[2016] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 37/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

DELROY LAING v R

Robert Fletcher for the appellant

Mrs Sharon Milwood-Moore for the Crown

29 September, 1, 3 October 2014 and 18 March 2016

MCDONALD-BISHOP JA (AG)

[1] This is an appeal by Mr Delroy Laing, the appellant, against his conviction and sentence in the Circuit Court for the parish of Trelawny on 22 June 2012. He was convicted of the offence of causing grievous bodily harm with intent. The particulars of that offence were that on 22 September 2009, he caused grievous bodily harm to Baron Tucker, the complainant, with intent to cause him grievous bodily harm. He was sentenced by the learned trial judge to eight years imprisonment at hard labour.

[2] The appellant applied for leave to appeal his conviction and sentence, which was considered on paper by a single judge of this court. The grounds of appeal advanced on the application were (1) "verdict unreasonable" and (ii) "sentence excessive". On 5 May 2014, the single judge granted leave to appeal on the basis that "it was arguable whether the learned trial judge did not adequately direct the jury on self-defence".

[3] Between 29 September 2014 and 3 October 2014, we heard this appeal. At the commencement of the hearing, Mr Fletcher, who appeared for the appellant, sought and obtained the leave of the court to abandon the original grounds of appeal that were advanced on paper before the single judge and to argue instead six supplementary grounds of appeal. These supplementary grounds were as follows:

1. The directions of the learned trial judge on the appellant's defence of self-defence were inadequate thereby denying him a fair and balanced consideration of his case and a fair chance of an acquittal.

2. The learned trial judge erred in law in his directions to the jury on how to treat the appellant's unsworn statement.

3. The learned trial judge spent an inordinate amount of time in his directions demonstrating the implausibility of the appellant's account as well as making comments on collateral matters which devalued the appellant's account and denied him a fair and balanced consideration of his case.

4. The learned trial judge improperly exercised his discretion to keep two jurors who admitted conversing with the mother of the complainant after they had been empanelled.

5. The sentence is manifestly excessive.

6. The absence of a character direction, at least on the issue of propensity, weakened the fairness of the trial and denied the appellant a fair consideration of his case.

[4] Following the helpful submissions of counsel on both sides, we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice, ordered a new trial. We promised then to put our reasons for that decision in writing. Admittedly, due to a regretted administrative oversight, we have failed to do so expeditiously and for that we profusely apologise. Here are our reasons for that decision.

The background

The prosecution's case

[5] The conviction of the appellant arose out of facts that were put forward by the prosecution as follows. On 22 September 2009, the appellant was a security guard employed to the Starfish Hotel in the parish of Trelawny. The complainant was a craft vendor whose shop was situated on a section of the beach adjacent to the Starfish Hotel property. On that date, at about 5:30 pm, the complainant closed his shop and

was walking along an area of the beach adjoining the hotel property in the company of three women.

[6] While walking along the beach, the complainant saw the appellant and another security guard run towards him from behind a hotel boat that was docked on the beach. The appellant had a stone and a long stick and his colleague had a knife and a long stick. The appellant threw a stone at the complainant resulting in serious injuries to his left leg. The appellant and his colleague proceeded to beat the complainant in his head and all over his body with the sticks they had, resulting in bodily injuries to him. The complainant had not done or said anything to trigger this sudden attack by the appellant and his colleague. Both parties knew each other before the day in question, and prior to that date, the appellant had threatened the complainant twice.

[7] For completeness, Dr Phyo Kyaw, a medical doctor, testified that he examined and treated the complainant on the same day at the Cornwall Regional Hospital. He observed injuries to the complainant's left leg, left shoulder, head and right hand. The injury to the left leg was, however, the major injury and, in his opinion, the injuries were consistent with being inflicted by a blunt object such as a stick or a baton.

[8] Also, on the same day, Constable Leo Barnes, who was then stationed at the Falmouth Police Station, received a report from the complainant concerning the incident and he observed the complainant with a cast to his left leg. He commenced investigations and subsequently, on the instructions of his superior officers (he being a probationer at the time), served summons on the appellant to secure his attendance at

court. The appellant was advised of the report made against him by the complainant but upon being cautioned, he made no comment.

The appellant's case

[9] The appellant's response to the prosecution's case was embodied in an unsworn statement from the dock. He raised self-defence. In summary, his account was as follows. Prior to the date of the incident, there was a security concern with problems on the hotel beach presented by persons on the neighbouring Burwood Beach. The complainant was a vendor on that beach. A list of names was given to the security personnel concerning persons who were allegedly harassing the hotel guests. The complainant's name (his alias) was at the top of that list. As a result, security personnel were placed at the border between Burwood Beach and the hotel beach. On the day in question, he was on duty at that section of the hotel beach. At about 3:00 pm, he saw some craft items on the border between the hotel and the public beach. He asked to whom the items belonged and the complainant indicated they were his. He told the complainant to remove the items and he refused to do so. He called his supervisor who came and chased the complainant from the hotel beach, whereupon, the complainant threatened him saying, "Laing, yuh a stop mi food an mi must kill yuh".

[10] Later, at about 5:30 pm, he was on duty at the hotel beach when he saw the complainant among a group of persons walking towards the hotel beach. He noticed the complainant with the ladies and the complainant had a stone in his right hand and a knife in his left hand. He had his baton in his hand. The complainant threw the stone,

which caught him on his right arm and then attacked him with the knife. He hit the complainant on his knee based on his training as a security guard that in order to defend himself he must not hit anyone in the face. The complainant was still advancing towards him with his knife in his hand and he swung his baton in an attempt to ward him off. His colleague was trying to take the knife from the complainant. He subsequently realised that he had received injuries to his hands. He received medical attention from the hotel nurse and later at the St Ann's Bay Hospital. He made a report at the police station before he was taken to the hospital.

Ground 1

Inadequate directions on self-defence

[11] The appellant's complaint in this ground was that the learned trial judge had failed to properly instruct the jury on the defence of self-defence that was raised as an issue on his case. According to learned counsel, although the summation is replete with references to self-defence, the "overwhelming majority of these references repeated the direction that the prosecution had a duty to show that the appellant did not act in lawful justification in causing injury to the complainant". He noted that nowhere in the summation did the learned trial judge give "a wholesome and complete definition or explanation of the concept of self-defence providing the jury with a composite idea of the elements which should guide them in their consideration of the issue", which according to him, is the test to be applied for self-defence as laid down by the Privy Council in the well known case **Solomon Beckford v R** [1988] AC 130.

[12] According to Mr Fletcher, "without this definition or a composite explanation allied with the fragmented and incomplete references to self-defence and the prosecution's duty, the jury must have formed the view that a fair consideration of the case lay with satisfying themselves whether the prosecution had negative self-defence on its case alone".

[13] He maintained further that "honest belief as an ingredient of the test for self-defence must come to some extent from a more robust presentation of what the appellant was saying". In this regard, he said, the jury was "severely underserved as the summation was weak in its regard for the appellant's side of the story, much time being spent on demonstrating to them the implausibility of the appellant's case".

[14] Mrs Milwood-Moore, for the Crown, was not convinced that the directions of the learned trial judge on the issue of self-defence were inadequate. She submitted, in response, that this ground of appeal should fail because it was not necessary for the learned trial judge to have reproduced, verbatim, directions on the issue of self-defence as laid down in the case **Beckford v R**. She maintained that, as long as the directions adequately invite the jury to consider the law as it relates to self-defence, a strict, inflexible approach as to how this is communicated to the jury is not necessary.

[15] She pointed the court to several aspects of the judge's directions, which she argued had served to demonstrate that the learned trial judge had fulfilled his duty to the jury. She highlighted in this regard his directions on (i) honest belief in relation to self-defence; (ii) the law as it relates to trespassers; (iii) the duty of the prosecution;

and (iv) the submissions of the appellant's counsel at trial as it relates to a comparison between the unsworn statement of the appellant and the complainant's testimony. In her view, the learned trial judge had properly directed the jury to consider the defence as one that was available to the appellant. Therefore, while he did not give the directions on self-defence in accordance with any particular formulation or used the words employed in **Beckford v R**, his directions were adequate and fair.

[16] We have noted that the directions of the learned trial judge were not in keeping with the conventional terms usually used by trial judges, as adopted, from time to time with necessary modification, from the traditionally utilised Judicial Studies Board Bench Books. However, we do accept, as contended by Mrs Milwood-Moore, that the learned trial judge was not bound or required to reproduce in a textbook fashion or in an inflexible manner any formulaic directions on self-defence. In one of the classic pronouncements as to what is required to be said by a trial judge in summing-up on the issue of self-defence, Lord Morris in **Palmer v R** [1971] AC 814, in delivering the opinion of the Privy Council, stated, at pages 831 and 832:

> "In their Lordships' view, the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary but everything will depend upon the particular facts and circumstances. Of these a jury can decide.
> …

> There are no prescribed words, which must be employed or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence..."

[17] The pivotal question for the consideration of this court was whether the summing-up of the learned trial judge was a clear exposition on the concept of self-defence in law in relation to the facts that the jury had to decide. Did it attain the required degree of clarity and precision in capturing all the requisite elements of the defence, so as to assist the jury in understanding its application to the facts of the case before them?

[18] A close analysis of the learned trial judge's direction on self-defence has revealed that from a very early stage in his directions to the jury, he had recognised that self-defence was a live issue in the case. He then explained the concept within the context of the burden and standard of proof. He stated:

> "Now this issue of self-defence now, is for the Prosecution -- to understand it is for the Prosecution to make you feel sure that Mr. Laing was not, was not acting in lawful self-defence. He, Mr. Laing, does not have to prove he was acting in self-defence, it is for the Prosecution to prove there is no self-defence in this case. And then when we go through the evidence I will indicate to you those parts of the evidence which, if you accept from the Prosecution, may mean that you may say there is no self-defence in this particular case."

[19] The learned trial judge was to reiterate at several points in the summing-up his directions as to the burden and standard of proof as they relate to the issue of self-defence. He was at pains to ensure that the jury was mindful of whose duty it was to prove self-defence and the extent to which it must be proved before they could convict.

[20] Apart from those occasions, when he repeatedly treated with the burden and standard of proof as it related to self-defence, these were the directions he gave on self-defence upon his review of the prosecution's case:

> "…And so, if you accept that version of the Prosecution's case or that interpretation of it from an evidential standpoint there is no self-defence in the case.
>
> **…**
>
> What the Prosecution is saying there is no evidence before you, if you accept Mr. Tucker, that Mr. Laing honestly believes he was defending himself. So, that is really the, as I tell you, the significance of this narrative about walking across the beach with the ladies, not attacking anybody, nothing at all. So, what the Prosecution is saying, if you are walking across the beach why would anybody believe you are attacking anybody. So, he could not, that is Mr. Laing, could not honestly believe that he was under attack or was about to be attacked.
>
> So, on this business of self-defence if you believe that Mr. Laing was or may have been acting in lawful self-defence he is entitled to be found not guilty on any count of the indictment. And I tell you why in a moment, because the Prosecution is to prove Mr. Laing's guilt. It is for the Prosecution to prove that he was not acting in lawful self-defence. It is not for him to prove he was acting in self-defence, has done it, but it is for the Prosecution to say there was no self-defence and this they do by putting the evidence before you. The evidence they have put before you, man walking across the beach with three women, not attacking anybody, not about to attack anyone and therefore Mr Laing could not have believed that he was attacked or about to be attacked by Mr. Tucker. So, that is what the Prosecution needs to prove, he was not acting in lawful self-defence.
>
> **…**
>
> The first order of business when you retire is you ask yourself has the Prosecution made me, 'me' individually and

> collectively, seven of you, made me feel sure that Mr. Laing was not acting in lawful self-defence. So, we talking about a road map now to decision, that is what we talking about. So, that's the first question. If you say I am not sure don't waste time, you know, come back and say judge not guilty on Count One, not guilty on Count Two, because it simply means that you not sure whether he was acting in self-defence or not so nuh hot up yuh head about anything else. So, first, yes, has the Prosecution made me feel sure that Mr. Laing was not acting in lawful self-defence?
>
> That is to say, do I believe Mr. Tucker so that I am convinced and feel sure that he was walking across the beach with these three ladies, not attacking a living soul. If that is true and you are sure about it self-defence gone through the window and the only thing left for you now is to say well, now that self-defence is gone the remaining question now is, is he guilty on Count One, or is he guilty on Count Two;"

[21] Having directed the jury in those terms, the learned trial judge, later on in the summing-up, proceeded to direct the jury's attention to the appellant's unsworn statement. He narrated the account of the incident as given by the appellant and then said to the jury:

> "So, the picture that is being painted here is that having hit Mr. Tucker, Mr. Tucker doesn't go down he is advancing with the knife, he is swinging the baton then reinforcements come in the form of Mr. Young and Mr. Henry, then Mr. Henry now was trying to take the knife from Mr. Tucker.
>
> So it would seem to suggest now that Henry has now come to engage Tucker, but at that point, Mr. Young said to me, you are bleeding, when I looked on my right hand it was swollen. He then said, go to the nurse and get some attention, that is, the hotel nurse. When I was at the nurse, the nurse was cleaning the wound. It was at that time I found out I got cut from the knife on the left arm. Nurse said, I must seek further medical treatment at hospital. Pause here, now. What he is saying to us, not only did Mr. Tucker hit him with the stone, he advanced towards him

> with the stone, he advanced towards him with the knife and gave him a cut with the knife. So he is saying he was actually under attack."

[22] There are several interesting features of the learned trial judge's directions, up to that point that have managed to detain the attention of this court in considering the merits of the appellant's arguments in respect of this ground of appeal. Firstly, the learned trial judge directed the jury on the issue of self-defence without any explanation of the concept in law and how it would operate within the context of the case on a whole. Secondly, he addressed the issue of self-defence as it relates to the case advanced by the prosecution only and then directed the jury on the verdict opened to them if they were satisfied to the extent that they were sure on the complainant's evidence that the appellant was not acting in lawful self-defence. Regrettably, up to that point, the learned trial judge had not yet put before the jury the appellant's unsworn statement on which the issue had been raised. In other words, he had not explained the defence by reference to the material facts of the case, which would have included, more than anything else, the appellant's case, he being the one who alleged that he was defending himself from an attack. Self-defence did not arise on the case for the prosecution for there to have been a one-sided examination of the facts and for the jury to give consideration to a verdict at that point.

[23] Indeed, it was a bit startling to see that the learned trial judge had given detailed instructions to the jury as to the verdicts that were open to them on the indictment, long before he had directed their attention to the case for the appellant. From the structure of the summing-up, it would appear, at first blush, as if the learned

trial judge had forgotten the appellant's case and its relevance to the question of self-defence and the verdict to be returned. His approach lends strong credence to the complaint of Mr Fletcher that he had invited the jury to say whether the prosecution had negatived self-defence purely on the evidence of the complainant alone.

[24] It is also noted that the learned trial judge, having pointed out what would have been the gravamen of the appellant's defence that he inflicted the injuries on the complainant when he was under attack and that he actually sustained injuries from the attack, again, failed or omitted to explain the concept of self-defence in law and to explain it by reference to the appellant's case. Having not yet done so on the review of the prosecution's version of the incident, he would have been presented with the perfect opportunity to do so at the point in the summing-up when he was focusing attention on the appellant's case. What he did instead was to proceed to direct the jury how to evaluate the unsworn statement in this way:

> "And in deciding the weight, you look at the internal logic of the statement to see if it makes sense. And on the critical part of his statement where he is saying, Mr. Tucker came on to the beach, stone and knife in hands, hit me with stone, I hit him with baton. Then he advances or continues to advance on me with this knife. I am swinging the baton. Mr. Young and Mr. Henry both came. And then now, Mr. Henry tries to disarm him. Does that make sense?...So you will have to assess his statement. Now, if you form the view that his statement makes absolutely no sense whatsoever, you give it zero weight."

[25] He said nothing more about the appellant's case within the context of the pertinent elements that constitute self-defence. In sum, he did not focus on the issue of self-defence on the appellant's case as he had done on the prosecution's case. It is,

indeed, true as Mr Fletcher noted, that the learned trial judge was, seemingly, more concerned with pointing out to the jury the implausibility of the appellant's case than in conveying to them the meaning of self-defence on which the appellant was relying.

[26] Mrs Milwood-Moore, in her valiant effort to satisfy us that the learned trial judge had discharged his duty satisfactorily in explaining self-defence to the jury, pointed to, among other things, an aspect of the summing-up where he addressed the issue of the treatment of a trespasser by a security guard. This is what he stated:

> "So, even assuming if you were to say that Mr. Tucker was a trespasser, no law gives any security officer the right to inflict these injuries, except in the circumstances prescribed by law. So there is no notion that because you are a trespasser you can be set upon and beaten. There's no such law. So don't get it into your brain that because – that is if you believe that Mr. Tucker was one of those persons trespassing on Starfish property, it gives any security guard there the right to beat him up. Not so.
> …
>
> What the law says - - allows you to do with trespassers, is to use force if necessary to remove them from your property. If the person attacks you is a different matter, but ordinarily the fact that a man is trespassing on your property does not give you the right to say come here man, I am going to beat you half to death. So, there is no such principle. Yes, you can remove trespassers from your property but the right to remove trespassers from your property does not also give you the right to beat him up. So, let us get that very clear… If he attacks you then you can use force to defend yourself against the attack. So, so this idea if any of you had it, that trespassers can be treated any old way, not so. So then, let us continue."

[27] After an assessment of those directions within the context of the summing-up as a whole, we found ourselves constrained to say that we could not accept that that

aspect of the summing-up as well as the other portions highlighted by Mrs Milwood-Moore (which have already been detailed), either singly or collectively, constituted adequate directions on lawful self-defence as it would have arisen on the facts of the case. Given the case presented by the appellant, more would have been required from the learned trial judge to properly put the defence before the jury for their consideration. While the prosecution's case was that the complainant was walking on the area of the beach passing alongside the Starfish Hotel, when he was suddenly pounced upon by the appellant and his colleague and beaten, the case for the appellant was diametrically opposed. According to him, the complainant, having threatened him earlier, was approaching where he was and without anything being done or said at the material time, attacked him and threatened bodily injury that prompted him to defend himself. So, on the appellant's case, no issue arose that the incident had occurred at a time when he was forcibly removing the complainant from the property as a trespasser.

[28] It was observed that the direction as to a trespasser was given during the context of the review of the prosecution's case only and so there was no corresponding reference to the appellant's case within the context of the law of self-defence at any time during the course of the summing-up. The focus on the appellant's case was, seemingly, more on demonstrating the implausibility of it.

[29] In fact, even the reference by the learned trial judge to the notion of "honest belief" was during the course of directing the jury on what the prosecution was saying. He made no such reference to the concept in drawing their attention to what the

appellant was saying. The learned trial judge, in the context of the facts of this case, should have clearly conveyed to the jury, in terms that would reflect the fundamental principle underlying the defence that in a situation in which a defendant honestly believes it is necessary to defend himself, the use of such force as is reasonably necessary is not unlawful.

[30] So, in keeping with the classic test of self-defence propounded by the Privy Council in **Beckford v R**, it was for the jury to decide: (a) whether the appellant believed or may honestly have believed that it was necessary to defend himself; and, if so, (b) whether the force he used was reasonable. The jury was to have had regard to all the circumstances, including the appellant's explanation of what he did and why he did it. At the end of the day, they were required to judge what the appellant did against the background of his honest belief and on the totality of the circumstances, and with the assistance of the learned trial judge, determine whether self-defence should avail the appellant as a matter of law. Their judgment about those matters was to depend upon their view of the facts of the entire case, having obtained proper directions in law from the learned trial judge.

[31] We found that the directions of the learned trial judge did fall short of being a clear, coherent, composite and balanced exposition of the essential elements of the law of self-defence that should have been brought to the attention of the jury for a full and fair consideration by them of all the relevant facts of the case. At the end of the day,

the directions relating to self-defence, in our view, were inadequate and therefore unsatisfactory. This ground was found to be of considerable merit. It succeeded.

[32] It is considered important to indicate that the directions on self-defence were not examined in isolation from the overall summing-up. When those directions were viewed alongside other aspects of the learned trial judge's treatment of the case in its entirety, and, particularly, of the unsworn statement of the appellant (the subject of complaint in ground two), it was realised that the cumulative effect was such as to cast serious doubt on the overall fairness of the trial and on the safety of the conviction. An examination of ground two is now warranted.

Ground 2

Improper and unfair treatment of the unsworn statement

[33] The complaint of the appellant as contained in ground two was that the learned trial judge erred in his directions to the jury as to how to treat with the unsworn statement. It is necessary to first establish the main planks of the learned trial judge's directions on this issue.

[34] The learned trial judge gave a modified version of the direction prescribed by the Privy Council in **Director of Public Prosecutions v Walker** [1974] 1 WLR 1090; (1974) 12 JLR 1369, which is now commonly referred to in our courts as "the Leary Walker Direction". After doing so, he indicated to the jury that the appellant had a right to make an unsworn statement, which meant that he could not be cross-examined on it. He also compared the testimonies of the complainant and the doctor to that of the

unsworn statement of the appellant, and indicated to the jury that the evidence presented by those witnesses was tested by cross-examination, unlike the unsworn statement made by the appellant.

[35] The learned trial judge then said:

> "You see, Mr. Foreman and members of the jury, an unsworn statement--and these are not my words, that is what the Privy Council is saying, as recently as 1995 -that an unsworn statement is inferior in quality to sworn testimony. Qualitatively an unsworn statement, untested by cross-examination is inferior in quality to sworn evidence, but nonetheless you take it into account and give it what weight you think it deserves. If it has some weight in the context of this case, the weight that it may have is whether you have some doubt as to whether he may have been acting in lawful self-defence, that is, the value of it, the primary value of it, in the context of this particular case.
>
> So, the accused man had a free choice. He could say nothing, he could make an unsworn statement and he could have given sworn evidence. He elected to make an unsworn statement. You will have to decide the weight.
>
> And in deciding the weight, you look at the internal logic of the statement to see if it makes sense."

Then, he continued:

> "Now, if you form the view that his statement makes absolutely no sense whatsoever, you give it zero weight. However, giving his statement no weight does not translate into proof of the Prosecution's case because, you see, Mr. Foreman and members of the jury, it is entirely possible for you to say that everybody is lying, you know, the police, doctor, Mr. Tucker, Mr. Laing, liars, four. None of them talking the truth. An unreliable, deceitful lot... Because if you reject Mr. Laing's evidence - not evidence, unsworn statement, it doesn't necessarily mean that you have to believe Mr. Tucker, you know. So, if you say Mr. Laing zero

weight to your statement, you still examine what Mr. Tucker has told you bearing in mind the doctor's evidence."

[36] The attack launched by Mr Fletcher on the learned trial judge's directions are summarised as follows.

(i) In dealing with the effect of the unsworn statement given by the appellant, the learned trial judge devalued the weight to be given to his account in a way and in a manner that was inappropriate.

(ii) Also, the direction was not a correct statement of the law as to the use a jury may make of the unsworn statement of an accused because while it is true that the jury may give such weight as they choose to an unsworn statement, it is outside of the purview of the learned trial judge to tell them what weight they must give to it and what it means. Also, it is wholly incorrect to assert that the value of the unsworn statement here lies solely in whether it merely cast doubt on the prosecution's case. A jury could believe the account of the accused completely.

(iii) The learned trial judge ought not to have included any directions that spoke to his own determination of the weight to be placed on, and the meaning to be ascribed to, the unsworn statement. Accordingly, the learned trial judge wrongly directed the jury that

> the value of the unsworn statements lies in whether it casts doubt on the prosecution's case.

Reliance was placed by learned counsel on the decision of this court in **Alvin Dennison v R** [2014] JMCA Crim 7.

[37] Mrs Milwood-Moore, in response, submitted that the directions to the jury were consistent with those stipulated in **DPP v Walker**. She maintained, *inter alia*, that it could not successfully be said by the appellant that the jury was left unclear that the weight to be attached to the statement was within their province. She argued that the directions given are distinguishable from, and cannot be said to have gone as far as, the directions in cases such as **Dennison v R**; **R v Ian Bailey** SCCA No 12/1996, judgment delivered 20 December 1996; and **R v Michael Salmon** SCCA No 45/1991, judgment delivered 24 February 1992.

[38] In **DPP v Walker**, the Board, in speaking on the directions that a trial judge should give in relation to the unsworn statement of a defendant, stated in so far as is relevant to this aspect of our analysis (page 1373):

> "…[T]he judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing...The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's

> unsworn statement only such weight as they may think it deserves."

[39] A thorough review of the law as it relates to the approach that a trial judge should take in treating with an unsworn statement was undertaken, from a historical perspective, by Morrison JA (as he then was) in **Dennison v R**. There is nothing more that we could usefully add at this time to expand on the relevant principles as pellucidly set out in that case. It may conveniently be said that the dicta from **DPP v Walker**, **Dennison v R** (and the various cases cited therein) have provided the framework within which the directions of the learned trial judge in the instant case have been analysed.

[40] The learned trial judge saw it fit to point out to the jury that the unsworn statement was "qualitatively inferior" to sworn testimony while making it clear as he did that those were the words of the Privy Council in **DPP v Walker**. No challenge could be posed to that, in principle, because indeed, the Privy Council had also said in **Beckford v R** that an unsworn statement, "because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony". The authorities are replete with this observation from the Board.

[41] It should be noted, however, that despite authoritative dicta to the effect that the unsworn statement is qualitatively inferior, from an objective point of view, it is still material put before the jury for their consideration and for them to take into account in determining whether the prosecution has discharged the burden cast on it in law to prove the case against a defendant. As Shaw LJ instructed in **Joseph John Coughlan**

v R 64 Cr App Rep 11, at pages 17 to 18 (cited in **Regina v Robert Morris** SCCA No 24/1998, judgment delivered 12 July 1999), what is said in such a statement ought not to be altogether brushed aside; it may make the jury see the proved facts and the inferences to be drawn from them in a different light. Also, as strongly reiterated by Morrison JA in **Dennison v R**, following on the dictum of Gordon JA in **R v Salmon**, in our law an accused has a right to make an unsworn statement in his defence and the value of an unsworn statement in a particular case is still purely a jury matter.

[42] It is for this reason that the Privy Council in **DPP v Walker** had directed that the jury must be told that it was "**exclusively** for them to make up their minds whether the unsworn statement has any value, and, if so, what weight to be attached to it" (emphasis added). It means that despite whatever view a trial judge may hold of the evidential quality, value, worth or utility of an unsworn statement, as long as a defendant has that legal right to state his case in that way, it should be left exclusively for the jury's consideration how they are going to treat it.

[43] The learned trial judge did not tell the jury that it was exclusively for them to first make up their minds as to whether the unsworn statement of the appellant had any value and to say what value, if any, it had. What he did, instead, was to proceed to tell them the value it may have had, which was, as far as he saw it, to cast doubt on whether the appellant may have been acting in lawful self-defence. This was clearly outside the permissible bounds of the **DPP v Walker** formulation. It was, at best, an unintentional usurpation of the jury's function.

[44] Indeed, the unsworn statement could have led the jury to believe the appellant and so be convinced of his innocence, even though it was not given on oath and subject to cross-examination. It could also have strengthened the prosecution's case against him, cast doubt on the case presented by the prosecution or it could have been seen as being of no value to anyone at all. It was exclusively for the jury to say what effect it had on them and the value of it and, therefore, not for the learned trial judge to tell them exactly how to view it.

[45] In relation to the weight to be attached to the statement, if any, the learned trial judge told them that if the statement made no sense at all they should give it "zero weight". It was exclusively for the jury to determine what weight they would attach to it whether it made sense to them or not. In keeping with the **DPP v Walker** directions, in this regard, it was for the jury to decide whether the evidence for the prosecution had satisfied them of the appellant's guilt beyond a reasonable doubt. Therefore, they were to be instructed that in considering their verdict, they were to take the unsworn statement into account, consider it in relation to the whole of the evidence and to give it such weight as they thought it deserved. The learned trial judge's direction did not go so far to fit the purpose of weighing the statement within that context.

[46] The weight to be attached to the unsworn statement was a matter within the sole purview of the jury and not of the learned trial judge. We would reiterate the words of Gordon JA in **R v Salmon** and as repeated in **Dennison v R**, that "[i]t is still the province of the jury, not the judge, to consider the unsworn statement and give it

such weight as they think it deserves". The learned trial judge, regrettably, crossed the line of demarcation between the role of the judge of the law and the role of the judges of fact and as such fell in error in relation to some aspects of his directions to the jury.

[47] It has not escaped attention that the learned trial judge at the end of giving his directions on the unsworn statement had told the jury that by giving the statement "zero weight" does not translate into proof of the prosecution's case. The question is whether this can be taken as a rehabilitative direction. We found, upon careful consideration, that this later direction was not sufficiently potent to remedy the damage that would have been done by the learned trial judge's failure to treat properly with the unsworn statement. For, while expressing to the jury the value of the unsworn statement, he never once alluded to another option that was open to them, which was that they could have believed the appellant although he had made an unsworn statement (even if that seemed unlikely in his view).

[48] The appellant's defence, although raised in an unsworn statement, ought to have been fairly left for the consideration of the jury as the sole judges of the facts for them exclusively to make up their minds what value it had, if any, and what weight they would attach to it in considering whether the prosecution had made out its case against him to the requisite standard. It is said to be an inherent principle in trials in English law (and we would say, by extension, our law) "that however distasteful the offence, however, repulsive the defendant, however laughable the defence, he is entitled to have his case fairly presented to the jury both by counsel and the trial judge": Archbold

Pleading Evidence and Practice in Criminal Cases 1992, volume 1, paragraph 4-403 and the cases cited therein. It cannot comfortably be said that the learned trial judge had managed to adequately diffuse the risk of unfairness and possible injustice to the appellant that would have emanated from his overall treatment of the unsworn statement.

[49] In the end, when the inadequacy of the directions on self-defence were examined, particularly, alongside the treatment of the appellant's unsworn statement, it was found that the cumulative effect of the learned trial judge's directions would have had the effect of diluting the strength of the appellant's case to his detriment. We concluded that there was merit in ground two and held that the appellant had succeeded on that ground.

Ground 3

Unfair and irrelevant comments

[50] The appellant complained also that the learned trial judge spent an "inordinate amount of time in his directions demonstrating the implausibility of [his] account as well as making comments on collateral matters which devalued [his] account and denied him a fair and balanced consideration of his case". Mr Fletcher pointed to the learned trial judge's treatment of three aspects of the evidence, in addition to the treatment of the unsworn statement, in seeking to substantiate this ground of appeal.

[51] Firstly, learned counsel pointed out that the learned trial judge had spent much time commenting on the doctor's evidence that he had only made note of "medically significant" injuries. This, according to him, would have implied that there were injuries consistent with the prosecution's case that the doctor did not note. According to learned counsel, the evidence of the medical doctor was, to a considerable extent, central to the resolution of the issues because the credibility of the complainant hinged to some extent on that resolution. The import of those comments, he argued, was that the appellant was not to be believed in his account as to what he did and how.

[52] Secondly, he complained that the learned trial judge had embarked upon an admonition to the jury against believing that there is any legal right devolved upon anyone to beat "a trespasser half to death" just because he is a trespasser. Mr Fletcher contended that that issue "was unnecessarily introduced and could only have served to plug into a local social phenomenon that carries great emotional content and served to exacerbate the case for the appellant".

[53] The third and final aspect of the summing-up that was criticised under this ground relates to the learned trial judge pointing out to the jury the fact that the appellant was not arrested but issued with summons by the police. The complaint was that the comments made by the learned trial judge would seem to suggest that there was an imbalance in the way the appellant was treated compared to the complainant although the appellant had no control over the police processes. In Mr Fletcher's view,

that comment was expressive of some amount of bias to the detriment of the appellant's case.

[54] Mrs Milwood-Moore did not share the views expressed by Mr Fletcher concerning the learned trial judge's treatment of the matters identified. After demonstrating her point by reference to the material aspects of the summing-up, she argued that the comments and directions highlighted by Mr Fletcher did not amount to unfairness or prejudice to the appellant and, so, the learned trial judge did not err in treating with the matters raised by the appellant. She urged the court to find there was no merit in this ground of appeal.

[55] We observed that the learned trial judge's approach to the evidence was along the line of a deeply critical analysis in doing what he might have regarded as the best way to assist the jury in approaching their task as the tribunal of fact. There is nothing wrong with that approach, provided that, ultimately, the facts were left for the jury to decide and there was no usurpation of their function.

[56] We found that the learned trial judge, in treating with the evidence of the doctor and that of the complainant on the question of the injuries suffered by the complainant, did not overstep his bounds, no matter how unfavourable to the appellant his analysis may have turned out to be in this regard. It did not cross the line of necessary judicial assistance or permissible judicial comment. This complaint did nothing to advance the appellant's cause on this ground.

[57] We found that the learned trial judge's choice of the words "beat you half to death", in explaining to the juror the law as it relates to a trespasser, may have been a bit emotive within the context they were used, but they were not in reference to the complainant's injuries and could not objectively be taken to have been so. Therefore, they could not be taken as likely to have inflamed the jury thereby influencing them to view the evidence in a manner prejudicial to the appellant. We, however, found that with those directions not properly and adequately explained by reference to the concept of self-defence in law and the appellant's case as presented, the comments relating to a trespasser may have devalued the appellant's account of the incident and led to his case not being properly considered by the jury. In that regard, it could not be said that no unfairness was caused to him. We found, to that extent, that there was some merit in this complaint.

[58] In relation to the final complaint, we found that the learned trial judge's prolonged focus on the evidence of the investigating officer that he had served a summons on the appellant rather than arresting him was unnecessary. Whatever the police had chosen to do in the circumstances to secure the appellant's attendance at court, the fact is that the appellant had attended court and surrendered to face his trial. Therefore, since nothing with which the jury was concerned would have turned on the fact that the appellant was summoned, it is difficult to understand the learned trial judge's prolonged focus on that aspect of the case. His comments, however, did not have the prejudicial effect ascribed to them by Mr Fletcher. Indeed, there is nothing in his treatment of this aspect of the case for the prosecution that could be taken as being

prejudicial to the appellant. If anything, it would more stand as a subtle criticism of the approach of the police to the apprehension of the appellant. We found nothing in this complaint that would have formed a proper basis to justify an interference with the appellant's conviction.

[59] In disposing of the complaints embodied in this ground of appeal, having looked at them in the round, we concluded that the learned trial judge's treatment of the conflict between the complainant's evidence and the doctor's evidence was unassailable but that the other aspects of the appellant's complaint were, somehow, justified, albeit not enough by themselves to render the conviction unsafe. However, the comments of the learned trial judge that he made on the prosecution's case concerning the law relating to a trespasser coupled with the less than satisfactory treatment of the issues of self-defence and the appellant's unsworn statement would have served to deny the appellant a fair and balanced consideration of the case advanced by him, thereby eroding his defence. For this reason, we were propelled to conclude that there was some merit in ground three and as such it was not wholly rejected. It partially succeeded.

Ground 4

Improper exercise of judicial discretion in failing to discharge two jurors

[60] In this ground, the appellant contended that the learned trial judge improperly exercised his discretion to retain two jurors "who had admitted conversing with the mother of the complainant after they had been empanelled". It should be indicated

from the outset that there was no admission by any juror that they had spoken to the complainant's mother, so there is an error in the contention of the appellant in that regard as set out in this ground of appeal. Notwithstanding that error, the appellant is correct to say that the learned trial judge had allowed two jurors to remain as part of the jury after it was reported that they were observed conversing with the complainant and his mother following their selection to try the case.

[61] The circumstances leading to this complaint are important for the purposes of our analysis and so the salient facts will now be outlined. The jury was duly empanelled at about 10:30 am but was not put in charge of the appellant and no foreman was selected. The case was stood down to commence at 2:00 pm. Before the jurors were released, they were warned by the learned trial judge not to speak to anyone about the case. The complainant was also warned not to communicate with the jurors or to anyone. The learned trial judge spoke to him in these terms: "Don't talk to anybody, so nobody can accuse you of talking to any jurors".

[62] At about 2:00 pm, upon the resumption of the matter for the trial to commence, counsel for the appellant at the time, Mr Zavia Mayne, brought it to the attention of the court that during the break, two members of the jury were seen by him, on two separate occasions, engaged in discussions with the complainant and his mother. On the first occasion, one juror was seen conversing with the mother of the complainant (the first conversation). That juror was eventually selected as the foreman. On the

second occasion, the other juror was seen conversing with the complainant and his mother (the second conversation).

[63] Mr Mayne advised the learned trial judge that he had brought his observations to the attention of Crown Counsel, Mr Greg Walcolm. Mr Walcolm confirmed that he had observed the first conversation. Speaking of that conversation, he said he saw the mother of the complainant and the juror in question looking at each other and that "they seemed to be discussing something". He said that he directed the attention of the registrar of the court to his observations and he instructed her to advise the juror to desist from conversing with the complainant's mother and that a report be made to the learned trial judge.

[64] In relation to the second conversation, Mr Walcolm also confirmed that he saw that juror in the company of the complainant, the complainant's mother and another lady. He saw the juror looking in the direction of the mother, who was talking, but he did not see the juror speaking to her. He said he, however, enquired of the inspector of police (presumably an officer assigned to the court) if she had observed anything and she told him that she had seen the juror and the mother of the complainant, in fact, speaking to each other.

[65] Neither Mr Mayne nor Mr Walcolm was in a position to have heard what was being said by the persons involved in these conversations. The registrar and inspector of police who reportedly observed the parties were not examined by the learned trial

judge and so there was no report to the court as to the content of any conversation in which the jurors were allegedly engaged.

[66] Without any input from either counsel, the learned trial judge called and questioned the complainant in the presence of counsel but in the absence of the members of the jury. The complainant denied speaking to anyone. He said he was with his mother but he did not hear or see her speak to any juror. She was only speaking to a lady in the court yard, he said. The complainant's mother was also questioned in the absence of the jury. She stated that she was speaking to a lady who she was telling to read the Book of Psalms. She did not speak to any juror or anyone else. Neither the complainant nor his mother was sworn before they were questioned by the learned trial judge.

[67] In similar fashion, the two jurors were called by the learned trial judge and questioned separately in the absence of the other members of the jury. They too were not questioned on oath. The juror reportedly involved in the first conversation told the learned trial judge that he was with another juror in the court yard but that they were not talking to the complainant's mother. He said she was some distance away from him. The second juror denied speaking to the complainant's mother but admitted that he was present when he heard the complainant's mother speaking about Psalms being "a wonderful part of the Bible to read".

[68] At the end of the enquiry, there was no admission from the jurors that they had spoken to the complainant or his mother. Also, there was no evidence of the content of any discussion about the case or otherwise among the persons reportedly conversing.

[69] Mr Mayne was not invited by the learned trial judge to put questions to the parties or to confront them directly with what was observed. After the parties all gave their responses and were stood down, the learned trial judge asked Mr Mayne and Mr Walcolm whether or not they wished to say anything. Mr Mayne said:

> "M' Lord, in respect of the - what has being [sic] said, at the time when the number two juror was observed, there were really two persons there, and in terms of the version of what took place, what I gathered from what is being said upon being asked to desist has not been represented. We are not trying to cast aspiration [sic aspersion?], m' Lord, but there have been some clear inconsistencies in terms of what I saw and what is being said and I will just leave it at that."

Mr Walcolm responded:

> "My Lord, in relation to the first incident that was brought to my attention, I did not see a third party. In relation to the second incident, the mother said she did not speak to the juror, the juror on the other hand said she was interacting about the Bible and nothing else. Very well, m' Lord."

Up to then, Mr Mayne had not applied for the jurors to be discharged in the light of what he termed as "inconsistencies" between what they said and what he said he had observed. He expressed his concern and disquiet with the responses but he was content to let the matter rest there. There was no submission in law from either counsel.

[70] The learned trial judge then proceeded to indicate his ruling on the issue, the crux of which was as follows:

> "...essentially an enquiry of this nature, that the Court is primarily concerned with, is whether or not the exchange in the report that sets out, there was some exchange between the parties, whether or not the exchange was such, that it can be said that the integrity of the trial process had been compromised or undermined, or where it is compromised or undermined.
>
> The Court has to also take into account and consider that the Court has also been reminding the jurors from Monday, when they came, to be careful in speaking with persons in and around the precinct of the Court.
>
> Nonetheless, perhaps it may be we are expecting too much... But as I said, the primary concern is whether or not the trial process itself can be said to be compromised or undermined, specifically if there are [sic] anything to indicate prejudice to the defendant, or bias in favour of the complainant.
>
> From what has been said, certainly from this, I do not form the view that anything has been done or said to compromise the integrity of the trial. What the Court proposes to do, is to allow the trial to proceed and to impress upon the jurors the decision taken, and the importance of keeping the instructions of the Court, not to engage in conversation with persons in and around the Court...
>
> So, what I will propose to do going forward, is to, strongly admonish the jurors and then see that we have standard times for persons leaving the courtroom... So that is one course..."

[71] Mr Fletcher submitted that despite the overriding discretion of the learned trial judge to decide whether a real danger of bias had flowed from the allegations made in the circumstances of this incident, the safest way to have resolved the matter would have been, at least, to excuse the two jurors. The concern expressed by Mr Mayne, he

said, ought to have been treated as a continuing lack of confidence by the appellant in the potential fairness of the trial if those jurors remained.

[72] He complained further that the enquiry should have been on oath because there is a presumption of truth that comes from an oath, which could have assisted the learned trial judge. Also, he contended, there was a "fairly egregious" breach for it to have happened twice, instead of from a single encounter, and that should have put the learned trial judge on "aggravated alert" that great care needed to have been taken on the matter.

[73] There are, of course, no statutory provisions, rules of court or practice directions within our jurisdiction that have laid down the specific procedure to be adopted and the test to be applied by a trial judge when a complaint or suspicion of possible jury misconduct or impropriety is raised during the course of a trial. Guidance is, however, obtained from the relevant and strong authorities that have made it clear that when an issue arises as to the conduct of the jury or individual jurors, it is incumbent on a trial judge to conduct a proper investigation into the matter. The authorities have also established, beyond question, that a judge has the power to discharge individual jurors (and the jury) for misconduct or impropriety as a matter of necessity. The discharge of a juror is, therefore, within the discretion of a trial judge but that discretion must be exercised judiciously.

[74] In **R v Orgles and another** [1993] 4 All ER 533; [1994] 1 WLR 108, the English Court of Appeal stated in clear terms that when circumstances such as these arise, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial and to that end to exercise, at his discretion, his common law power to discharge individual jurors (to the statutory limit) or the entire jury. See too **R v Hambery** [1977] QB 924. The Court further noted, in speaking of the procedure to be adopted, that "the judge's discretion enables him to take the course best suited to the circumstances".

[75] The appellant, in challenging the exercise of the learned trial judge's discretion in retaining the jurors in question, had criticised the learned trial judge's failure to take sworn testimony from the parties interrogated. This aspect of the ground of appeal will be addressed first. This argument concerning the requirement for the conduct of the enquiry to be by the taking of evidence on oath arose for consideration in the Trinidad and Tobago case **Sangit Chaitlal v the State** (1991) 39 WIR 295, which has proved rather helpful.

[76] In that case, a juror was seen conversing with a witness for the prosecution. The trial judge invited counsel for the prosecution and for the defence to his chambers where he conducted an inquiry into the incident. No objection was raised to this course of action and the inquiry was conducted without evidence being taken on oath. A marshal of the court told the inquiry that he had seen a named juror speaking to a witness. In the course of cross-examination, it became clear that he had not lodged an

official report on the matter himself and that he did not attach any significance to it. The witness and the juror denied that the incident had occurred. In fact, they denied knowing each other. The defence did not avail itself of the opportunity to cross-examine the juror. The trial judge in the exercise of his discretion decided that the evidence was not sufficiently credible to raise the possibility of a miscarriage of justice. The trial was allowed to continue with the juror on the panel and the appellant was convicted.

[77] On the question whether the failure to adduce evidence on oath had vitiated the subsequent verdict at the trial, the court stated on this point, at page 307:

> "We have not been able to find any case which holds that an inquiry of this kind must in every case be by way of sworn testimony and that failure in this respect is fatal to the validity of the trial. We think that the matter is one best left to the discretion of the trial judge, having regard to the nature, quality and degree of the complaint. In all cases, however, the paramount duty of the trial judge is that he must adopt a course the aim of which is to determine whether there is the possibility of a miscarriage of justice."

[78] We would say, in adopting the position of the Court of Appeal of Trinidad and Tobago, that whether the enquiry should be conducted on oath is a matter for the discretion of a trial judge taking into account the nature, quality and gravity of the complaint. The more serious and grave the allegations of impropriety and the more likely the possibility of a miscarriage of justice, then the greater would be the need for the veracity of the allegations to be established. In such situations, and especially, where conflicting or divergent accounts are likely to be given and so the issue of credibility would loom large in the resolution of the matter, then it may be desirable that the answers be taken on the *voir dire* oath. In other words, if the basis of the

enquiry makes it desirable in the interests of justice for sworn testimony to be taken, then that course should be adopted. Failure to do so, however, will not necessarily and automatically vitiate a conviction. It would all depend on whether there may have been a miscarriage of justice from failure to do so.

[79] In this case, given that the basis of the enquiry did not involve any report of the content of any conversation or conduct that, *prima facie*, would have suggested the 'infection' or 'contamination' of a juror, the failure of the learned trial judge to conduct the enquiry on oath could not be made the subject of criticism by this court, albeit that it may have been better for him to have done so, given how the matter eventually unfolded. His failure to do so, however, was not regarded, in and of itself, as being an adequate basis on which the conviction should be disturbed. The crucial question, as we saw it, was whether the learned trial judge wrongly exercised his discretion in retaining the two jurors in question as members of the jury.

[80] In **R v Sawyer** (1980) 71 Cr App R 283, the English Court of Appeal propounded the test for a judge in determining whether to exercise his discretion to discharge a juror or jury. Lord Lane CJ stated the applicable principles in these terms at pages 285 and 286:

> "Upon those facts the judge had to decide whether or not there was a real danger that the appellant's position had been compromised by what had happened. Was there a real danger that she was or might have been prejudiced by what had gone on? The discretion which he undoubtedly had to stop the trial had of course to be exercised judicially and had to be exercised upon the facts, as he knew them.

> It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger. Certainly there is no ground for us in this case to interfere with the discretion which the judge exercised."

[81] This "Sawyer's danger test", that is to say, the test of whether there is any danger from anything said or done which could prejudice the jury against the defendant was approved by the House of Lords in **R v Spencer and Smails** [1986] 2 All ER 928; (1986) 83 Cr App R 277; [1987] AC 128 and later followed in **R v Putman and Others** (1991) 93 Cr App R 281. In Archbold 2013 at paragraph 4-312, it was noted (quoting the dictum of the English Court of Appeal in **R v Mears and Mears** [2011] 10 *Archbold Review* 3, CA), that:

> "...the question a court should ask itself being whether or not there was a real danger or risk of bias or unfairness should be suitably adapted to one in which the court should ask itself whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, the two being the same, that the jury were or would be biased. The independent observer must reach his conclusion on the basis of all the raw material; it is not open to the judge to find facts and then to attribute knowledge of such facts to the observer."

[82] The case **R v Twiss** (1918) 13 Cr App Rep 177, which was also relied on by the Crown in this case, is quite instructive on this issue. In that case the conviction was allowed to stand where, before the summing-up, members of the jury had conversed with witnesses for the prosecution. Following an enquiry conducted by the trial judge, it was found that the defendant could not have been prejudiced by the conversations, and, in fact, had not been prejudiced. Darling J opined, at page 181:

> "In these circumstances, it is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the appellant in the case. It is not enough to say he spoke to somebody; it is not enough to say that the person to whom he spoke was a witness in the case, although that makes it necessary to consider the matter more carefully."

[83] His Lordship did go on to give a word of caution, when he said, at page 182:

> "I hope that nothing decided in this Court to-day [sic] will incline anybody to think that we hold it to be a laudable practice for the jury to go out and talk to people. They had much better keep their own counsel and not speak to anybody. If they speak to anybody about the case, they certainly ought not to speak to a witness, because in that case their conduct may be open to grave suspicion."

[84] In **R v Prime** (1973) 57 Cr App Rep 632, the appellant sought support from the case **R v Crippen** (1910) 5 Cr App Rep 255, to argue that his conviction should be quashed based on an irregularity that he contended had occurred during the course of the trial. The irregularity complained of was that two jurors were seen conversing with a person (Earl) outside their number. In fact, Earl had been called to serve as a juror in the same case but on his own initiative, had indicated that he knew the defendant and so he was excused. It was alleged by the appellant's wife and his mother that while Earl was in the company of the two jurors, he jokingly remarked, "[h]e is guilty". The appellant was convicted by the jury and so he appealed. The appeal was dismissed.

[85] At pages 635 and 636, Lord Widgery CJ had this to say, which is worth repeating, *in extenso*:

> "In considering the case of CRIPPEN (supra) one must keep in the forefront of one's mind the fact that the rules in regard to jurors were wholly different in those days. In

those days, for instance, in a murder trial the jury were kept together and segregated from everybody else from the moment when the trial began right up to the time when they retired to consider their verdict. They were accommodated in a hotel on the same floor, and had jury bailiffs watching over them during the night to see that nobody spoke to them, and the like. It was a wholly different background: of course in those circumstances if one juror was removed from the others and was away under no proper surveillance for one and a half hours, the opportunity for arguing that there had been a mistrial was clear enough. But those are not the conditions which prevail today. Today, for reasons which seem no doubt good to Parliament, jurors are not segregated in that way, they come into the court as ordinary individuals, using the same entrance even as everybody else; when the midday adjournment comes, they leave the jury box and walk out through the same entrance as everybody else. Very often they have lunch sitting on the next stool to a witness in the case. Things of that kind would no doubt have horrified the judges who heard Crippen's appeal, but present day Parliament has allowed jurors that kind of freedom and it must be taken as a corollary that we are now prepared to accept that contact between a juror and someone else is not necessarily fatal to the validity of the trial, and it must be taken that we have accepted, and the public have accepted, that jurors are better educated than they were, and that if they are told by the judge not to talk about the case outside, there is a reasonable prospect that they will not do so. Accordingly, we no longer find ourselves horrified by the thought of the juror sitting next to a witness at lunch; that is one of the things the present day system accepts as inevitable, and we must do the same.

If the matter goes further than that, and it can be shown that somebody tries to tamper with a juror in the sense that he has tried to pass to him information which should not be passed, that is a different matter; but it has got to be proved by acceptable evidence, and it is not to be inferred nowadays merely because by force of circumstances a juror and an outsider have been put in close company one with the other." (Emphasis added)

[86] The authorities have clearly established that the observation of a juror engaged in conversation with witnesses or persons connected to them is not enough for that juror to be discharged or the trial stopped, without more. What must be established on acceptable and credible evidence is that something had been said or done that could have or has prejudiced the defendant and which had the effect of undermining the fairness and integrity of the trial.

[87] It is to be noted that in this case, defence counsel did not apply for the jurors involved or the jury of which they were to be a part to be discharged from serving following the enquiry, despite his obvious disquiet with the responses. He evidently was content to make a report to the learned trial judge for the necessary action to be taken by him. It is accepted law, however, that where no application is made on behalf of a defendant, the question of the discharge of the jury (or juror) is one for the discretion of the judge: Archbold Criminal Pleading Evidence and Practice 2013, paragraph 4-316 and **R v Wright** 25 Cr App R 35 cited therein.

[88] We do empathise with the learned trial judge because he would not have been prepared for such an eventuality, especially having just warned the jury and the complainant not to speak to anyone. He apparently did what he considered best in the circumstances and that was to embark immediately upon an enquiry. He could have paused, however, to take some time for reflection as to the best way forward. He could have considered soliciting counsel's view as to the way forward, that is, in so far as the procedure to be adopted should be.

[89] The online version of the English Judicial Studies Board March 2010 Crown Court Bench Book has made a recommendation that is relevant for present purposes in the section bearing the sub-heading, "Time for reflection", found in Chapter 18 (entitled "Jury Management"), at page 384. There, it is stated in reference to a trial judge's approach to reported jury misconduct or suspected impropriety/irregularity involving jurors:

> "10. Such eventualities, by their nature, occur unexpectedly. **It is sensible not to take precipitate action, unless there is an emergency, and to involve the advocates in the decision making process as soon as possible.** If the source of the problem is believed to be external it may be necessary to isolate the juror concerned immediately in the hope that contamination by discussion can be avoided. **The advocates should, in any event, be consulted as to the course appropriate to the exigency which has arisen.**" (Emphasis added)

[90] That having been said, it is now necessary to examine the learned trial judge's treatment of the issue that was raised for resolution before him concerning the two jurors. He found, following his enquiry, that there was nothing to show that a fair trial was not possible as he had found no evidence of anything said or done that could have prejudiced the appellant or compromised the integrity of the trial. Evidently, he had in mind the appropriate test to be applied. The remaining question for consideration is, therefore, whether his finding of no danger or risk of prejudice was supported on the facts and the totality of the circumstances that were before him.

[91] There were, admittedly, unusual features in this case (which were absent in **Sungit Chaitlal** and which, therefore, serve to render the two cases distinguishable from each other). The first point of departure is that, in this case, the report to the court of the suspected irregularity was from both counsel for the defence and counsel for the prosecution. Counsel for the prosecution candidly indicated to the court his observations and the actions he took following on his observations. He had involved the registrar and the inspector of police, who, from all reports, had also witnessed the reported conversations. So, the observations would have been made by four officers of the court with differing interests in the proceedings of the court. There was thus, *prima facie*, considerably weighty and sufficiently credible information to the court concerning the two jurors.

[92] In the face of such reported observations from, *prima facie*, credible sources, the two jurors did not admit to having been in any conversation with the complainant's mother or the complainant. This gave rise, on the face of it, to a serious credibility issue. Despite that, the learned trial judge did not question the registrar who was sent by Crown Counsel to speak to the parties who were reported to have been seen engaged in the first conversation and he did not invite Mr Mayne to cross-examine them. Crown Counsel, like Mr Mayne, had said that he had seen no third party with the juror and the complainant's mother when they were speaking. The learned trial judge did not resolve that obvious conflict with respect to that juror, who incidentally, was later selected to be the foreman.

[93] Furthermore, the learned trial judge accepted that there was some discussion about the Book of Psalms. That discussion, however, would not have been applicable to the first reported conversation but only to the second one. So, although there was seemingly credible 'evidence' of direct contact between the juror and the mother who were reportedly engaged in the first conversation, no one knew what information had passed between them. The learned trial judge also overlooked the fact that the parties to the second conversation had denied speaking directly to each other, even about the Book of Psalms. Yet, Mr Walcolm had reported that the inspector had told him that he had seen those parties speaking with each other. In the face of that information, the inspector was not called for questioning. Mr Mayne was also not invited to cross-examine that second juror and/or the complainant's mother to confront them with that information.

[94] Up to the end of the enquiry, the conflict between the report that was made to the court by counsel on both sides and the responses of the persons involved in the reported conversations was not resolved. Mr Mayne should have taken a more robust stance on the matter and not allow the matter to rest in the light of his clear misgivings and serious concerns about the veracity of the responses from the persons he observed conversing. His stance is, however, understandable because issues concerning alleged jury misconduct do not usually admit of an easy and ready solution. It is for that reason that time for reflection by the trial judge is strongly recommended and the views of counsel solicited.

[95] What is clear from the circumstances of this case is that the learned trial judge would have failed to take into account what counsel had indicated as having given rise to a serious credibility issue. There was, *prima facie*, weighty and credible 'evidence' that the implicated parties may not have been totally truthful to the court. In other words, the veracity of their explanation of what they said had transpired could have been tainted by their apparent or intimated lack of forthrightness. The learned trial judge ought to have been alerted to the likelihood or possibility that the whole truth may not have been spoken by the parties involved. It warranted caution in his approach and in the exercise of his discretion to have the jurors remain. This need for caution was even greater when it is considered that the responses from the parties were not elicited under the compulsion of oath or affirmation and there was no cross-examination of them.

[96] So, while it is accepted that there was no clear and direct evidence disclosed on the enquiry of anything said or done that could have prejudiced the appellant and compromised the trial, equally, there was also nothing from which it could have been found definitively that the possibility or danger of risk of prejudice did not exist. The problem is that the enquiry did not go far enough, as it ought to have done, in order for the learned trial judge to properly rule out the risk or danger of any such probability or possibility. The motive of the implicated parties to hide the truth about the fact of conversing when they were reportedly seen by the officers of the court doing so was a significant cause for concern and a burning question which the learned trial judge

should have demonstrably addressed and sought to resolve before coming to a definitive finding that the trial was not compromised or undermined.

[97] In Archbold Criminal Pleading Evidence and Practice 2013, at paragraph 4-321, under the heading, "Approach of the Court of Appeal", it is explained:

> "The Court of Appeal will not lightly disturb the exercise of the discretion by the trial judge as to whether to discharge either individual jurors or the whole jury, **provided that the judge has properly investigated the matter…has satisfied himself that there is no possibility of individual jurors or the jury as a whole having been improperly influenced,** and where appropriate, has warned the jury to put the matter out of their minds: see *R. v. Panaysis (Charalambous)* [1999] Crim. L.R. 84..." (Emphasis added)

At paragraph 4-322, the learned writers continued:

> "**It is important that there should be a proper investigation by the trial judge of any complaint concerning the jury…**" (Emphasis added)

[98] We believed that in failing to conduct a more thorough investigation into the circumstances of this case, the learned trial judge may have failed to take into account all relevant considerations before coming to his findings that the appellant was not prejudiced or that there was no danger of him being prejudiced or the trial undermined. We have recognised that each case will turn on its own peculiar facts but the ultimate goal must always be the attainment of justice. As is often said, "justice should not only be done, but should manifestly and undoubtedly be seen to be done". In the circumstances as obtained in this case, we found ourselves unable to say that no

injustice was caused simply because the investigation carried out by the learned trial judge was not sufficiently thorough.

[99] It is our view, that in such a situation as this where the jurors were not at the time put in charge of the case for the trial to commence, it would have been far more prudent and safer for the learned trial judge to have, at least, discharged the two jurors in order to avoid all possibility or accusation of risk of prejudice to the appellant. When all the circumstances were examined within the context of the guidance afforded by the authorities, we found that we were not placed in a comfortable position to be able to confidently declare that the learned trial judge had exercised his discretion properly in allowing those jurors to remain as members of the jury. Ground four succeeded.

Ground 6

Absence of a good character direction

[100] We deemed it more convenient, and for the sake of coherence, to examine this ground before looking at ground five. This is so because the issue raised in this ground concerns the matter of the conviction of the appellant with which the preceding grounds are concerned, while ground five addresses the matter of sentence. The appellant's complaint in this ground will now be examined.

[101] The appellant contended that the absence of a good character direction, at least on the issue of propensity, had weakened the fairness of the trial and denied him a fair consideration of his case. The argument advanced by Mr Fletcher in support of this ground was that despite the fact that the appellant gave an unsworn statement, a

direction on propensity ought to have been given. This direction, he said, was important because the appellant was operating in a position of authority as part of a private security apparatus and because statements made by the complainant as to violent threats made to him by the appellant prior to the incident were denied by the appellant. In his view, the learned trial judge ought to have asked counsel whether he wished to advance the appellant's character specifically (possibly by calling a witness). According to Mr Fletcher, the learned trial judge by so doing would have demonstrated "his undoubted awareness of the current law on the importance of this element of human life to the trial process".

[102] We could not find favour with the submissions of Mr Fletcher that the learned trial judge ought to have asked counsel if he wished to advance the appellant's character and that the absence of a good character direction had prejudiced the appellant. It was not the duty of the learned trial judge but of the appellant and his counsel to raise the issue of the appellant's good character. The appellant had not chosen to do so and he has presented no affidavit to this court indicating his reasons or motives for not doing so. It is settled law, that where the issue of good character is not distinctly raised by the defence, through the questioning of the witnesses for the prosecution or by adducing such evidence on his case, the trial judge is under no duty to raise the matter and to give a good character direction to the jury. See **Thompson v R** [1998] AC 811, 844-845 and **Harold Berbick and Kenton Gordon v R** [2014] JMCA Crim 9.

[103] In Archbold Criminal Pleading Evidence and Practice 2013, at paragraph 4-484, it is stated:

> "It is up to defence counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character; and, since the fact that a defendant has no previous convictions does not inevitably mean that he is of good character, it is good practice for the judge, where there is any doubt as to the position, to raise the matter with counsel."

[104] Furthermore, the appellant did not give sworn evidence in denial of the charge (which would have entitled him to the credibility limb of the direction) and did not raise incompetence of counsel as a basis for his arguments and so his reliance on the opinion of the Privy Council in **Noel Campbell v R** [2010] UKPC 26 was misplaced.

[105] We concluded then that there was no basis on which the learned trial judge could honestly be criticised in failing to give a good character direction and no miscarriage of justice is discerned as a result of the absence of such a direction in the circumstances of this case. We found no rational basis on which ground six could have succeeded; that ground, therefore, failed.

Ground 5

Sentence manifestly excessive

[106] The appellant had complained about the sentence being manifestly excessive. However, given our findings with respect to grounds one, two and four that touched and concerned the appellant's conviction and the ultimate decision that was taken as to

how to dispose of the appeal, it was not considered necessary to proceed to examine this ground. We will therefore express no finding in relation to it.

Disposal of the appeal

[107] We found that the learned trial judge had erred in his treatment of the issue of self-defence and the appellant's unsworn statement to such an extent and in such a manner as to deny the appellant a fair and balanced consideration of his case. This was exacerbated by the unnecessary comments concerning the treatment of a trespasser, which had the effect of devaluing the appellant's account of the incident. Furthermore, the learned trial judge's conduct of the enquiry concerning the communication between the two jurors and the mother of the complainant was not carried out in a manner that generated sufficient confidence in this court for it to be concluded that the integrity of the trial process was not compromised or undermined in any way to the prejudice of the appellant. The cumulative effect of all these matters on the trial was such as to render the conviction unsafe.

[108] For all the foregoing reasons, the appeal was allowed, the conviction quashed and the sentence set aside.

[109] In considering the appellant's prayer that a verdict and judgment of acquittal be entered, we gave due regard to all the circumstances of the case and were led to consider the principles laid down for the guidance of this court in **Reid v R** [1979] 2 All ER 904. We found that it was in the interests of justice that the matter be remitted for

a retrial. Accordingly, the order was made that the case be remitted for retrial at the next sitting of the Trelawny Circuit Court scheduled for 3 November 2014.