been proper for him, before discharging the juror, to have made enquiries in order to ascertain whether the nature of the juror's illness was of a kind which would have prevented him from continuing to serve. Although this had not been done, a serious charge was hanging over the applicant's head. Time was of the essence. The interests of justice demanded that the matter proceed without delay. There is nothing to show that there was any possibility of a real danger of prejudice to the applicant with the trial proceeding with 11 jurors. In all the circumstances, we see no good reason to disturb the judge's exercise of his discretion when he continued the trial with 11 jurors.

[60] A further incident occurred after the discharge of that juror. During the progress of the trial, a report was made by another juror relating to telephone calls he received which he considered threatening. Visits were also made to the juror's home which caused him some discomfort. The matter was aired in open court and the jury was eventually discharged. Interestingly, on a examination of the following dialogue between counsel for the applicant Mrs Samuels Brown and the learned trial judge, it could

not be said that Mrs Samuels Brown was in any way opposed to the termination of the trial:

"**His Lordship**:	Well, the Jurors think that, regardless of what was said, even taking into consideration the oath or affirmation that they have taken, in light of what transpired, at least some of them would feel intimidated in relation to the verdict that might be given based on what was said, and it would appear to me from what was said to the juror that if the verdict went a particular way then that juror might have been in some danger.
Mrs. Samuels -Brown:	And, indeed, if it went one way or another at this stage, either way, there could be a blight put on the verdict.
His Lordship:	I am not asking on whose behalf, for which side, neither do I propose to ask.
Mrs. Samuels -Brown:	I am saying, it doesn't matter because sometimes, by approaching from one side you push the person to the other side. So, if it results that they cannot take a true verdict, that is all right, but it is truly regrettable."

In the presence of the jury, his Lordship directed a detective to investigate the matter and speak to the members of the jury with a view to collecting a statement. His Lordship then said at pages 328-9:

> "This is something which cannot be tolerated, and any person who does such a thing ought to be brought before the court and severely punished. The administration of justice is something which we pride ourselves on… whatever happened to that particular juror would have been discussed among all of you. I am sure, therefore, all of you would have been aware, and as it is said, justice should not only be done but also appear to be done. In light of what has been done I have no option but to discharge you from returning in this case and we will have to set another date. You have gone over and above your period which you are required to serve, so I must thank you for your indulgence and for your commitment, because none of you seem to have been reluctant when I ask about going on until the case is finished but unfortunately, this new development has caused us to terminate this case at this time …"

[61] Having regard to the report by the juror, the overriding principle that a trial must be seen to be fair and impartial would have been a highly pertinent consideration. The trial judge being clothed with discretionary powers to manage the trial, dealt with it as the exigencies of justice dictated. The jurors having conferred among themselves at the invitation of the learned trial judge, informed him of their unease in continuing with the case. The nature of the report by the juror was one which would have created a serious concern for the administration of justice and indeed, in dealing with the matter, the learned trial judge was not unmindful of the well-known dictum of Lord Hewart C.J., in **R v Sussex Justices ex parte McCarthy** [1924] 1 KB 256 when at page 259 Lord Hewart said:

> "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

[62] The learned trial judge directed himself in conformity with the foregoing precept. In keeping with the dictum, he declared, "Justice should not only be done but seen to be done". In all the circumstances, it was right and proper for the learned trial judge to have aborted the trial.

[63] With all the foregoing observations in mind, we cannot ignore the fact that the offence committed by the applicant was indeed a very serious one. We cannot disregard a very compelling evidential fact that the applicant discharged 11 bullets in the deceased's back. It is clear that the applicant, while discharging these 11 bullets, was behind the deceased. The occurrence of murders in Jamaica is alarming and has caused grave consternation among all law-abiding citizens. This ugly monster has often been publicly categorized as an epidemic. The public interest demands that the continued escalation of the crime of murder be deterred. Harrison P. (as he then was) in **R v Dalton Reynolds** in speaking to the preponderance of the commission of murders in the Jamaican society and the demand of public interest to discourage such offences, said (page 14):

> "We take note of the fact that the offence committed by the appellant was a particularly grave one, in that, the appellant and four others

> chopped the deceased to death by the infliction of some twenty chops. This undeniably is the type and nature of action that it is in the public interest to discourage. The prevalence of the crime of murder and its toll on the lives of Jamaicans is unprecedented and well documented."

[64] It cannot be denied that the delay of 11 years is inordinate. The applicant, no doubt would have suffered some anxiety and concern having a murder charge hanging over his head for that period of time, having been subjected to three trials and three appeals. Indeed, it can be said that there was an infringement of his rights under section 20 (1) of the Constitution. However, the fact that there was some prejudice occasioned by the delay, does not mean that his conviction should be automatically quashed. The most serious feature of the prejudice he had undergone is the possibility that his defence has been impaired by the delay. However, the case against the applicant is relatively straight forward and likewise his defence. Any prejudice which he may have encountered by the delay can be easily discounted. In all the circumstances, we can see no good reason for the applicant to have justifiably complained of prejudice. Clearly, there is no justification for quashing the conviction on the ground of abuse of process or oppression.

Ground 3 - No case submission should have been allowed

Ground 4 - Verdict unreasonable having regard to the evidence

[65] Mrs Samuels Brown argued that the prosecution failed to establish a prima facie case of murder and therefore the learned trial judge ought not to have called upon the applicant to answer the charge. The only evidence before the court was one of self defence in the course of an attempted armed robbery, she argued. She further contended that the evidence of the witness Bryant lacks credibility as he had been wholly discredited and no reasonable jury could have acted upon it, as there was nothing coming from him which the jury could have believed. The evidence of Dr Sheshaiah, she argued, being equivocal, could not have stood on its own to support a conviction. The evidence of Michael Kinglock, she contended, being supportive of self-defence, the jury ought to have been directed that the prosecution had proved self defence.

[66] Miss Llewellyn, QC submitted that there was sufficient evidence before the court on which the jury could have convicted and it was for them to decide whether they believed the explanations given by Bryant for his lies. Bryant's evidence, she contended, when taken together with the evidence of the other prosecution witnesses, shows that the applicant could not have been acting in self-defence. There is nothing in Kinglock's statement showing that the deceased was armed with a gun, she

argued. There is compelling evidence, she urged, that the deceased received 11 shots to his back and when Dr Sheshaiah's and Assistant Commissioner Wray's (retired) evidence are taken together, they give some credence to Bryant's evidence that he saw a man of Indian extraction firing at someone on the ground. In addition, she submitted that Assistant Commissioner Wray (retired) stated that the presence of four of the gunshot wounds to the deceased's back showed that the person who fired did so while the deceased was stationary.

[67] The substance of the complaint in these grounds is premised on the inadequacy of the evidence, most of which relates to the inconsistencies and discrepancies arising therein. The question therefore is whether the evidentiary material before the court was so insubstantial and weak that the case ought not to have been sent to the jury. A court, when deciding whether the evidence presented by the prosecution is so weak that a reasonable jury ought not to convict upon it, is guided by the well known and often cited case of **R v Galbraith** [1981] 1 WLR 1039 ; 73 App Rep 124. Lord Lane C.J. at page 1043 directs that the approach of the court should be as follows:

> "How then should the judge approach a submission of 'no case'? (1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for

> example because of an inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited. In **R v Baker and Others** (1972) 12 JLR 902, Smith JA (as he then was) said:

> " The purpose of proving that a witness has made a previous inconsistent statement is to discredit his evidence in the eyes of the jury and they alone, as the judges of fact who must decide whether the witness has been discredited and to what extent. No case has yet altered this position."

In **Mills v Gomes** (1964) 7 WIR 418 at 440 Wooding C.J. said:

> "In our view then the direction to be given must have due regard to the facts of each case. No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The Judge may, and in cases such as we are now considering we think it is his duty to give such directions as will assist the jury in assessing the credit worthiness of the evidence given by the witness whose credibility has been attacked but it can be but seldom that the circumstances will warrant his going beyond that. More especially , where a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement due regard being had to the explanation proffered."

[69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony.

[70] Even in circumstances where a judge is of the view that, by reason of discrepancies and inconsistencies, a conviction could not be supported by the evidence, it is not the judge's duty to stop the case and this is so, even if he believes the witness to be lying. In **Kissooa and Singh v The State** (1994) 50 WIR 266 Kennard JA at page 289, said:

> "Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nevertheless have left the case to the jury. It cannot be too clearly stated that the judge's obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury."

[71] Mrs Samuels Brown sought to distinguish **Galbraith** from the present case. She stated that in **Galbraith** the only question was as to the proof of the identity of the perpetrator and not proof of the ingredients of the offence. She said that there was evidence of an agreement between the witnesses and the description given by the witness Gilette fitted the appellant but he attended the identification parade and was unable to recognize anyone at the club. The witness Cook described the appellant as a participant but subsequently stated that he had been mistaken.

[72] It was further argued by her that in the present case, it is not that Bryant was asserting that he could have been mistaken but that he had admitted that he had been lying. He was in fact a self-confessed liar, there was no evidence of any agreement between the witnesses and Kinglock did not provide any evidence as to the murder, she contended.

[73] In **Galbraith** the issue as to the credibility of the witnesses could not have stood up to scrutiny. In addition, the evidence as to the identification of the perpetrator was so weak that the case could not have been left for the jury's consideration. In the instant case, it cannot be denied that the evidence of Bryant contained inconsistencies and discrepancies and that he had admitted under cross-examination that he was a liar. It emerged that he lied about his academic record, and his employment history in England. He also gave contradictory evidence relating to his conviction for larceny. He however gave explanations as to the fabrication. It was for the jury to decide whether he was discredited. In our opinion, the fact that essentially, he had lied in respect of matters affecting his personal life, did not necessarily mean that his credibility had been completely destroyed to the extent that the jury could not have accepted such of his evidence as they believed. It is of significance that certain facts stated by him were never challenged. There was unchallenged evidence from him that he saw the deceased lying on the ground in the car park, that he saw the applicant with a gun in hand

walking away from the body of the deceased and that he, among others, picked up spent shells near the body of the deceased.

[74] Additionally, although Bryant had stated that three or four shots were fired while Corporal Llewellyn testified to hearing two shots, it is indisputable that shots were fired. The applicant admitted that he fired shots. It was for the jury to decide if shots were fired and the circumstances under which they were fired. There is nothing to show that Bryant's credibility was so thoroughly destroyed, that his evidence could not have been placed before the jury.

[75] On the evidence, there was adequate proof of factual matters to be determined by the jury as to the guilt or innocence of the applicant. The applicant discharged his firearm which resulted in the death of the deceased. There was the evidence of Kinglock who stated that he had seen the deceased and the applicant in the car park and had seen the applicant with a gun. He said the deceased pointed his finger at the applicant saying, "Pussy don't move." Bryant said he saw a man of Indian extraction walking away from the body of the deceased. Dr Sheshaiah found 13 gunshot wounds inflicted on the body of the deceased, 11 of which were to his back. Seven of these injuries were to his lower back. Assistant Commissioner Wray (retired) opined that the deceased would have had to be stationary to have received the shots to

the lower back. The bullets and fragments found in the body of the deceased were identical to those used in the applicant's firearm. It cannot be ignored that there was the applicant's statement to the police in which he stated that the deceased was armed with a firearm. Although a bullet was found, no gun was found at the scene. All these factors must be weighed in the balance. The question for the jury was whether the killing was done in self-defence or by reason of provocation. It follows that the learned judge was correct in refusing to withdraw the case from the jury.

[76] It was further contended by Mrs Samuels Brown that the unsworn statement of the applicant established that he acted in self-defence and in the absence of credible evidence to the contrary, the jury ought to have been directed to return a not guilty verdict.

[77] The jury had all the available evidence before them. There was evidence from Kinglock, Bryant, Dr Sheshaiah, Sergeant Warren and the ballistic expert upon which the jury could have deliberated. They were instructed to take the unsworn statement into consideration and it was for them to have given it such value as they considered that it deserved. Consequently, they could have arrived at a verdict. As rightly submitted by Miss Llewellyn, even if they had rejected Bryant's testimony, there was sufficient evidence to have sustained a conviction. The appellate court is

a court of review and therefore it never seeks to embark upon a retrial of a matter. The court will only set aside a verdict if it is abundantly clear that a trial judge is palpably wrong on the facts. A complaint against conviction will not be entertained unless it is shown that a verdict rendered by a jury is unreasonable and unsupportable in light of the evidence. In **R v Lao** (1973) 12 JLR 1238 at page 1240, Henriques P., adopted and approved the following principles laid down in Ross on the Court of Criminal Appeal (1st edn. page 88):

> "It not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal – that the verdict was against the weight of evidence – is not a sufficient ground. It does not go far enough to justify the interference of the court. The verdict must be so against the weight of evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the court feel some doubt whether, had they constituted the jury, they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a

> court composed as a court of the appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury. "

[78] As correctly submitted by Miss Llewellyn, the Board, in the matter of **Steven Grant v The Queen** PCA No 30 of 2005 delivered on 16 January 2006, observed that from the manner in which the gunshot injuries to the deceased's back were positioned, with a jury being properly directed, the applicant would encounter great difficulty in surmounting this hurdle. Upon our assessment of the case, it cannot be said that the evidence was incapable of or insufficient in maintaining a verdict of guilt. We are of the view that the jury had been satisfactorily directed upon adequate evidentiary material on which they could have arrived at a verdict. It clearly would have been inappropriate for the learned trial judge to have usurped the jury's function by taking the case away from them.

Ground 5 - Failure of judge to give adequate directions to the jury on the legal consequences of Bryant's evidence

[79] It was Mrs Samuel Brown's submission that the learned trial judge was under a duty to consider whether the evidence of Bryant was sufficient to establish proof beyond reasonable doubt and in light of its inadequacy, she would have been obliged to have withdrawn his evidence from the jury. In the alternative, she submitted, the learned trial

judge ought to have, in clear and unequivocal terms, directed the jury on the unreliability of his evidence.

[80] Miss Llewellyn argued that the learned trial judge brought to the attention of the jury the nature of Bryant's evidence and declined to review his evidence in examination in chief illustrating that it was hearsay and inadmissible. The learned trial judge presented most of his evidence in cross-examination and left for the jury's consideration such evidence which was unchallenged, she contended. She further argued that the learned trial judge directed the jury that they should carefully analyse such parts of his evidence as they found credible and although the witness was a self-professed liar, it was for the jury to determine the issue of his credibility and reliability.

[81] The learned trial judge did not review Bryant's evidence in examination in chief. She properly directed the jury that it was hearsay and inadmissible. She, however, assiduously recounted his evidence elicited under cross examination, repeatedly told the jury that he was a self-professed liar and directed them how they should treat his evidence. At pages 866 and 867 of her summation she said:

> " Well, he ended up after being thoroughly cross-examined, after being exposed – 'exposed' being the word used by counsel, which I adopted in the situation – exposed for being a liar, and a self-confessed one too. It was

suggested to him he was no longer sure; he said that was correct.

So he had to be re-examined by Crown Counsel; and when she asked him to tell us what it is he actually saw, I think you will recall that Mr. Bryant paused for a while and then what I have recorded that he said, is that when he went outside, 'My very first view, when I looked through the window, was the young fellow on the ground. I saw him on the ground. Basically, the shots had already been fired, all the shots and surely the young man was on the ground. I did not see a man of Indian extraction come up and shoot him. I did see a person moving off but not actually shooting at the man on the ground. I saw the man of Indian extraction out there with a gun.'

So I have not reviewed what Mr. Newton Bryant said to you in-chief because Mr. Foreman and your members, if we had been aware that Mr. Newton Bryant was going to say some of the things he told you about what he heard as against what he saw, that would have been hearsay and would have been inadmissible, what he said; but you consider Mr. Newton Bryant for what he presented to you, because at the end of the day, what is left, there was no challenge that he was there, there was no challenge that he did see something, there was no challenge that he saw a young man; I don't think that there was any challenge too as to how the young man was dressed.

He said he was dressed in a green shirt and blue pants lying on the ground with his hands outstretched; and at the time he went out there he saw a man of Indian extraction moving away with a gun. He said he didn't see any gun around that man on the ground, and he saw no gun in the man's hand.

> At the end of the day, it is for you to decide what you make of him. You are to decide what you make of what he said he saw, because ultimately the Crown, as I said, has presented to you evidence that was available to them; and it is for you, Mr. Foreman and your members, to carefully analyse each bit of evidence that you find reliably connected to try and get the picture of what happened out there that night; because the Crown is saying that this young man, Kymani Bailey, was murdered."

[82] No violence was done by the manner in which the learned trial judge dealt with Bryant's evidence. Her directions were adequate. The members of the jury were in the best position to decide the force of Bryant's evidence in their search for truth, or in establishing falsehood on his part. There were facts arising out of his evidence which remained unchallenged. This, the jury could have properly taken into account. As earlier indicated, it was within their province, as the tribunal of facts, to decide whether they could have placed reliance on such evidence.

[83] The directions given by the learned trial judge were sufficient to alert the jury to their duty to conclude that Bryant was discredited if they were of the opinion that he had lied when he told them that he had heard shots, he had seen the deceased lying on the ground in the car park , he had seen the applicant walking away from the body of the deceased and that he had picked up spent shells in the car park. In any

event, the essence and import of the directions adequately informed the jury that they were at liberty to disregard Bryant's evidence completely.

[84] The complaint of the inadequacy of the directions is unjustified. The learned trial judge in clear terms satisfactorily informed the jury as to the approach to be taken with regard to Bryant's evidence. She with due care and diligence assisted them in assessing Bryant's creditworthiness by explaining to them the effect of his evidence. It was for the jury as the tribunal of facts to decide to what extent he was discredited - see **R v Baker et al** (1972) 12 JLR 902.

Grounds 6 - Failure to give adequate directions on self-defence

7 - The evidence of Kinglock being left to the jury in terms excluding the deceased from being armed with a gun

8 - Directions on self defence confusing in dealing with the applicant's statement as part of the prosecution's case

[85] Mr Atkinson contended that the learned trial judge's directions to the jury on self-defence were inadequate as her directions would have left the jury with the impression that the applicant went after the deceased after the attack had ended, she having spoken of the force used by the applicant to respond to the perceived attack. The question of the degree of force and the question of retreat would not be

appropriate in the circumstances of this case, he argued. The learned trial judge, he contended, failed to point out to the jury the difference between the reasonableness of a response to an attack and the matter of continuing to respond after the attack has ended. She ought to have instructed them on the circumstances at the time and whether the applicant had honestly believed he was under attack, he argued.

[86] Miss Llewellyn submitted that the learned trial judge gave extensive and satisfactory directions on self defence and there was no necessity for her to have gone further than she had, as she could not have gone outside of that which was presented in the unsworn statement. A .38 caliber bullet was found at the scene but there is no evidence to account for its presence there and, as a consequence, it could not have been used to represent the presence of a gun. Accordingly, the question of the deceased having been in possession of a gun would be a fanciful possibility, she argued.

[87] The learned trial judge presented to the jury extensive directions on the law of self-defence. At pages 834 – 837, she said:

> "It is for the prosecution to make you sure that the defendant was not acting in lawful self-defence. It is not for him to prove that he was. A person only acts in lawful self-defence if in all the circumstances he believes that it is necessary for him to defend himself and if the amount of force which he uses in doing so is reasonable. So there are two questions for you to answer: Did the

defendant honestly believe or may he honestly have believed that it was necessary to defend himself? A person who is an aggressor who acts in revenge, who knows he does not need to resort to violence, does not act in lawful self-defence.

Now, if you are sure that the defendant did not honestly believe that it was necessary to defend himself, then self-defence does not arise in this case. But if you decide that he was, or may have been acting in that belief, you must consider a second question, and the question is this: Taking the circumstances and the danger as the defendant honestly believes them to be, was the amount of force which he used reasonable? Force used in self-defence is unreasonable and unlawful if it is out of all proportion to the nature of the attack, or if it is in excess of what is really required of the defendant to defend himself. When deciding whether or not the force used by the defendant was reasonable, questions such as these are helpful: What was the nature of the attack (sic) that he perceived them to be? Was a weapon used as he perceived it to be? If so, what sort and how was it used?

You must remember that a person who is acting in self-defence cannot be expected in the heat of the moment to weigh precisely the amount, the exact amount of defensive action which is necessary.

If you conclude that the defendant did more than he honestly and instinctively thought was necessary to defend himself, you may think that it would be strong evidence that the amount of force used by him was unreasonable. If you however feel, if you are sure that the force used by the defendant was unreasonable, he cannot have been acting in lawful self-defence, and therefore, he would be guilty. If the force used

was, or may have been reasonable, then he is not guilty.

Failure to retreat when attacked or when it is possible to do so is not conclusive. It is simply a factor which you take into account in deciding whether it was necessary for the defendant to use force and whether the force used was reasonable. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or pure aggression. It is a matter for you, Mr. Foreman and your members, that you consider the circumstances, all the circumstances that the Crown has presented to you, and you need to address, ultimately, three questions: Before and at the time of the shooting, was the defendant subject to a threat or attack or what he perceives (sic) to be such? If yes, you consider secondly, was the threat or attack such, or perceived to be such, as to justify the use of reasonable force in self-defence? If yes, you consider thirdly, did the force used by the defendant go beyond what could in all the circumstances make an allowance for the emergency of the moment? Could it be justified? If you find it is justified you would be obliged to find him not guilty. If you find that it was not justified then you would be obliged to find him guilty."

At page 868 lines 6 – 14, she said:

"The Crown has to satisfy you so that you feel sure that if any force was used to repel any attack, the force was reasonable. No, the Crown has to prove that the force was not reasonable which would make it unjustified, unlawful, and which would mean that self-defence would not arise.

If you think the force was reasonable, was justified, that would mean that self-defence has been proved, which is the defence here, and

> you would be obliged to find the accused man not guilty."

[88] The learned trial judge's directions on the law of self-defence were not only very exhaustive but also extremely clear. It could not be said that the jury had not been properly directed on this defence. Importantly, there was no evidence of a gun being found in the car park. There was however, evidence of a .38 bullet being found which was not capable of being discharged from the applicant's firearm. This, the applicant contended, had not been brought to the attention of the jury. It is perfectly true that the jury was not told of the bullet. However, this would not be fatal to the conviction. Despite the fact that it was not done, this evidence was before the jury. Clearly, one should not underestimate the capabilities of a jury. They take with them their common sense to the table of deliberation. They heard the evidence and would no doubt have taken into account the fact that a bullet was found at the scene which was not discharged from the applicant's gun and would have also obviously taken into consideration the fact that no gun was found. Consequentially, it would have been for them to have given the matter of the discovery of the bullet such weight as they deemed fit.

[89] It was also Mr Atkinson's contention that the learned trial judge failed to remind the jury that Kinglock stated that he saw something drop but did not know from whom it fell, which, was consistent with the

deceased having had something in his hand. It cannot be taken that it did not fall from the deceased, he contended. The learned trial judge, he argued, having not brought this fact to the jury's attention was clearly inviting them to embark on a speculative venture.

It is true that Kinglock referred to observing something fall. However, he was unable to say from whom it fell. Kinglock saw the deceased point at the applicant, which the learned trial judge did not fail to bring to the jury's attention. The jury would have been cognisant of the fact that Kinglock stated that he saw something fall. The learned trial judge having given adequate and satisfactory directions to them on self defence, it would have been for them to say what weight they ought to attach to this piece of evidence.

Ground 9 - Misstatement of the applicant's defence- misdirection

[90] It was further contended by Mr Atkinson that the learned trial judge effectively withdrew Kinglock's statement from the jury by misstating the applicant's statement which he had given to the police and which had been admitted into evidence. He argued that in so doing, she may have conveyed to the jury the belief that the applicant pursued the deceased and fired additional shots when in fact there was no longer any danger that he was under attack.

[91] The learned trial judge in referring to the applicant's statement to the police, at page 896 of the transcript, said:

> "He said upon seeing this, he immediately reached for his firearm which was to the right side of his waist to the front and which was loaded with a magazine containing about thirteen rounds 9mm cartridges and one round in the chamber. He pointed his firearm in the direction of the man and began to squeeze the trigger. He was unable to say how many shots, how many rounds were discharged from his firearm or indeed if any caught the man.
>
> He said the man ran to the edge of the wall and to the other side where he could not see him. He walked to where he had run, looked around the wall, saw the man standing, still holding the gun in his hand facing him. He said he pointed his gun in the direction of the man and squeezed the trigger again. He does not know how many rounds were discharged or if any caught the man."

As can be readily observed the learned trial judge was essentially quoting from the statement of the applicant which was given to the police. Clearly, nothing in the foregoing can be classified as a misstatement by the learned trial judge which could have induced the jury to entertain the belief that the applicant pursued and shot the deceased when he, the applicant was not under attack.

[92] A further complaint was with reference to the learned trial judge having said at page 935, "He [the applicant] went after that person. He saw the person again and he fired at that person again." This, Mr Atkinson

categorized as a misstatement. Mr Atkinson is, without doubt, mistaken and has clearly taken this direction out of the context of the summation. It is clear that the learned trial judge did not misquote the evidence. She was merely bringing to the attention of the jury what the applicant had said to the police. It could not be said that in so doing, she had withdrawn Kinglock's statement from the jury.

Ground 10 - Misdirection in characterizing the applicant's statement

[93] It was Mrs Samuels Brown's submission that the applicant, in his statement, did not admit any incriminating acts yet, the learned trial judge informed the jury that his statement contained "incriminating parts", but she failed to explain to the jury the meaning of these words and to inform them how to treat them.

[94] Miss Llewellyn conceded that the learned trial judge did not address the jury on the meaning of the words, nor did she tell them how to treat them. She argued, however, that the statement made by the learned trial judge should be considered on the totality of the evidence in that she directed the jury on the presumption of innocence, the burden and standard of proof, and reminded them of the fact that the applicant fired several shots to the back of the deceased while he was running away.

[95] The use of the words of which Mrs Samuels Brown complains, in our view, has no intrinsic merit. The words were well within the context of the evidence as it relates to the statement given by the applicant. The directions given by the learned trial judge on the statement are to be found at pages 894 and 895 where she said:

> "As you review the statement you may notice that it contains both incriminating parts and explanations. You need to consider the whole of the statement in deciding where the truth lies. You may feel that the incriminating parts are likely to be true; for why else would he have made them? Why else would he have said them? You may feel that there is less weight to be attached to his explanations. They have not been made on oath, they have not been tested in cross-examination."

Then at page 935 she said:

> "He said he was confronted by a person with a gun. He fired at this person. This person left. He went after that person, he saw the person again and he fired at that person again. Because remember if the attack had stopped, if there was no longer any imminent danger, that is another factor you consider in determining whether or not the force used was justifiable. If in all the circumstances you find that the force used was justifiable, you would be obliged to find him not guilty. And if you find that it was in excess of what the situation demanded, you will be obliged to find him guilty of the offence of murder."

[96] An examination of these directions reveals that the learned trial judge failed to give an explanation of the words "incriminating parts"

and she did not instruct the jury how to treat the words. Clearly, counsel underrates the ability of the jury to reason and understand and to use their common sense as they are expected to do. The learned trial judge substantially recounted the contents of the applicant's unsworn statement. In the process, she carried out an analytical review of it with reference to the law of self defence. Surely, there would have been no necessity for her to have offered any explanation to the jury as to the meaning or the effect of the words.

[97] Further, the unsworn statement of the applicant must be considered against the background of the evidence advanced by the prosecution which includes the statement given by the applicant to the police. There was, in fact, evidence in that statement which could be regarded as incriminatory in that he stated after his first encounter with the deceased, the deceased went out of sight and he went in the direction towards which the deceased had run, where the deceased again confronted him. The learned trial judge guided the jury on the law of the burden and standard of proof and on more than one occasion throughout her summation and in particular, in dealing with the statement of the applicant, directed the jury on the presumption of innocence on the part of the applicant. The complaint is without doubt unsubstantiated.

Ground 11 - The sincerity of the defence wrongly impugned by the directions of the learned trial judge

[98] It was submitted by Mrs Samuels Brown that the authenticity and sincerity of the defence were wrongly impugned by the learned trial judge by her reference to the applicant's statement as a recitation of what he had told the police.

[99] This, Miss Llewellyn countered by contending that the word "recite" as used by the learned trial judge means "declaim from memory" and even if the word "recite" might have arrested the minds of the jury within the context of the Jamaican parlance, the word was in fact used within a comment made by the learned trial judge and the learned trial judge alerted the jury that they were not bound to accept the comments of counsel or of herself.

[100] The learned trial judge at page 928 said:

> "Thereafter, he told you he made his report to the police; his conscience is clear. He acted to defend himself, that is what he said. It is for you, Mr. Foreman and your members, to attach such weight as you think it deserves. It is not for him to prove anything. He recited from the statement that the police got from him."

Clearly, the foregoing speaks to the applicant's statement which substantially reflects his narrative of the events which he related to the police and of course it could be considered as a mere reiteration as to

what transpired at the time of the incident. The jury is expected to apply their common sense in dealing with this as well as other issues. In our view , there is nothing to show that the use of the word 'recite' went beyond the learned trial judge outlining the applicant's statement and it is without doubt that the jury would have seen it in that light.

Ground 12 - Failure to assist jury as to what parts of evidence amounted to provocation

[101] Mrs Samuels Brown argued that the learned trial judge effectively withdrew provocation from the jury as she did no more than abstractly recite the law on provocation and cursorily referred to the allegation that the deceased went behind the applicant and that Kinglock, who had a bird's eye view, did not see anything in the deceased's hand.

[102] This submission is clearly without merit. The learned trial judge in detail, outlined the law of provocation and clearly directed the jury on the evidence which obviously, could have supported the defence in accordance with the law. At pages 837 – 839, page 935 lines 23 -25 and pages 944 – 947 she said:

Pages 837 – 839

> "In the circumstances of this case, Mr. Foreman and you members, I think I shall also leave to you, for your consideration, whether or not the accused man was provoked because before you can convict this defendant of murder the prosecution must make you sure that he was not

provoked to do as he did. Provocation has a special meaning in this context which I will explain to you. If the prosecution does make you sure that he was not provoked to do as he did he will be guilty of murder. If, on the other hand, you conclude either that he was or that he may have been provoked, the defendant would not be guilty of murder but guilty of the lesser offence of manslaughter.

How then do you determine whether the defendant was provoked or may have been provoked to do as he did? There are two questions here which you will have to consider before you are entitled to conclude that he was or may have been provoked on this occasion. May the deceased's action, conduct, that is the things he is alleged to have said or done, or both, have provoked, that is caused the defendant suddenly and temporarily to lose his self-control?

In this case we have heard it said that the deceased went up behind the accused as he was urinating and used certain words, "pussy hole, don't move," and was – well, the accused said he was pointing a gun at him. The statement of the witness you did not see yourself said he was pointing his fingers at him. Did those actions, those words, could they have provoked, caused the defendant suddenly and temporarily to lose his self-control? Now, if you are sure the answer to that question is no then the prosecution would have disproved provocation and providing that the prosecution has made you sure of the other ingredients of the offence of murder which I have referred to already, your verdict would be guilty of murder.

If your answer, however, to the question as to whether the deceased's actions could have provoked the defendant to suddenly and temporarily lose his self-control is yes, you must go on to consider a next question, and that is, may that conduct of the deceased have been such

as to cause a reasonable and sober person of the defendant's age and sex to do as he did? A reasonable person is simply a person who has that degree of self-control which is to be expected of the ordinary citizen who is of the defendant's age and sex. If you think that the conduct would have been provoking to such a person like the defendant then you must ask yourself whether a person like that might have been provoked to do as the defendant did. When considering the question, therefore, you must take into account everything which was done and/or said according to the effect which, in your opinion, it would have had on an ordinary person.

If you are sure that what was done and/or said could not have caused any ordinary sober person of the defendant's age and sex to do as he did, the prosecution would have disproved provocation, then providing the prosecution has made you sure of the ingredients of the offence of murder, your verdict would be guilty of murder. If, on the other hand, your answer is that what was done and/or said would or might have caused an ordinary person of the defendant's age and sex to do as he did then your verdict would be not guilty of murder but guilty of manslaughter by reason of this provocation."

Page 935 lines 23 -25

"You may also consider, as I said, whether or not the deceased's conduct, that is the things that he is alleged to have said or done or both, whether those things provoked the accused man and caused him to suddenly and temporarily lose his self-control."

Pages 944 – 947

"….So force, in the circumstances, would not be necessary. So, anything happening thereafter would amount to murder, because the person would have been no longer acting in self-

defence. So, that is the law as it relates to self-defence. Very well.

As it relates to provocation, you need to be sure that he was not provoked to do as he did. If the Prosecution does make you sure that he was not provoked to do what he did, then he would be guilty of murder. If on the other hand, you conclude either that he was and that he may have been provoked, then he is not guilty of murder but guilty of the lesser offence of manslaughter. So, you need to consider what it is alleged that the deceased did.

It is alleged that the deceased came up behind the accused as he was urinating and said "Pussy hole, don't move." The accused, in his unsworn statement, said that the person had a gun. Mr. Kinglock, who told you he had a bird's eye view, who saw the gun of the accused, said he did not see anything in the person who came up – didn't see anything in his hand. You have the statement of Mr. Kinglock. He said the handle was being held in a particular position. Those are the things it is alleged that the deceased did.

Now, you have to decide whether you believe that that is what the deceased did, and then you have to decide whether those things could have caused the defendant to suddenly and temporarily lose his self-control, because if your answer to that is no, if you don't think that the things the deceased did could have caused the defendant to lose his self-control, that would mean that the prosecution would have disproved provocation, there was no provocative act and provided that you are sure about the other ingredients of murder, then you will have to find him guilty of murder.

However, secondly, provocation, you need to consider, if you think that the acts done or things said could have been provocative, you ask

> yourselves whether such conduct would have caused a reasonable and responsible person of the defendant's age and sex to do as he did, remembering that a reasonable person is simply a person who has that degree of self-control which is expected of the ordinary citizen of the defendant's age, and sex. If you think that the conduct would have been provocative and if you think that a person of the defendant's age, sex, reasonably responsible would have reacted the way that he did, these are the things you need to determine.
>
> If you are sure that what was done and/or said would not have caused an ordinary responsible person of the defendant's age and sex to do as he did, the prosecution would have disproved provocation. In other words, provocation would not have arisen providing that the prosecution has satisfied you as to the other ingredients, your verdict would be guilty of murder.
>
> On the other hand, if your answer is that what was done, what was said by the deceased would or may very (sic) caused an ordinary reasonably responsible person of the defendant's age and sex to do as he did, your verdict would be not guilty of murder but guilty of manslaughter by reason of provocation. That is the law as it applies to – very well. Is that sufficient?"

It is without doubt that the learned trial judge had not only given proper directions on the law but had also properly left to the jury such evidence which could have amounted to provocation and satisfactorily directed them as to the manner in which they should approach it.

Ground 13 - Judge failed to give directions re restraint of fleeing felon

[103] In this ground Mrs Samuels Brown's complaint is that in the context of the defence, it must be established, on the balance of probabilities that a felony had been committed and the person who is sought to be restrained had committed a felony. She submitted that defence of a right to restrain a fleeing felon arose on the prosecution's case and ought to have been left to the jury.

[104] This submission is wholly unmeritorious. The circumstances of this case would not warrant any direction on the law relating to a fleeing felon. There is no evidence which contradicts the fact that the deceased received shots in his back. The prosecution's case is formidable. The distribution of 11 shots, seven of which are to the lower back of the deceased, indicates a clear intention on the part of the applicant to kill the deceased. As correctly submitted by Miss Llewellyn, a trial judge is not required to instruct the jury on all improbable or impossible defences and even if, at common law, the applicant is entitled to protect himself from a fleeing felon such protection does not aid him in this case, as the deceased was not a fleeing felon.

Ground 14 - Judge withdrew Kinglock's statement from jury when she said only two persons knew what happened.

Ground 15 - Learned trial judge presented Kinglock's statement in an unfavourable light

Ground 16 - Learned trial judge's failure to point out that Kinglock's evidence supported the defence

Ground17- Invitation to jury to consider Kinglock's statement in the context of the doubt cast by Corporal Powell

[105] Mr Atkinson submitted that given the nature of the case, the directions given on Kinglock's statement were inappropriate. The jury ought to have been directed to consider Kinglock's evidence fully and the fact that the learned trial judge stated that only two persons knew what happened, is not an accurate reflection of what transpired that morning, he argued. It was his further submission that the learned trial judge failed to have adequately informed the jury that Kinglock's evidence supported the defence. Significantly, it was argued, she failed to address the evidence that a .38 bullet was found and that Kinglock said he saw something drop and to point out to them that they were deprived of hearing Constable Williams, Kinglock and Sergeant Warren being cross-examined. The learned trial judge invited the jury to give consideration to Kinglock's evidence in the context of the doubt cast on it by Corporal Powell's evidence without reference to the fact that Corporal Powell's evidence was contradicted by Sergeant Warren's evidence, he further submitted.

[106] We will first deal with the contention that the learned trial judge effectively withdrew Kinglock's statement from the jury by stating that only

two persons knew what happened on the morning of the incident. The submission is misconceived. This is obviously a comment by the learned trial judge and it is without doubt true that only the applicant and the deceased would have been the persons to speak comprehensively as to the events. The learned trial judge fully addressed the contents and significance of Kinglock's statement and told the jury how to treat it. The prosecution placed reliance on circumstantial evidence, there being no witness who could speak to everything that transpired in the car park that morning. Logic dictates that the only two persons who would be fully cognizant as to what occurred that morning, would surely be the applicant and the deceased. It could not be said that the learned trial judge in making the comment would, in any way, have diverted the minds of the jury from the full effect of Kinglock's statement.

[107] We now turn to the complaint that Kinglock's statement was presented unfavourably. The learned trial judge pointed out to the jury that he had a bird's eye view of the car park, had seen the deceased point a finger at the applicant saying at the time, "Pussy hole don't move". She also brought to their attention that Kinglock said that the applicant had a gun but he did not see the deceased with a gun and that the men went out of sight after they went around a wall.

[108] The learned trial judge did not fail to direct the jury that Kinglock's evidence was by way of a statement and instructed them as to its effect. Those directions were couched in the following manner at page 907 when she said:

> "Mr Foreman and your members, the accused is entitled to have his case assessed in the light of all available evidence, and as such, in the interest of fairness, the prosecution has put forward for your consideration, the statement of Michael Kinglock. You have to analyse it and see what you make of it, remembering your duty as judges of facts. There is a potential risk of relying on a statement by a person you have not seen or having (sic) been able to assess and who has not and have (sic) never been tested by cross-examination. I therefore must ask you to scrutinize the evidence contained in the statement with particular care. You should consider it in the context of all the other evidence. You notice if there are any discrepancies between this and the oral evidence of all the other witnesses. As I review the statement with you, I will direct your attention to any, if I see them, for your consideration. If I don't mention any that you recall, give it such weight as you think it deserves.
>
> You need to see what you make of the statement, see what you accept of it, what you reject of it; but you must not look at it in a vacuum."

She then went on to state at page 915:

> "So, that was the statement of Mr. Kinglock for your consideration against the background of the other evidence presented by the Crown. You consider that against the background of all the other evidence presented to you by the Crown of Mr. Grant, as agreeing to the words

> spoken in that statement. Mr. Grant having fired, the person having moved off, he went in that direction of the person and fired more shots. Mr. Kinglock said he heard only one set of shots. Mr. Kinglock said from where he was on the building, he could not see what happened after they went off."

[109] The directions of the learned trial judge are adequate. They cannot be said to be unfair. No fault can be ascribed to the learned trial judge as to her treatment of Kinglock's statement.

[110] There remains to be considered the complaint that the learned trial judge inferentially invited the jury to disregard or place little or no weight on Kinglock's evidence. Kinglock was a witness as to fact and the learned trial judge gave adequate directions on his evidence. The evidence given by Sergeant Warren, the investigating officer, and Corporal Powell, who went on the scene after the incident, as well as Constable Williams to whom the applicant made the report, was formal. Sergeant Warren said that Kinglock's statement was taken at the Halfway Tree Police Station while Corporal Powell said it was taken at the scene. There has been no challenge to the statement. Clearly it is of no moment as to where it was taken. Contrary to the submission that the learned trial judge failed to address the question of the inability of the jury to hear Kinglock, Constable Williams and Sergeant Warren being cross examined, she clearly and definitively pointed out to the jury the significance of their not having the

benefit of hearing these witnesses being tested under cross-examination. The learned trial judge having comprehensively and correctly directed on Kinglock's evidence, it would have been unnecessary for her to have given any further directions.

Ground 18 - Learned trial judge failed to give adequate directions on how to treat the statement of the applicant

[111] It was contended by Mrs. Samuels Brown that, on the prosecution's case, the applicant spoke to the deceased being armed with a firearm, yet the learned trial judge failed to instruct the jury that in assessing the statement of the applicant, it formed a part of the prosecution's case.

[112] This submission is devoid of merit. There is no dispute that the statement of the applicant given to the police was admitted as part of the prosecution's case. In that statement, he spoke of the deceased being armed with a gun. This, the learned trial judge dealt with in the context of reviewing the evidence in its totality. Apparently, counsel has overlooked the fact that the learned judge gave accurate directions on self-defence and provocation to the jury. This clearly indicates that she had left for their consideration the fact that the applicant had stated that the deceased was armed with a firearm. It would not have been incumbent on her to have expressly informed the jury that the statement formed a part of the prosecution's case. They would have been aware

that this was so. They were aware that the statement was put in as part of the evidence adduced by the prosecution. They were given directions as to how to treat the unsworn statement. In considering the unsworn statement they would have realised that it should be balanced against the statement given to the police.

[113] Consequently, the learned trial judge having given full, ample and adequate directions on the relevant defences, correctly left the issues for the jury's consideration for them to give such weight to the statement as they thought fit. In all the circumstances, it cannot be said that the applicant's statement to the police was not brought to the jury's attention in assisting them in their deliberations in arriving at a verdict.

Ground 19 - Learned trial judge's failure to adequately direct on circumstantial evidence

[114] Mr Atkinson submitted that the prosecution's case was largely dependent on the evidence of Bryant, the police officer, the medical doctor and the ballistics expert. Bryant was discredited but Kinglock's evidence supported the defence, he argued. However, the directions to the jury were limited to Kinglock's statement, and the applicant's statement to the police but the entire circumstances were not put to the jury, he argued. The learned trial judge, he contended, failed to instruct the jury that if the circumstantial evidence does not fall in one direction then they should acquit the applicant. The jury, he argued, did not

believe Bryant but they, having disregarded Kinglock's evidence and that of the applicant, were without assistance as to how they should treat the rest of the evidence.

[115] Miss Llewellyn argued that the learned trial judge's directions on circumstantial evidence were adequate and helpful and although she did not strictly follow the **Hodge's** directions, the jury could not have failed to comprehend the nature of the circumstantial evidence which they should examine for their determination of the facts to be proved and the inferences to be drawn therefrom.

[116] The learned trial judge, in dealing with the matter of circumstantial evidence, at page 822 lines 9-21, stated:

> "Now, one witness may prove one thing and another proves another thing. And these things taken together must prove the charge to the extent where you feel sure. If taken together they lead to one conclusion and that conclusion is the guilt of the accused, then and only then can you say he is guilty. If the circumstances relied on do not point in one direction and one direction only, if it falls short, if it does not satisfy that test, if it leaves gaps, then it is (sic) no use at all. You should however be careful to distinguish between arrival at conclusions based on reliable circumstantial evidence and not mere speculation."

At page 916 lines 15-19, she said:

> "I suggest to you that it is important in this case, that nothing should be considered on its own, but in the context of everything else that you

> have heard over the course of these two and-a-half weeks."

[117] As prescribed by the law, an accused can be convicted on circumstantial evidence. However, before conviction, there must be cogent evidence to show a series of circumstances under which the crime was committed, which points to one conclusion. In **R v Bailey** (1975)13 JLR 46, cited by Mrs Samuels Brown, it is held that it was a settled rule of practice that where the Crown relies on circumstantial evidence, to prove the guilt of an accused, the jury should be directed in keeping with the rule in **Hodge's** case.

[118] **Hodge's** rule is a rule of practice and not a rule of law. In **McGreevy v DPP** (1973) 57 Cr App Rep 424, the House of Lords, on a point of law to be certified, considered the following:

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

[119] Lord Morris of Borth-y-Gest placed the rule in its proper perspective

when he said at page 436:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence, they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that, if a fact which they accept is inconsistent with guilt or may be so, they could not say that they were satisfied of guilt beyond all reasonable doubt."

[120] In **Guerra and Wallen v The State No. 1** (1993) 45 WIR 370 Bernard C.J. said:

> "As a matter of fact it is clear law that even when a case is based on circumstantial evidence no special direction is required."

[121] The fact that the formulation of the direction within the dictates of **Hodge's** case is not a rule of law is further supported by the dictum of

Harrison JA, as he then was, in **R v Anthony Rose** SCCA No 105/1997, delivered 31 July 1998 when he said, at page 12:

> "Athough the Learned Trial Judge did not follow studiously, the pattern of direction in **Hodge's** case we are of the view that the jury could not have failed to understand what was the nature of the circumstantial evidence they were required to examine in order to determine what facts were proved and the inferences they could draw from such facts. There was no room for the jury to speculate, as complained of by counsel for the applicant."

[122] It is perfectly true that the learned trial judge had not faithfully adhered to the **Hodge's** directions. The rule requires a trial judge to particularize with specificity every aspect of the circumstantial evidence, informing the jury of the possible inferences as are capable of being drawn from such evidence. This practice, although useful, does not necessarily require that a trial judge should adhere to it strictly. **R v Anthony Rose** shows that in giving directions on circumstantial evidence, it is only desirable that there be adherence to the essence of the **Hodge's** case.

[123] It is clear from the foregoing, that although the directions given by a trial judge may not fully accord with the formula laid down in **Hodge's** case, the failure to strictly adhere to the ***Hodge's*** directions does not render a summation defective. The question therefore is whether the approach adopted by the learned trial judge was sufficient to alert the

jury that they should be satisfied that each portion of the evidence must lead to one conclusion.

[124] The learned trial judge directed them on the law of circumstantial evidence. She brought to their attention that aspect of Bryant's evidence which remained unchallenged. She reviewed Kinglock's and Williams' statements and told the jury how to treat them. They were informed of Sergeant Warren's evidence by way of his depositions and they were informed how they should treat it. Instructions were given to them with respect to the applicant's statement to the police. They were instructed as to the evidence of the doctor as well as that given by the ballistic expert and the applicant's unsworn statement.

[125] We fully endorse the dictum of Harrrison JA (as he then was) in **R v Anthony Rose** and are firmly of the view that the jury would have understood the essence of the circumstantial evidence upon which they were called to deliberate in order to decide such facts as were proven. The failure of the learned trial judge to have strictly conformed to the **Hodge's** directions would not, in our view, amount to a miscarriage of justice so as to render the conviction bad.

Ground 20 - Summation in its totality unfair

[126] This ground is wholly unsustainable. The learned trial judge left with the jury the relevant law and she gave adequate directions thereon.

Kinglock's statement was admitted into evidence. This clearly could have inured to the applicant's benefit. There would have been the possibility that the jury could have accepted it and found in favour of the applicant. This having been said, we are mindful that if Kinglock, Constable Williams and Sergeant Warren were available at the trial, the defence would have had the occasion to cross-examine them. The jury would have had the opportunity to observe them and to have heard them being tested under cross-examination. However, the fact that this had not materialized, the learned trial judge would not have been prevented from putting before the jury such evidence as was adduced from them. There were the unchallenged parts of the evidence of Bryant, the evidence of Kinglock, evidence by way of the applicant's statement to the police, Sergeant Warren's depositions, the medical evidence revealing that the deceased received 13 shots, 11 of which were to his back, seven of which were to his lower back and the evidence of the ballistic expert.

[127] The learned trial judge faithfully reviewed and analysed the evidence, instructing the jury how to apply the law to the evidence. We are satisfied that in her review of the evidence, she properly guided the jury as to their approach to it. As earlier pointed out, this is a court of review and where the crucial issues between parties are issues of fact, the appellate court will not interfere unless the trial judge is shown to be

palpably wrong: see **R v Lao**; **Eldemire v Eldemire** (1990) 27 JLR 316; and **Industrial Chemical Company (Ja.) Ltd v Ellis** (1986) 35 WIR 303. In our review of the summation as a whole, we are of the opinion that there is nothing therein from which we would regard any miscarriage of justice to have resulted sufficient to warrant the conviction being disturbed.

Ground 21 - The learned trial judge misdirected the jury as to how to deal with previous inconsistent statements

[128] It was Mrs Samuels Brown's submission that the learned trial judge in reviewing the evidence of Corporal Wynter failed to direct the jury that where a witness admits under cross examination the truth of a previous statement, the statement becomes evidence in the case.

[129] It cannot be denied that, as a matter of law, where a witness accepts the truth of a previous inconsistent statement, the statement becomes evidence in the case. However, the witness Corporal Wynter did not admit that he had made a previous inconsistent statement contrary to his evidence in court in that he had, on a prior occasion, said that on his arrival at the scene, he saw a man running to the side of the building. Under cross-examination, he did not accept that it was the truth. It was put in at the trial as an exhibit.

[130] The learned trial judge, in reviewing Corporal Wynter's evidence

gave clear directions on the matter by saying at page 848 lines 16 – 25:

> "He was shown a certain document and he said he saw those words printed there but he maintains that what is written there doesn't make sense to him. It wouldn't make sense to have said that. He cannot recall saying that. It is there but he just couldn't recall, so it was put in as an exhibit for what it is worth, for your consideration. And that was basically the substance of Corporal Wynter's evidence as I have chosen to review it with you at this time.
>
> It is significant, from his evidence, to consider where it was that he saw this man."

It can be seen from the foregoing that the learned trial judge brought to the jury's attention the fact that the witness did not admit to making the previous inconsistent statement and that it should be treated as a part of the evidence. It cannot be said that the learned trial judge had not left this to be considered by the jury as part of the evidence, proffered by the Crown.

Ground 22 - Learned trial judge's directions on character incomplete

[131] It was Mrs Samuels Brown's submission that the learned trial judge misdirected herself on the law when dealing with the evidence of character in that the applicant's witnesses spoke to his reputation as well as his character but the learned trial judge failed to deal with the matter of his reputation. Further, she argued, the learned trial judge

made reference to a pre-trial statement instead of the unsworn statement.

[132] It is undeniable that an applicant's good character is of probative value and where credibility is an issue, a good character direction is relevant. The applicable principles with respect to a good character direction have been clearly established by the authorities. A trial judge is under a duty to inform the jury as to the approach they should adopt in considering character evidence. Where the issue of the character of an accused is raised, in keeping with the standard directions as proposed by the authorities, the jury must be instructed that it is pertinent to his credibility and propensity to commit the offence with which he has been charged. In **Aziz** [1995] 3 WLR 53 Lord Steyn in dealing with the question of good character directions at page 60 said:

> "It has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of the trial judges to decide whether to give directions on good character led to inconsistency and to

> repeated appeals. Hence there has been a shift from discretion to rules of practice."

[133] In the instant case, evidence of the applicant's good character was given. The learned trial judge at pages 929 - 930 dealt with the character evidence in this manner:

> "So, you have heard that he is a young man of good character , not just in the sense as he told you, that he is law-abiding, but you heard the witness speak of the positive qualities that he has. Of course, good character cannot by itself provide a defence to a criminal charge, but it is the evidence which is before you, you should take into account in favour of the accused and consider the following: In the first place, although he has not spoken to you, given evidence before you, he has, as you know, given an explanation to the police. In consideration of that explanation and the weight you should give it, you should consider the evidence made by the persons that testified of his good character and take that into account to decide whether you believe him. In the second case, it is a fact that a person of good character may mean that he is less likely than others to have committed a crime like this."

[134] It is clear that the learned trial judge in issuing directions as to the character of the applicant addressed the two limbs of the character direction as proposed by the authorities. She did not fail to make specific reference to the applicant's unsworn statement and in the process appropriately directed the jury as to the impact of the applicant's good character on his credibility and the propensity to commit a crime. In

giving the jury assistance as to how to treat the evidence of character, the directions would have clearly included the applicant's reputation. This ground is wholly devoid of merit.

[135] For the foregoing reasons, we dismissed the application for leave to appeal against conviction and sentence.