[2012] JMCA Crim 59

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 61/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

LESLIE McLEOD v R

Delano Harrison QC for the applicant

Jeremy Taylor and Miss Lavern Walters for the Crown

24, 25 July and 20 December 2012

MORRISON JA

Background

[1] This is an application for leave to appeal against the applicant's conviction for murder in the Home Circuit Court on 18 May 2009, after a trial before Beckford J and a jury. The applicant was sentenced to 15 years' imprisonment and the learned trial judge stipulated that he should serve a minimum of 10 years before becoming eligible for parole.

[2] This was in fact the applicant's second trial for murder arising out of the same set of facts, his first trial having ended on 14 February 2008 in the jury's inability to arrive at a unanimous verdict, as a result of which an order for re-trial was made.

[3] The applicant was charged with the offence of murder, on the basis that he murdered Junior Wilson ('the deceased') in the early morning of 19 July 2004. The prosecution relied on the evidence of a single eye-witness, Mr Michael Reid, a boyhood friend of many years of the deceased, whose evidence was that the applicant had been previously known to him for over 10 years before the incident. The defence was a complete denial by the applicant of having murdered the deceased and the major issue in the case was therefore the correctness of Mr Reid's identification of him as the person who caused the death of the deceased.

The case below

[4] At the material time, the applicant, who was a haulage contractor and lumber dealer, resided at 41 Duhaney Drive, in the community of Duhaney Park, St Andrew. For the purposes of his business, he owned two trucks which, when not in use, were usually parked facing each other on the side of the road outside the gate of his home. The deceased, who was also known as 'Sam Jeggeh', was close to 50 years in age and was a drug addict, who frequented the Duhaney Park Plaza.

[5] At the trial, Mr Reid was the second witness called for the prosecution, after the deceased's cousin, Miss Kay Davis, gave brief evidence of having identified the deceased's body to Dr Patricia Sinclair at the Kingston Public Hospital morgue for the

purposes of a post-mortem examination. Early in Mr Reid's evidence, almost immediately after he had identified himself as a resident of Duhaney Park, long-time friend of the deceased and a self-employed washer of cars, the learned trial judge received certain information through the Registrar from the foreman of the jury. Although the judge appears to have thought initially that what was being said was that a juror knew the applicant, it turned out that the indication from a member of the jury was that he had discovered that Mr Reid was known to him. A discussion immediately ensued between the judge and counsel on both sides, the result of which was that the judge then and there discharged the juror in question, reserved her decision on how the trial should proceed thereafter for consideration overnight and took an early adjournment for the day.

[6] When court resumed the following morning, the learned trial judge gave her ruling as follows:

> "Mr. Foreman and members of the jury, yesterday you will recall that one of your number said he knew the witness who was at that point giving evidence, I have reviewed the matter and I have decided that this is a matter that we can proceed with, which we can proceed with eleven of you since there were twelve of you empanelled and Mr. Richards did not know that this witness would have been there and you had not yet gone out and it is on that basis that I have decided that I will continue to hear the matter. I don't want anybody to have the wrong idea why we have eleven jurors in a murder case and this is why I take the time to do this."

[7] The trial therefore proceeded with 11 jurors. Continuing his evidence, Mr Reid told the court that at about 2 o'clock on the morning of 19 July 2004 he was on his

bicycle at the corner of Bronte Way off Duhaney Drive in the Duhaney Park area. He was on his way back to the Duhaney Park Plaza, having gone to his home at Sherlock Crescent to collect a vacuum cleaner for use in a 'coaster' van which he was in the process of washing. He saw the applicant coming between the two trucks parked at the gate at 41 Duhaney Drive. There were lit streetlights on the road on both sides of the house, one of them "almost right at his gate" and, Mr Reid said, "[i]t was like broad daylight, you couldn't miss his face". The applicant, who had a machete in his hand, was "moving very fast", towards someone who Mr Reid did not immediately recognise, but then made out from his bald head and the familiar shirt which he was wearing to be the deceased, Sam Jeggeh. Then, said Mr Reid, "I heard when [the applicant] said in a loud tone of voice, you won't stop lurking round mi place boy." The applicant used the machete to chop after the deceased, who put up his hand, whereupon Mr Reid saw blood "rushing from [the deceased's] hand". The deceased then moved off, as if in the direction of the plaza, with the applicant following behind him, "under him tail like a cat moving very fast". The deceased fell onto his knees and turned to face the applicant. Then, Mr Reid continued, the following ensued:

> "A Mr. McLeod did not hesitate.
> Q What did Mr. McLeod do?
> A As the face came around like this, Mr. McLeod did like that. (witness demonstrates)
> Q I see you did something, tell us what Mr. McLeod did?
> A He chopped him straight across his face.
> Q And what happened after that?
> A After he chopped him straight across his face.
> A Sam Jeggeh to move [sic], like when you know when you cut off a foul neck, him start to flatter.
> Q At this time was Sam Jeggeh still on his knees?
> A Yes, sir.

Q So him start to flatter, what then happened?
A Mr. McLeod moved around on the sidewalk and went in his yard.
HER LADYSHIP: Sorry.
WITNESS: Mr. McLeod moved around on the sidewalk and went through his gate with the machete in his hand."

[8] According to Mr Reid, he had a clear view of the applicant, assisted by streetlights which were on the same side as the parked trucks, one of them "right over the truck". When he first saw the applicant, he was able to see his whole body and the applicant was wearing short pants, a broad belt and no shirt. Throughout the entire incident in which the deceased was chopped, which lasted for a "[q]uick 20 minutes", Mr Reid's view of the applicant was not obstructed in any way; neither did he lose sight of the applicant, whom he was able to observe at various distances between 15 and 30 feet.

[9] When he was cross-examined, Mr Reid was asked whether, as the applicant advanced towards him, the deceased ran or "stood same place". His answer was that the deceased had just stood there and had only started to run after he got the first chop from the applicant. Mr Reid was then asked if he had on any previous occasion said that he had seen the deceased "being chased round and round the trucks", to which he answered that he did not remember. When it was suggested to him by counsel who then appeared for the applicant, Mr Leon Palmer, that he had in fact said that twice before at the applicant's first trial, Mr Reid maintained that he could not remember. An attempt by Mr Palmer at this point to refer Mr Reid to the transcript of what he had said at the previous trial, for the purpose of contradicting him, foundered because of the absence of a certified copy of the transcript and the learned trial judge

indicated that she would allow counsel to revisit the matter when the transcript became available.

[10] Later in the trial, a certified copy of the transcript having been obtained, Mr Reid was recalled to the witness box and Mr Palmer returned to the matter, in the following exchange:

> "Q. ...you remember on the last occasion when you were here I asked you if you had – if you had – if you recall that you had given evidence in the Circuit Court here before a Judge?
> A. Yes, Mr. Palmer.
> Q. Yes, and you said, 'Yes'. In the other court?
> A. Yes, Mr. Palmer.
> Q. And I had asked you if you had said at that time that when you saw the accused man he was moving after Sammy Jeggy 'round and 'round the truck was moving round Sammy Jeggy. You recall that?
> A. Yes, Mr. Palmer.
> Q. What do you now say, you recall saying that you had said so or you can't recall?
> A. Can't recall.
> Q. Do you recall also or can't you recall also saying they were on the sidewalk running around the truck?
> A. I don't remember.
> Q. You don't remember?
> A. No.
> Q. You can read, right?
> A. Yes, Mr. Palmer.
> Q. I am going to ask you to look at this document.
>
> ***Document shown to witness***
>
> Q. Do you now recall saying that?
> A. Yes, Mr. Palmer.
> Q. Yes to the both of them?
> A. Yes, Mr. Palmer.
> Mr. L. PALMER: That is all. Thank you.
> Well…
> HER LADYSHIP: That's it?

MR. L. PALMER: That will be all from me, ma'am."

[11] When he was re-examined by counsel for the Crown, Mr Reid was asked, "for how long did [the applicant] chase [the deceased] 'round and 'round the truck…[h]ow many minutes or seconds did he chase him 'round and 'round the truck?" His response was, "It went very fast by the 'quint' of the eye."

[12] Corporal Samuel Fearon gave evidence that, at about 1:30 am on 19 July 2004, accompanied by a constable of police, he was on motorised patrol along Duhaney Drive, heading in a southerly direction. On reaching the vicinity of the Duhaney Park Primary School he saw a man lying in the middle of the road, as a result of which he stopped and alighted from his vehicle. He observed that the man had what appeared to be "a large chop" across his face and his head, and his left arm was severed. The man was bleeding and groaning and rolling in pain. Corporal Fearon immediately dispatched the constable who was with him to the Duhaney Park Police Station, while he remained on the scene with the injured man. Shortly afterwards, the constable returned in the company of Woman Constable Shirley White, who was stationed at the material time at the Duhaney Park Police Station, in a marked police vehicle. At this point, with the help of neighbours who had been awakened, the injured man was wrapped in sheets and taken away to the hospital. Corporal Fearon was able to make these observations at the scene by the lights of the police vehicle, as well as by the streetlights in the road. On 22 July 2004, Constable White attended at the Kingston Public Hospital Morgue. There, she identified the body of the deceased as the same body which she had seen lying in the roadway on Duhaney Drive a few days before.

[13] On 4 August 2004, Miss Kay Davis, a cousin of the deceased, identified his body to Dr Patricia Sinclair, a consultant pathologist attached to the National Public Laboratory, who performed a post-mortem examination on the deceased's body. Her examination revealed "penetrating wounds to the forehead and the left upper limbs which were consistent with chop injuries". One chop wound extended laterally across the deceased's right cheek and penetrated through the cheekbones to a depth of approximately 4 centimetres into the bones of the face. There were also gaping chop wounds to the left arm, extending completely through the bones of the elbow joint, severing bone, soft tissues and blood vessels. The left forearm "was really just hanging by the skin, kept together by the skin at the back of the elbow…[and the]…ends of the forearm bones protruded through the wound". Lastly, there were two superficial incised wounds, one a 2 centimetre wound on the palm of the right hand, which Dr Sinclair interpreted as probably "defensive in nature", and the other a 3 centimetre wound over the lower rib cage on the right side. An incised wound was, the doctor told the court, "a wound with sharp margins made by a sharp instrument". The deceased's death was caused by the "chop wounds to the facial bones and the left upper limb with massive haemorrhage and hypovolemic shock".

[14] The investigating officer was Detective Sergeant Kingsley Bennett. He too was in attendance at the post-mortem examination on 4 August 2004 and on that day he obtained from Dr Sinclair samples of blood from the deceased. These samples were "placed in an envelope, sealed and labeled as exhibit [sic] for the forensic laboratory". On 5 August 2004, he took and recorded a statement from Mr Reid and on 26 August

2004 the applicant was taken into custody and told that he was a suspect in the matter of the murder of the deceased on 19 July 2004 "along Duhaney Drive in the vicinity of his home". The applicant was also told he would be placed on an identification parade and, when cautioned by Sergeant Bennett, he reportedly said, "A hear mi hear 'bout the incident."

[15] The identification parade was in due course conducted by Inspector Randall McKenzie at the Hunts Bay Police Station on 6 September 2004. The applicant, who was represented on the parade by Mr Palmer, was pointed out at the parade by Mr Reid as the person whom he had seen chop the deceased with a machete on 19 July 2004. Late in the afternoon of 6 September, Sergeant Bennett again cautioned the applicant and formally charged him with the murder of the deceased. The applicant made no statement.

[16] On that same day, apparently after the completion of the identification parade and the charging of the applicant with murder, Sergeant Bennett went to the applicant's home. The applicant was not present, but with Sergeant Bennett was an employee of the applicant sent by him to accompany the sergeant. At the applicant's home, according to Sergeant Bennett, he "retrieved a machete from the kitchen". The machete was in due course taken to the forensic laboratory.

[17] In cross-examination about this last bit of evidence, Sergeant Bennett confirmed that he had also taken a sample of the deceased's blood to the forensic laboratory. Mr

Palmer's attempt to elicit further evidence from Sergeant Bennett as regards the outcome of this exercise was met by an objection from prosecuting counsel as follows:

> "Q And you got back a certificate subsequently?
> A Yes, sir, I did.
> Q There was no match..
> MR. J. TAYLOR: I am objecting, my Lady. My friend is seeking to elicit the contents of a document which is not in evidence and of which this witness is not the maker.
> HER LADYSHIP: He can show it to him, if he received it, he took it there and he can show it to him.
> MR. J. TAYLOR: Well my, Lady.
> HER LADYSHIP: Cannot elicit the contents as you are doing it, but you can, you can ask him about it and you can show it to him.
> MR. L. PALMER: Very well. I don't have it in my possession, counsel has it.
> Q Anyway nothing turned on the certificate.
> A That is right, sir."

[18] That was the case for the prosecution. The following exchange then took place between Mr Palmer and the learned trial judge:

> `"MR. L. PALMER: May it please you, m'Lady, I need to have a brief consultation with my client and I am wondering if the court could afford me – I ask that the accused man be taken to a place I can consult with him.
> HER LADYSHIP: Mr. Palmer, you are not serious, are you?
> MR. L. PALMER: Yes, m'Lady.
> HER LADYSHIP: You have exactly two minutes and no more and he is not going anywhere but right there.
> MR. L. PALMER: Can't I have the privilege of consulting with my client in private?
> HER LADYSHIP: At this point, at this point? The only other witness that was brought

this morning was the doctor and you were off for all day yesterday, you were off, he was on the building.

MR. L. PALMER: M'Lady, I am just asking for time to...

HER LADYSHIP: No, the answer is no. You asked the question, I shouldn't argue with you I should have just said no. If you want two minutes you can have it and that's it.

MR L. PALMER: Two minutes?

HER LADYSHIP: Uhm, just not Jamaican two either.

MR. L. PALMER: But can't I speak with my client in a private place?
Very well, m'Lady.

(Mr. Palmer consulted with client)

Mr. Foreman and members of the jury, the accused will give a statement from the dock."

[19] In his unsworn statement from the dock, the applicant told the court that he had spent the night of 19 July 2004 asleep at his home at 41 Duhaney Drive and had not heard "any sound or anything". He woke up early the following morning to attend traffic court in Linstead and, upon his return home in the afternoon, he was told by a neighbour that someone "got chop" in the vicinity of his (the applicant's) home. He went about his normal business as a haulage contractor for the next few weeks, until he woke up one morning to find a fire in progress on one of his loaded trucks and that some of the goods on the truck were damaged. The Fire Brigade was called to put out the fire and the applicant made a report to the Duhaney Park Police Station. He was told to bring in the truck so that the police could see what goods had been damaged and it was while he was in the process of doing that the following day that Sergeant

Bennett asked to see him, after which he arrested and took him into custody. It was when he went to Half Way Tree court, after having been put on an identification parade, that he saw Mr Reid, who was previously unknown to him, for the first time.

[20] The applicant called a witness, Mr Verman Budram, who was at the material time a resident of 57 Duhaney Drive, where he had lived for over 30 years. The applicant lived about six lots away from his home and had been known to him "for a long time, number of years". Asked what type of person he considered the applicant to be, Mr Budram's response was that he was a "quiet, hard-working person", who was willing to help and was not a violent type.

[21] That was the case for the defence, after which the learned trial judge summed up the case in considerable detail to the jury. After retiring for 22 minutes, the jury returned a verdict of guilty of murder and the applicant was in due course sentenced as already indicated.

The challenge on appeal

[22] The applicant's application for leave to appeal against his conviction and sentence was initially considered on paper by a single judge of this court on 16 July 2010, when it was refused. As a result, the applicant renewed, as he was entitled to do, the application before the court itself. In supplemental grounds of appeal filed on 8 September 2011 and 8 May 2012, and amended supplemental grounds of appeal filed on 8 May 2012, Mr Harrison QC for the applicant challenged the applicant's conviction and sentence on five grounds, as follows:

"1. In light of the fact that, after evidence had begun, it came to her attention that a member of the jury and the principal prosecution witness knew each other, the learned trial judge erred:

a. in her failure to conduct an investigation of the issue; and

b. in her decision to discharge merely that single juror and not the entire body.

2. Though plainly herself recognising the glaring weaknesses in the identification evidence, the learned trial judge failed to highlight them as such for the jury's guidance in approaching them.

3. The learned trial judge erred in that she permitted admission of the irrelevant and potentially prejudicial evidence that a machete was taken from the Applicant's home by the police. Further, not having precluded the admission of that evidence, the learned trial judge failed to direct the jury adequately to disabuse their collective mind of it.

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

5. In light of the fact that the Applicant particularly desired to testify in his defence, his counsel's failure to consult with him at any time prior to the commencement of the instant trial, so as to receive proper instructions from him in that regard, deprived him of the opportunity to present his defence to the jury adequately and/or in the manner actually desired. In the result, a substantial miscarriage of justice occurred (see pages 184-186; Applicant's affidavit sworn to on 14 November 2011 and filed herein on 21 November 2011)."

[23] On 21 November 2011, the applicant filed an affidavit (sworn to on 14 November 2011) in support of ground five, which complained of a failure by Mr Palmer to consult and advise the applicant prior to the commencement of the trial, as to whether he should give sworn evidence or make an unsworn statement from the dock in his defence. We cannot avoid setting out that affidavit in full:

"I, **LESLIE McLEOD**, being duly sworn, make oath and say, as follows:

1. I am a Businessman and reside and have my postal address at 41 Duhaney Drive, Duhaney Park, Kingston 20, in the parish of Saint Andrew.

2. I was first tried for the murder of Junior Wilson in the Home Circuit Court in the parish of Kingston between 11 and 14 February 2008. Mr Leon Palmer of counsel represented me then.

3. Prior to the commencement of that trial Mr. Palmer took a statement from me at his office at Eureka Crescent in the parish of Saint Andrew. During the process of taking that statement, he instructed me that I would be giving a statement, in my response to the charge against me, from the dock where I would be sitting in Court: He would not put me in the witness-box.

4. At the time I had no idea of the difference between a statement from the dock and evidence from the witness-box as I had never before attended at, or participated in, any court proceedings whatever. So, I was totally in my lawyer's hands and relied without hesitation on him and his experience. The difference in the effect of those two options was not then explained to me.

5. At my first trial I did in fact make an unsworn statement in my defence, as proposed by Mr. Palmer. The jury failed to arrive at a unanimous verdict and so, the judge ordered a re-trial and extended the bail that I was on, pending re-trial.

6. During the period of my awaiting re-trial, I had ample time to reflect on my first trial and eventually came to the view that it was very likely that that jury did not unanimously agree to acquit me because, as I reasoned it: here was I, a businessman of middle age, being tried by them on such a very serious charge as murder, and yet I did not go into the witness-box to swear to tell the whole truth about the incident that resulted in the charge against me.

7. As I thought about the matter, I began to consider the significant impact that a witness's [sic] testimony might have on a jury, particularly if he appears undisturbed by cross-examination. I therefore thought that (especially in regard to the evidence of Michael Reid, the key witness against me, a young man, who was cross-examined extensively by Mr. Palmer), I would surely have stood a far better chance with the jury if I had been cross-examined as he was. I therefore determined, as time passed, that I would have to give evidence from the witness-box at my re-trial.

8. A few weeks before 18 May 2009, the date fixed for my re-trial to commence, I began to make efforts to arrange a conference between Mr. Palmer and me so as to discuss the strategic and tactical approach to the re-trial, generally, and, further, to advise him that, after much reflection, I desired to give evidence upon oath in my defence at the re-trial. Despite several attempts to communicate with him, I failed to have audience with Mr. Palmer.

9. On Monday, 18 May 2009, my re-trial began. Up to that date I never had the desired communication with Mr. Palmer to discuss any aspect of the case. The case was called up some minutes after 10:00a.m. and stood down till 2:00p.m. I remained on bail but still had no communication with my counsel.

10. At 2:00p.m. the jury was empanelled and there was a problem with one of their number that resulted in him being excluded from the jury, which proceeded thereafter with a body of eleven. The case was adjourned to the next day – Tuesday, 19 May – and my bail was extended.

11. On the next day I came to Court on bail, but, at the end of that day's hearing, my bail was revoked. Up to that time I had had no communication with Mr. Palmer, no opportunity to discuss the case. However, after my bail was revoked by the judge and before I actually left the courtroom, Mr. Palmer approached me and told me that he would come to see me by the lock-up downstairs.

12. Mr. Palmer never did see me then nor at any other time while the trial progressed. Now in custody, I never saw Mr.

Palmer except in Court whenever hearing in the matter resumed. I nonetheless hoped anxiously that I would at least have the opportunity to advise Mr. Palmer of my desire to advance my defence upon oath. Up to the moment when the prosecution closed its case, Mr. Palmer and I had at no time ever conferred about my re-trial.

13. At this point in the re-trial, Mr. Palmer sought leave of the trial judge to have what he referred to as a 'brief consultation' with me and for me to be taken to a place where he could consult with me. The judge then reminded Mr. Palmer that he had had all day the day before during which, in terms of a time and place for consultation, I was actually on the court-building in custody.

14. Mr. Palmer repeatedly pleaded with the judge, who insisted that she would allow him only 'two minutes' in which to consult with me, in no private place, but right there in the dock before the jury in whose presence the entire exchange between the judge and my counsel had taken place. I was quite embarrassed for my counsel and for myself. Moreover, I was worried that I would never now get the chance to share with him my desire to give evidence.

15. Given that maximum grant of two minutes by the judge, Mr. Palmer came up to me in the dock and told me in a soft voice that I should not show any remorse; I should bear in mind whatever the witnesses had said against me and just respond to that. That was all. Mr Palmer then turned from near the dock and left.

16. There was at that time not a single word between us as to my desire relating to my defence. The circumstances (the time-limit, the lack of privacy, my deep sense of embarrassment) did not lend themselves to any such exchange between my counsel and me.

17. Although I really desired to state my defence upon oath, I felt, in all the circumstances at that particular time, that I had no choice but to make an unsworn statement once more. Moreover, although he did not say so expressly during those 'two minutes', Mr. Palmer clearly implied then that I should make an unsworn statement; which I did.

18. If I had had the kind of opportunity by which I could have advised Mr. Palmer that, after serious thought on the matter, I strongly desired to give evidence in my defence on this occasion, I would have given him very clear instructions to that effect."

[24] When the application for leave to appeal came on for hearing on 14 May 2012, the court ordered that this affidavit should be brought to the attention of Mr Palmer, who no longer appeared in the matter, for the purpose of affording him an opportunity to make such comments as he might wish on it. This, Mr Palmer did, in an affidavit of his own, sworn to and filed on 24 May 2012, which is reproduced, virtually in full, below:

"2. That I have perused the Affidavit of Leslie McLeod bearing date the 14th day of November, 2011 and filed in this Honourable Court on the 21st day of November, 2011 and in response to certain allegations made against me therein wish to state as follows:

3. That I unequivocally deny and refute the allegations made by the Applicant that I singlehandedly took the decision to have him give an unsworn statement at his trial without prior consultation with him.

4. That leading up to the Applicants [sic] first trial and again at his re-trial, I explained to him the difference between making an unsworn statement from the Dock and how such statement or evidence may be treated and giving evidence on oath, and having done so, he elected to make a statement from the Dock.

5. It is totally false to say that I did not consult with the Applicant before the re-trial. Upon receipt of the transcript of the first trial, I had consultations with the Applicant, reviewing the evidence of the main prosecution witness and decided on the way forward for the re-trial.

6. That after the jury was empanelled and the Applicant [sic] bail revoked, I consulted with him again and he expressed the desire to have one of his neighbours as his witness at the trial. The Applicant gave me the witness' name, address and telephone number and I eventually found the witness and took a Statement from him.

   At no time did the Applicant express to me any concern which he might have had about giving a Statement at the trial as against giving his evidence on oath.

7. That it is true, to say that at the end of the Prosecution's [sic] case, I requested the Trial Judge to allow me a few minutes to consult with the Applicant. The Trial Judge refused to grant me time to do so.

   That I did not believe that my request was unreasonable or unprecedented, as I felt that Counsel should be free to consult with his client throughout the proceedings.

8. That the Trial Judge having refused to grant the adjournment, I approached the Applicant and informed him that his witness was waiting outside of the court room but that he would have to make his Statement of [sic] give his evidence before I called the witness. The Applicant agreed that he would proceed to make his Statement from the Dock.

9. That which [sic] I spoke softly to the Applicant, out of the hearing of the Jury, I did not tell the Applicant that he should not show any remorse. I do not understand what is meant by that comment."

The submissions

[25] Once the hearing commenced, Mr Harrison abandoned ground two, but made vigorous submissions on all the other grounds. On ground one, the submission was that the matter that was brought to the court's attention at the beginning of the trial as regards one of the jurors and the prosecution's key witness knowing each other, which resulted in the particular juror being discharged, gave rise to the possibility of

contamination of the jury. In these circumstances, the trial judge ought to have investigated the allegation so as to put herself in a position to make an informed assessment of what would be the appropriate course of action. The judge having failed to do so, she did not arm herself with the information necessary to enable her to decide whether or not to discharge the entire jury and as a result there was nothing on the record "to preclude the possibility of a real danger of bias". On this ground, Mr Harrison placed great reliance on the decision of the Court of Appeal of England and Wales in ***Blackwell and Others v R*** [1995] 2 Crim App R 625.

[26] On ground three, Mr Harrison's complaint related to Sergeant Bennett's evidence that he had retrieved a machete from the applicant's home and submitted it to the forensic laboratory for testing and analysis, presumably with a view to determining whether there were any traces of the deceased's blood, samples of which were also submitted, on the machete. Given the fact that it appeared that the analyst's certificate did not point to anything significant arising from this comparison, at the end of the day the evidence of the taking of the machete from the applicant's home and its having been submitted for analysis was wholly irrelevant and the judge ought not to have allowed it to be placed before the jury. Alternatively, the jury having heard the evidence, the judge was obliged to caution them "to rid their minds of it entirely", as it did nothing to advance the prosecution's case against the applicant. The directions actually given to the jury on the issue were "infirm" and wholly inadequate.

[27] On ground four, Mr Harrison based his complaint on the unreasonableness of the jury's verdict on what he described as "the patently unreliable quality of the evidence",

a view which, it was submitted, was clearly shared by the judge in the light of her invitation to the jury "to examine that evidence keenly for possible unreliability". In this regard, Mr Harrison himself invited close scrutiny of the identification evidence given by Mr Reid, in particular his "lack of candour" in relation to the evidence which he had given at the applicant's first trial.

[28] On ground five, which was in fact argued by Mr Harrison ahead of the other grounds, it was submitted that the applicant had been denied a fair trial, in the light of his having been deprived of the opportunity to consult and take advice from his counsel on the question of whether or not he would give evidence. Although Mr Harrison was careful to say on this point that neither the ground nor the submission was intended to be a reflection on the competence of Mr Palmer, he nevertheless submitted that, to the extent that there appeared to be a dispute as to the facts between client and counsel, the account of the former should be preferred to that of the latter. On this ground, we were referred to ***R v Clinton*** [1993] 1 WLR 1181, ***Sankar v The State of Trinidad & Tobago*** [1995] 1 WLR 194 and ***Gerald Muirhead v R*** [2008] UKPC 40.

[29] Despite the fact that Mr Taylor for the Crown was invited by the court to respond to Mr Harrison's submissions on grounds three and four only, we also had the benefit of detailed skeleton arguments from him on the other grounds. As regards ground one, his submission was that there was no necessity for the learned trial judge to have carried out an investigation in this case, there having been no allegation of misconduct against the juror in question. In any event, section 31(3) of the Jury Act permitted the judge to proceed as she had done, having discharged a single juror.

[30] On ground three, Mr Taylor, who, as it happens, had also appeared for the Crown at the trial, indicated that the evidence of the seizing of the applicant's machete had been led "purely for the narrative"; he nevertheless accepted that that evidence was potentially prejudicial to the applicant. However, it was submitted, any prejudice that could have been caused by this evidence was entirely curable by an appropriate direction by the judge to the jury, which was given in this case. In this regard, Mr Taylor referred us to the decision of this court in ***Machel Goulbourne v R*** [2010] JMCA Crim 42 (on the proper approach by a judge to prejudicial evidence) and to the recent decision of the Privy Council in ***Nigel Brown v R*** [2012] UKPC 2 (on the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act).

[31] On ground four, Mr Taylor's submission was that the verdict of the jury was justified on the evidence, given that they had received adequate directions from the trial judge on the issues of the credibility of Mr Reid and the identification evidence generally. For the purposes of this ground, the applicant was required to show that the verdict was so against the weight of the evidence as to be unreasonable and insupportable (***Joseph Lao v R*** (1973) 12 JLR 1238), failing which the verdict of the jury should stand.

[32] And finally, on ground five, we were treated to a rich exposition by Mr Taylor in his skeleton arguments on the principles relevant to a complaint on appeal by an unsuccessful defendant of a lack of effective assistance by counsel, tracing the evolution of the principles at common law and considering the constitutional dimension

in the light of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 ('The Charter of Rights').

[33] In a brief reply, Mr Harrison sought to distinguish ***Nigel Brown*** and ***Machel Goulbourne***, the one on the basis that in that case the evidence of the identification witness remained impressive and unshaken at the end of cross-examination, the other on the basis that the court was there concerned with an inadvertent disclosure of prejudicial material by a witness for the prosecution.

Discussion and analysis

Ground one

[34] This ground raises the question whether the judge's handling of the disclosure that the principal witness for the prosecution and a juror were previously known to each other was appropriate in the circumstances.

[35] Section 31(3) of the Jury Act provides as follows:

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

[36] In the light of this section, it appears to us that there can be no question that Beckford J acted within her clear powers when, having discharged the juror to whom Mr Reid was known previously, she determined that the trial should proceed with the

remaining 11 jurors. But, Mr Harrison says, the learned judge was under an obligation to investigate the allegation that the juror knew Mr Reid before deciding to discharge him, with a view to ascertaining whether it might in fact be necessary to discharge the entire jury.

[37] For this contention, Mr Harrison based himself on ***Blackwell***, the facts of which it is therefore necessary to examine in some detail. The appellants in that case were charged with conspiracy to supply cannabis resin and possession of ammunition without holding a firearm certificate. The trial of the appellants commenced on 4 May 1993 and, on 13 May 1993, the day on which the prosecution closed its case, counsel brought to the trial judge's attention the behavior of a male member of the public in court, who appeared to be paying more attention to the appellants than to the evidence and seemed to have some kind of unsavoury motive. It also emerged subsequent to that that this man and a female member of the jury had some contact with each other. The judge was asked by counsel more than once after that, but declined, to investigate the matter and, on 21 May, he was told that the man and the female juror were said to be going to get married to each other. On 24 May, immediately before the judge was about to sum up to the jury, an application was made to discharge the entire jury, as a result of which, after lengthy submissions, he discharged the female juror, without making any enquiries of her or of her fellow jurors. The trial proceeded with the remaining jurors and the appellants were convicted.

[38] On appeal, it was submitted that the trial judge had erred in not carrying out an investigation into whether or not extraneous information had been relayed by the man to the female juror, into whether or not they had discussed the case between them and into whether or not any information had been relayed by that juror to the jury as a whole. Thus, it was contended, because the judge had carried out no investigation, he was in no position to exercise his discretion not to discharge the jury. Upholding this submission, it was held that the judge had improperly exercised his discretion not to discharge the jury because he did not have the information required to make the decision. Delivering the judgment of the court, Morland J said this (at pages 633-4):

> "If there is any realistic suspicion that the jury or one or more members of it may have been approached or tampered with or pressurised, it is the duty of the judge to investigate the matter and probably, depending on the circumstances, the investigation will include questioning of individual jurors or even the jury as a whole. Any such questioning must be directed to the possibility of the jury's independence having been compromised and not the jury's deliberations on the issues in the case.
>
> When the judge has completed his investigations whether relating to the activities of people outside the jury or the jury collectively or individually the judge is in a position to make an informed exercise of judicial discretion as to whether or not the trial should continue with all 12 jurors or continue after the discharge of an individual juror, or the whole jury may have to be discharged."

[39] In our view, the circumstances of this case are plainly distinguishable from those of the instant case. In ***Blackwell***, the concerns generated by the presence in court of the strange man and his subsequent contact with and alleged intention to marry one of the jurors arose after the trial had already been underway for well over a week and

close to the end of the prosecution's case. In the instant case the information as regards the juror and Mr Reid's previous knowledge of each other reached the judge early on the first morning of the trial, at which point the only evidence which had been heard had come from a purely formal witness, and Mr Reid, who was the main witness in the case, had only just commenced his evidence. It appears to us that there was absolutely no basis to suppose at that still very preliminary stage that there was any suspicion, realistic or otherwise, that an approach of any kind had been made to any of the jurors. We cannot therefore accept that further investigation was warranted and we consider that the learned trial judge's decision to discharge the particular juror and to continue with the trial with 11 jurors, as section 31(3) of the Jury Act empowered her to do, was a proper exercise of her discretion in the circumstances.

Ground three

[40] This ground raises the question of what ought the judge to have done in response to the evidence adduced by the prosecution that a machete had been taken from the applicant's home after his arrest and charge for murder committed by the use of a machete. As has been seen, nothing at all came of the taking of the applicant's machete and its submission to the forensic laboratory for testing. Although it appears that a certificate was in fact obtained from the laboratory, it was not in evidence and, as Sergeant Bennett allowed when pressed in cross-examination, "nothing turned on it" (see para. [17] above). In his submissions before us on this point, Mr Taylor accepted that in these circumstances this evidence was potentially prejudicial.

[41] In ***Machel Goulbourne***, this court had to consider, hardly for the first time, what should be the appropriate response by a trial judge to the inadvertent disclosure of prejudicial evidence to the jury. The court said this (at para. [21]):

> "In such circumstances, it is always a difficult decision for a trial judge to make as to the best way to mitigate the effects of such evidence. Occasionally, the potential of prejudice is so clear and serious that the only appropriate step for the judge to take will be to discharge the jury and have the matter begun anew before a freshly constituted jury. Sometimes it may be best to tell the jury immediately after the evidence comes out that it is irrelevant and should be completely ignored by them. Or it may sometimes be best left to the end when the judge is summing up to the jury to tell them to leave it out of their consideration entirely. Often the judge may decide on a combination of these two approaches, that is, to tell the jury immediately to ignore the evidence and to reinforce this with a further explicit warning in the summing up. And, in yet other circumstances, the judge could well decide, in her discretion, that the best way to deal with an inadvertent casual disclosure is to say nothing at all about it, rather than, by making a comment on it, to recall it to the jury's mind when they might otherwise have forgotten about it entirely (see, for an example of a case in which it was held on appeal that, in the particular circumstances of that case, the trial judge could not be faulted for adopting this last approach, ***R v Coughlan*** (1976) 63 Cr App Rep 33, esp. at page 38)."

[42] It is therefore clear that there is no fixed formula according to which a judge is required to deal with the inadvertent disclosure of prejudicial material to the jury during the course of the trial. Each case will depend on its own facts and the trial judge has a discretion in these matters which will not lightly be interfered with on appeal. As Sachs LJ put it in the well-known case of ***R v Weaver*** [1967] 1 All ER 277, 280 (to which reference was also made in the judgment of the court in ***Machel Goulbourne***, at para.

[22]), "…it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course".

[43] In the instant case, although the learned trial judge made no comment on Sergeant Bennett's evidence after it was adduced, she did deal with it in her summing up as follows:

> "And, you were told, both counsel referred to the fact that blood was taken from the deceased and a machete was recovered from the home of the accused, Mr. Foreman, and that nothing turned up. It was sent for analysis to the laboratory and nothing turned on it. Mr. Foreman, members of the jury, as the Prosecutors told you it would have been the 4th of August this thing happened. On the 19th of July the incident of the chopping took place on the 19th of July. The machete was not confiscated until the 4th of August. Nothing was found on it, that is [sic] whole point. The point is if anything was found on it this was not matching the blood of the deceased, so, nothing really turned on the face of it but it was put before you so I go through it to let you know that it was not a matter of importance and should not be taken."

[44] Although Mr Harrison did submit that the judge ought to have ("by a timely intervention") prevented the evidence being heard by the jury at all, it is not entirely clear to us by what means this would have been achieved and the judge might well have thought that this was a matter best dealt with if and whenever an objection to the evidence was taken. As it happens, no objection to the evidence being given in chief was in fact taken by Mr Palmer, who chose rather to deal with it in cross-examination.

In our view, that evidence having been given, the learned judge acted well within the range of responses available to her in these circumstances by opting to deal with it in her summing up rather than making an immediate comment on it.

[45] But Mr Harrison's further complaint was that the judge ought to have done more than to tell the jury, as she did, that the recovery of the machete from the applicant's home "was not a matter of importance and should not be taken". We accept that the learned judge might in the circumstances have used far stronger language to convey to the jury that this evidence had absolutely no value whatsoever and should be ignored altogether. Indeed, as we indicated to Mr Taylor during the hearing, given that the outcome of the forensic test was known to the prosecution before the trial commenced, it is impossible to discern any sensible reason for the evidence to have been adduced at all and this does serve to distinguish the case, as Mr Harrison urged us to do, from cases of purely inadvertent disclosure, such as ***Machel Goulbourne***.

[46] However, that having been said, we have found it difficult to see how, in the light of the way in which the evidence unfolded and what the judge did tell the jury, they would have been in any doubt that this evidence did not enhance the case for the prosecution in any way. As the learned trial judge told the jury twice in the passage quoted at para. [43] above, nothing turned on it and, it appears to us, the jury could not have considered otherwise. (We were initially inclined to share Mr Harrison's unease at the judge's use of the word "confiscated" in this context. However, a closer consideration of the meaning of the verb 'to confiscate' reveals that "to take possession of by authority" is among its usual meanings, thus suggesting that the word was in fact

used appropriately to describe the seizure by Sergeant Bennett of the applicant's machete – see Chambers Twentieth Century Dictionary, page 272.)

Ground four

[47] The applicant's complaint on this ground is that the verdict of the jury was unreasonable in the light of the evidence. As we have already indicated, ground two, in which complaint was made that the learned trial judge had failed to highlight the "glaring weaknesses" in the identification evidence, was not pursued. However, Mr Harrison nevertheless urged us, in considering ground four, to look carefully at Mr Reid's evidence identifying the applicant, the quality of which he described as "patently unreliable".

[48] In ***Joseph Lao***, a case now firmly in contention as the authority most frequently cited by the Crown in response to appeals to this court, the court cited with approval (at page 1240) a passage from 'Ross on the Court of Criminal Appeal' (1st edn, page 88), in which it was emphasised that, "where there is evidence to go to the jury…[it is not] within the functions of a court composed as a court of the appeal that such cases should practically be retried before this court". It was accordingly held that, in order to successfully maintain on appeal that the verdict of a jury should be set aside on the ground that it was unreasonable in the light of the evidence, it was required to be shown that the verdict is "so against the weight of evidence as to be unreasonable or insupportable".

[49] The primary issues in the instant case related to identification and credibility. At an early stage of the summing up, the learned judge told the jury that the case for the prosecution "depends to a very large extent on the identification of the accused". She then proceeded to direct the jury fully and carefully along standard ***Turnbull*** lines, warning them as to the need for caution, in recognition as well as in identification cases, and explaining to them the reason for the warning. The learned judge took the jury in detail through the evidence of Mr Reid, for the purpose of highlighting to them the need for careful consideration of the circumstances of the identification: the duration of the incident; the length of time that the witness had the applicant under observation (was it a fleeting glance?); the distance at which he saw the applicant; the lighting; whether there was any interference with or obstruction of the witness' observation of the applicant's face; whether the witness knew the applicant before; and whether, given that the witness and the deceased were old friends, this made the circumstances of the identification especially difficult for him. The judge also referred to some inconsistencies in Mr Reid's evidence, as well as some discrepancies between his evidence and that of the police witnesses who went to the scene after the attack on the deceased, before concluding on this point as follows:

> "It is possible, even in recognition cases, Mr. Foreman and members of the jury, for someone to be mistaken. You may know of cases where, it may have happened to you, where you see a person in broad daylight and are sure it is someone you know and you call to them only to find that you are mistaken and that's not the person you thought you passed. So, Mr. Foreman, members of the jury, bearing in mind the warning I have given you and the weaknesses in the identification evidence that I pointed out to you, it is for

> you to say whether you are satisfied so that you feel sure that the witness, Mr. Michael Reid, saw what he said he saw. You see, even if the witness, Reid, is sure that he is making no mistake, it is you the jury, who must be satisfied so that you feel sure that he is making no mistake when he said he saw this accused man chop the deceased on the early morning of the 19th of July, 2004. And, that is what I wanted to say to you about identification evidence."

[50] It is his review of these directions that led to Mr Harrison's very proper concession before us that he could not press ground two. Instead, he focused entirely on the issue of Mr Reid's believability as a witness, in particular in the light of his late acceptance – after prompting in cross-examination - that he had omitted from his evidence at the trial to say what he had said at the applicant's first trial, which was that, when he saw the applicant on the night in question, "he was moving after Sammy Jeggy 'round and 'round the truck".

[51] At the completion of her review of the identification evidence, Beckford J turned her attention to the issue of Mr Reid's credibility, in terms which it is necessary to reproduce in full:

> "Now, you also have to look at whether or not this witness is a believable witness. Bear in mind that he is the sole eye-witness. Remember I told you about discrepancy, so, what you are going to look at now is in relation to discrepancy. Now, the witness, Reid, has admitted he believes he gave evidence which conflicts with his evidence before. You may take into account the fact that he made such a statement, when you consider whether he's a believable witness. However, the statement itself is not evidence of the truth of its contents, except for those parts of it which he has told you are true. In this case, the witness, Reid, was not asked whether what he told you, or

what he told the other Court was the truth; that when he saw the accused man he was moving 'round and 'round the truck after Sammy Jeggy and they were on the sidewalk running around the truck. He was not asked which is the truth. Nobody asked him that so you have two pieces of evidence put forward by him. He was not asked which is the truth, only whether he had said it to the other Court. To this question, having seen the document, he said yes he had said to the other Court that he saw them running on the sidewalk and around the truck and he saw them running 'round and 'round the truck. What he said to you was the accused was moving very fast coming between the two trucks, coming towards Sam Jeggy and he heard the accused say in a loud tone of voice, 'Yuh won't stop lurking 'round mi place buoy' and chop after the deceased, whereupon, [sic] deceased put up his hand and [sic] witness said he saw blood gushing from deceased's hand.

Now, Mr. Foreman, members of the jury, defence counsel said he noticed - - he looked twice – the witness put up his hand but remember I told you about Dr. Sinclair's evidence and Dr. Sinclair said she saw a chop across the right palm, so I don't know; what do you make of that? That's the evidence. Now, nowhere in the narrative that the witness Reid gave you did he tell you about any chase 'round and 'round the truck, so, you cannot substitute that bit of evidence; you cannot say that he was running 'round and 'round the truck or that he just ran at him and chopped at him. You have to look at what he told you. What you do is you look at that bit of evidence that he said yes he told the Court, that other Court, he told them yes they running 'round and 'round. You determine now whether or not that makes the witness a believable witness, because it was an inconsistency, it can't be you run and chop or running 'round and 'round at the same time and nothing was clarified before you. Matter for you.

Again, his evidence to you, the only time he mentioned the sidewalk was when he said the accused walked on the sidewalk to his gate after chopping the deceased in the face, remember? He said deceased turned up his face and he chopped him then walk around the truck and that is the only time he mentioned the chop to you. He told the other Court they were running on the sidewalk and around the truck, matter for you. He told you that the deceased was in

> the middle of the road on Duhaney Drive and this is evidence that is before you. Evidence given before another Court is not evidence that is substituted, it is not evidence before you unless the witness is saying to you, 'What I said to you is not the truth, what I said to the other Court is the truth', is that clear? So, what you are going to do with that is to use that to say, is the witness a believable witness? Can you believe him when he says what he did?
>
> So, then, Mr. Foreman and members of the jury, I have given you the scope, the example. Look at the discrepancies in the evidence. I am going – not going to go through to point out whether or not there are other discrepancies. If I have left anything out that you recall, you deal with it in the manner I have told you.
>
> So, you have to decide whether or not the accused man – the witness, Reid, is convinced that he was telling the truth, that he saw what he saw. It is you who must decide whether or not you accept him as a witness of truth. Only you can determine that."

[52] This was, in our view, a conspicuously fair and completely unexceptionable direction to the jury as to how to approach the question whether they could believe Mr Reid or not. Experienced counsel not having considered it necessary to make a submission of no case to answer at the end of the Crown's case (a decision not challenged on appeal), it was a matter entirely within the jury's purview, as judges of the facts, to assess Mr Reid's credibility and it is no part of this court's function to second guess the jury on this issue.

Ground five

[53] The applicant's complaint on this ground is that his counsel at trial failed to consult with and take instructions from him at any time prior to the commencement of

the trial, so as to receive proper instructions from him. He was thereby deprived of the opportunity to present his defence to the jury by way of his own evidence. When the time came for him to state his defence, the applicant stated, in the light of the limited time allowed by the judge, he decided that he had no option but to make an unsworn statement, as he had done at the first trial. Mr Palmer for his part insisted that in preparation for both the first and the second trials he had explained to the applicant the difference between evidence and an unsworn statement from the dock and that the applicant had elected to make an unsworn statement.

[54] Few would dispute Lord Hope of Craighead's observation in ***Benedetto v R*** [2003] UKPC 27, [2003] 1 WLR 1545, that "A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought." However, the common law has been slow to admit error or even incompetence of counsel as a ground of appeal and in ***R v Clinton*** [1993] 1 WLR 1181, 1187, the English Court of Appeal, in a judgment delivered by Rougier J, reiterated the traditional position:

> "…cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional…During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence. Some of these decisions turn out well, others less happily."

[55] It will therefore ordinarily be difficult to impugn successfully decisions made by counsel "in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client" (***Clinton***, per Rougier J, at page

1187). This is how Judge LJ (as he then was) stated the position in ***R v Doherty & McGregor*** [1997] 2 Cr App R 218, 220:

> "Unless in the particular circumstances it can be demonstrated that in the light of the information available to him, at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In **Clinton** itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would 'of necessity be extremely rare'."

[56] However, ***Clinton*** also establishes that, exceptionally, a decision taken by counsel "either in defiance of or without proper instructions, or when all the promptings of reason and good sense point the other way" (per Rougier J, at page 1188), may lead an appellate court to set aside a conviction on the ground that it was unsafe and unsatisfactory. In such cases, Rougier J considered that it was "less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict".

[57] In ***Clinton***, the court was concerned with section 2(1)(a) of the Criminal Appeal Act 1968 (which has since been repealed and replaced with some modification by the Criminal Appeal Act 1995), which provided that an appeal against conviction should be allowed if the conviction was considered unsafe and unsatisfactory. In ***Solomon v The State*** (1999) 57 WIR 432, the Court of Appeal of Trinidad & Tobago compared the language of the English provision with section 44(1) of the Supreme Court of Judicature

Act, which prescribes that an appeal shall succeed if the Court of Appeal thinks that "on any ground there was a miscarriage of justice", which is in *pari materia* with section 14(1) of the Judicature (Appellate Jurisdiction) Act, and concluded that there was no substantial difference in the effect of both provisions (see also ***R v Mills & Poole*** [1997] 3 All ER 780, 791, where Lord Hutton said that "[T]here is no real distinction between a material irregularity which causes a miscarriage of justice and a feature of the trial which causes a conviction to be unsafe."). We agree with this conclusion and we therefore consider that, on the basis set out in ***Clinton***, it is open to this court to allow an appeal in an appropriate case in which complaint is made of the conduct of defence counsel on the ground that there has been a miscarriage of justice.

[58] The Court of Appeal of Trinidad & Tobago applied ***Clinton*** in ***Bethel v The State of Trinidad & Tobago (No. 2)*** (2000) 59 WIR 451. Delivering the judgment of the court, de la Bastide CJ (as he then was) said this (at pages 459-60):

> "…we consider that when the conduct of a case by counsel forms the ground of appeal, we too ought to focus on the impact which the faulty conduct of the case has had on the trial and the verdict rather than attempt to rate counsel's conduct of the case according to some scale of ineptitude.
>
> There is, however, one important proviso which we would attach to this approach. It is conceivable that counsel's misconduct may have become so extreme as to result in a denial of due process to his client. In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance for, whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the conviction must be quashed. It is not difficult to give hypothetical

> examples of how such a situation might occur. An obvious example would be if the accused had the misfortune to be represented by counsel whose judgment was proved to have been impaired by senility, drugs or some mental disease. Another example, closer to the facts of this case, is if counsel conducted the defence without having taken his client's instructions. This is simply another application of the basic principle that, if there is a fundamental flaw in the conduct of a trial, the conviction which results from it cannot be allowed in any circumstances to stand."

[59] In ***Sankar v The State of Trinidad & Tobago***, the appellant had at his trial opted to remain silent rather than give evidence on oath or make an unsworn statement from the dock. On his appeal to the Privy Council, the appellant swore to an affidavit in which he stated that he had wanted to give evidence in his defence, but that during the testimony of the final witness for the prosecution his counsel had gone over to the dock and advised him to remain silent. In a response on affidavit, counsel agreed that he had advised the appellant to remain silent, but stated that he had only done so as a result of his having been told "something" by the appellant, which, in his view, obliged him to advise that the appellant remain silent, rather than make the unsworn statement which he had in fact opted to make.

[60] The Board considered that, whichever of these divergent accounts was true, the appellant was placed in a position, even on counsel's account, where he neither gave evidence nor made an unsworn statement "without his having received advice and without his being given any explanation as to what were the alternative courses which were open to him" (per Lord Woolf, at page 199). In the result, the appeal was allowed on the ground of a miscarriage of justice, because "[t]he defendant had been deprived

in reality of deciding whether or not he should give evidence or at least make a statement from the dock", it never having been explained to him "how important his evidence would be to the outcome of the trial and that, without that evidence, in practice there was no defence" (pages 199-200).

[61] In ***Boodram v The State of Trinidad & Tobago*** (2001) 59 WIR 493, the Board stated (at para. [39]) (citing ***Clinton*** and ***Sankar***) that, where counsel's conduct is called in question on appeal, "the general principle requires the court to focus on the impact of the faulty conduct". Lord Steyn, who delivered the judgment of the Board, also went on to endorse de la Bastide CJ's qualification in ***Bethel (No. 2)*** that, on the other hand, there may be cases where "counsel's misconduct has become so extreme as to result in a denial of due process to his client" (see also, ***Balson v The State of Dominica*** [2005] UKPC 2; and ***Weekes v R***, Criminal Appeal No. 4 of 2000, judgment of the Court of Appeal of Barbados delivered 30 April 2004.)

[62] Before turning to the instant case, we should mention lastly ***Muirhead v R***, in which a challenge on appeal to a conviction for murder on the ground of counsel's failure to advise the appellant to give evidence and to adduce evidence of the appellant's good character at his trial succeeded before the Board. The major problem faced by the Board in this case was the failure of counsel who represented the appellant at trial to offer any response to the appellant's assertion on appeal that he had been advised after the close of the prosecution's case (and against his better judgment) to make a statement from the dock rather than to give evidence in his

defence. In the result, the Board felt unable to conclude that the appellant had received a fair trial. Delivering the judgment of the Board, Lord Hoffmann referred to its earlier decision in ***Bethel v The State*** (1969) 55 WIR 394, in which the Board commented on the absence of any documentation concerning the instructions which counsel obtained from his client in these terms (at page 398):

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

[63] A feature which distinguishes the instant appeal from ***Muirhead***, of couse, is that we have had the benefit of Mr Palmer's affidavit, in which he denies the applicant's account as to the circumstances in which he came to make an unsworn statement. While the Board did observe in ***Bethel*** that ordinarily it would accept the explanation proffered by counsel in response to an appellant's allegation of incompetent conduct, it is not clear to us whether their Lordships had in mind in so saying cases of sharp disagreement between counsel and his client on a purely factual matter, of which the present case is an example. In ***Doherty & McGregor***, Judge LJ considered (at page 221) that, in the case of a factual dispute between a client and former counsel, "both the appellant and counsel may be required to give evidence so that, unless agreed, issues of fact may be resolved". In the instant case, although we did have the benefit

of affidavits from the applicant and Mr Palmer, we have not found it possible to resolve the conflict between them in the absence of cross-examination and the opportunity to observe them giving evidence in person. We consider that the court is therefore in no position to determine where the truth lies as between them on the question of the instructions received as regards the giving by the former of an unsworn statement. However, we cannot avoid the observation that it is a matter of regret that in this, a capital case, counsel of Mr Palmer's experience did not find it necessary to preserve a written record of the instructions he received on as important a matter as whether the applicant would give evidence or make an unsworn statement. Such a record would surely have served to break the deadlock between counsel and client on this vital issue of fact. (And it could well be time for the Bar to consider and settle some guidance to the profession along the lines of that given in December 1995 by the English Bar Council, with the approval of the Lord Chief Justice, about the procedure to be adopted in criminal cases which involve criticism of former counsel: see ***Doherty & McGregor***, page 219; and ***Weekes***, at para. [43].)

[64] But it nevertheless seems to us that it would be right for us to consider the matter briefly on the hypothesis that the applicant's version is the correct one and that he was not – or not adequately – advised on whether he should make an unsworn statement or give evidence. In so doing, we will adopt the approach sanctioned by ***Clinton*** and subsequently developed and refined in the later authorities, that is, to consider (i) the impact which the alleged faulty conduct of the case has had on the trial

and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a denial of due process to the applicant.

[65] As regards credibility, we fully accept the force of the view that is implicit in the applicant's affidavit (especially paras 6 and 7 - see para. [23] above), which is that there was at least a possibility that sworn evidence from him might have carried greater weight with the jury than the unsworn statement which he in fact made. This point has been made in different ways in the cases, but in ***Logan v R*** [1996] UKPC 64, for instance, Lord Steyn stated (at page 10) that an unsworn statement, untested by cross-examination, was in principle "markedly inferior in quality to sworn evidence" (see also ***Stewart v R*** (2011) 79 WIR 409, para. [15]), where, in the context of the necessity in an appropriate case for a good character direction, Lord Brown said that "the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock…than when he has given sworn evidence"). In this regard, it is perhaps not without significance that Beckford J's statement to the jury in the instant case that the applicant's unsworn statement was not evidence that "has been tested under cross-examination" and therefore could not be weighed "in the same scale" as evidence given on oath did not attract the attention of the applicant's very experienced counsel on appeal. So, on the face of it, it is, in our view, possible to suppose that the credibility of the applicant's account of what happened in the early morning of 19 July 2004 might have been enhanced had he gone into the witness box.

[66] But, in making this assessment, it is also important to bear in mind the crediblity of the Crown's sole witness as to the facts, Mr Michael Reid. Despite long and searching cross-examination by counsel for the applicant, Mr Reid's account of how the deceased lost his life remained at the end of the day substantially unimpaired, save in respect of the evidence of his failure to recall initially what he had said at the first trial as regards his having seen the applicant moving after the deceased "'round and 'round the truck" (see para. [10] above). And even so, Mr Reid having agreed when it was put to him that this was what he had said at the first trial, it seems to us that the evidence of the previous inconsistency became less significant as regards his credit than it might otherwise have been, although the judge did, as she was bound to, tell the jury that it was an inconsistency, since "it can't be you run and chop or running 'round and 'round at the same time".

[67] It therefore seems to us that, taking all factors into account, the failure of the applicant to give sworn evidence has not been shown to have had a significant impact on the trial and the verdict, particularly in the light of the fact that there was nothing in the applicant's unsworn statement to suggest that it might more effectively have been put before the jury in the form of sworn evidence. In so far as the second question is concerned, we cannot in these circumstances regard the alleged failure by counsel to afford the applicant an opportunity to consider giving evidence on oath as falling within the category of egregious breaches given as examples by de la Bastide CJ in ***Bethel No. 2*** (para. [57] above). Given the fact that the applicant was able to put forward his defence of alibi in his unsworn statement, thus obliging the judge to deal with it in the

summing up, it seems to us that it cannot be said that counsel's alleged misconduct was such as to result in a denial of due process to the applicant.

Disposal of the application

[68] It follows from all of the foregoing that, in our view, none of the grounds so expertly argued by Mr Harrison has been made good and that this application must accordingly be refused. The order of the court is that the applicant's sentence is to be reckoned from 28 August 2009.