JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 52/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

ANTHONY RUSSELL v R

Miss Nancy Anderson for the applicant

Miss Sophia Thomas for the Crown

30 May 2017 and 9 March 2018

P WILLIAMS JA

Background

[1] On 6 December 2010, after a trial in the Circuit Court for the parish of Saint James before Hibbert J and a jury, Anthony Russell, the applicant, was convicted for murdering Dahlia Dunkley and Kenroy Stewart. On 20 May 2011, he was sentenced to life imprisonment with the stipulation that he would be eligible for parole after he had served a minimum of 25 years, on each count.

[2] By notice dated 16 June 2011, the applicant applied for leave to appeal on the following grounds:

> " 1 **Misidentify** [sic] **by the witness:-** that the prosecution witness wrongfully identified me as the person or among any persons, who committed the alleged crime;
>
> 2. **Unfair Trial:-**that the evidence and testimonies upon which the learned trial judge relied on [sic] to direct the jury lack facts and credibility thus rendering the verdict unsafe in the circumstances;
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> 3. **Lack of Evidence:-** that the prosecution witnesses failed to put forward any piece of material, ballistic, or scientific evidence to link me to the alleged crime;
>
> 4. **Miscarriage of Justice: -** Based on the evidence as presented it is quite clear that I was wrongfully convicted of a crime I knew nothing about."

[3] The application was first considered on paper by a single judge of this court on 8 October 2015. The learned judge could see no reason to disturb the findings of the jury and the application was refused. As is his right, the applicant has renewed his application before us.

[4] When the matter came on for hearing, Miss Nancy Anderson applied for and was granted permission to abandon the initial grounds and to argue four supplemental grounds of appeal. The following grounds were therefore pursued before us:

> "1. The learned trial judge erred in that he failed to give further directions to the jury on the acts and words of third persons which the jury should consider as provocation in the killing of Dahlia Dunkley.

2. The learned trial judge failed to leave the issue of manslaughter to the jury in the killing of Kenroy Stewart as there was ample evidence adduced at the trial from which it would be open to a jury to infer that there had been provocation.

3. The learned trial judge erred in that he failed to provide any proper directions to the jury regarding the discrepancies and inconsistencies that arose in the case and was unhelpful as to how those discrepancies and inconsistencies were to be dealt with.

4. The sentence imposed on the applicant, Anthony Russell, is manifestly harsh and excessive in the circumstances."

The case for the prosecution

[5] The events that led to the conviction of the applicant occurred on 23 June 2008 in the Glendevon area of the parish of Saint James. The Crown relied on three witnesses to describe the events of that afternoon. However, what transpired on that day is cleverly encapsulated in two questions asked in cross-examination of the first witness by Mr Roy Fairclough who appeared for the applicant at the trial. The witness was Miss Keisha Dunkley and at the commencement of the cross-examination the following exchange took place:-

"Q: Now you would agree with me that the scene that day in front of your home was one of commotion, quarrelling, brawling and noise and fighting?

A: And killing

Q: And killing

A: Yes.....

Q: Except for the accused man all the combatants were blood family

A: Yes sir."

[6] Miss Dunkley is the daughter of the deceased woman, Mrs Dahlia Dunkley and niece of the deceased man Mr Kenroy Stewart. Mrs Dunkley and Mr Stewart were siblings. There was another sister who was involved in the incident, Miss Nevlyn Stewart who was the common-law spouse of the applicant. Other children of these siblings were also involved.

[7] Miss Dunkley told the court that on the afternoon of 23 June 2008, she arrived at her home on Charles Drive in the Glendevon community at about 5:00 pm. She resided there with her mother, her father, Mr Sobers Dunkley; her two younger sisters, Trisha and Andrea; along with a cousin, Kenisha, the daughter of the deceased Kenroy Stewart. On her arrival home that afternoon, she saw all those persons, with the exception of her mother, gathered outside the home.

[8] Kenisha, who was about 11 years old at the time, was crying and Miss Dunkley observed blood in the region of her ankle. After speaking with Kenisha for a brief period, Miss Dunkley was called inside the home by her father and went on to the patio upstairs leaving Kenisha on the steps outside.

[9] Miss Dunkley testified that she then saw two of her cousins, Sanika Russell and Anthony Russell Jr, coming along the road. These cousins are the children of the applicant and Miss Nevlyn Stewart. They all resided in the said community, a short

distance away from the Dunkley's residence. Mr Kenroy Stewart resided with them. At the time, Sanika was aged about 14 years and Anthony Jr was about 10 or 11.

[10] Miss Dunkley said that upon reaching the gate to her home, the cousins stopped. She saw Miss Nevlyn Stewart, her aunt, approaching from the opposite direction which was the direction of their home. Miss Stewart joined her children at the gate, on the road in front of the Dunkley's home. Miss Stewart was cursing.

[11] Kenisha, who was still on the steps, threw a plastic pipe in the direction of Miss Stewart and her children and it hit into a nearby fence. At this time Miss Stewart and her children started to curse Kenisha.

[12] Miss Dunkley said she then saw the applicant approaching from the direction of his home. She heard him cursing and uttering threats in the following terms "all di batty bwoy Sobers him can gwaan talk. If anyone a unooh lick mi pickney oonuh dead, mek none a oonuh lick mi pickney out yah and oonuh si what happen. Mi must kill oonuh, kill off di whole a oonuh".

[13] Miss Dunkley said the applicant continued down the road until he could no longer be seen by her. Meanwhile, Miss Stewart and her two children left in the opposite direction, the direction of their home. Shortly after, the children were seen coming back down the road and walked away till they too were out of sight.

[14] Mr Kenroy Stewart then arrived at the Dunkley's home and spoke to his daughter. Shortly after, Mrs Dahlia Dunkley arrived home and parked on the road

outside the gate. Miss Dunkley and her sisters went to their mother and spoke to her. Mrs Dunkley exited the van and spoke to her brother Kenroy before going to sit on the steps. Miss Dunkley said that at this point, her mother got out her cell phone and dialled 119.

[15] Miss Dunkley then saw her cousins, Sanika and Anthony Jr, coming back along the road. Mr Stewart and Kenisha approached them and after an exchange of words Kenisha picked up a handful of stones and hit Anthony Jr. After this, Sanika and Anthony Jr started throwing stones at Kenroy and Kenisha. Miss Dunkley said "a big brawl developed. Both parties were shouting".

[16] Miss Nevlyn Stewart returned with a machete in her hand. She was accompanied now by her other daughter, Suzette Foote, who was not a child of the applicant. Miss Dunkley said she then noticed that the applicant was standing "at the top of the road at one of [her] neighbour's gate known to [them] as Sharon". She said that at this point he was about one chain or about one and three quarter chains away from her.

[17] When Miss Nevlyn Stewart and Suzette joined in the throwing of stones, Mr Stewart and Kenisha ran off into the Dunkley's yard. The applicant was heard shouting "Nevlyn, come up yah so because memba say a nuh over deh so him live... and him haffi pass yah so fi go a Norwood. .....All the one Dahlia, you can gwaan. Mi must kill oonuh. Mi ha fi kill the whole a oonuh. Oonuh must dead".

[18] Miss Stewart responded "mi nah come nuh wey..... a pussy ha fi dead, anything a anything. A pussy haffi dead today".

[19] Mr Sobers Dunkley then spoke to his wife instructing her to drive the pickup from the road and into the yard. Mrs Dunkley got into the van and as she started it and attempted to move off, some pebbles flew from under the wheels at the rear of the vehicle. Miss Stewart went to the back of the vehicle blocking Mrs Dunkley from attempting to reverse. As she stood there, she shouted to Mrs Dunkley "[d]utty gal, mek one a dem stone deh ketch me and you see what happen, you see wey mi fling ina you vehicle".

[20] Mrs Dunkley exited the vehicle, stood in front of it and said "see it deh, mash it up nuh, mash it up nuh". Suzette then went up to Mrs Dunkley and began pointing a finger in Mrs Dunkley's face. Miss Dunkley said she walked over to her mother holding a piece of iron-pipe in her hand. Suzette's finger touched Mrs Dunkley on her nose. Mrs Dunkley grabbed the iron-pipe from her daughter and raised it in a striking position.

[21] Nevlyn Stewart came up with the machete. She chopped Miss Dunkley on her wrist. Almost simultaneously, Sanika re-appeared and sprayed something into Miss Dunkley's eyes. Miss Dunkley described how this caused a burning sensation in her eyes and forced her to rush to a pipe inside her yard to try and wash out her eyes.

[22] The next thing Miss Dunkley said she was able to see was her mother and aunt fighting. She said her view of all that was taking place on the road was obstructed by the wall which separated the yard from the road. She, however, next heard an explosion which sounded like a shot being fired from a gun. She saw when her aunt threw a dark object over a wall on the opposite side of the road.

[23] Miss Dunkley said she then saw her aunt run off in the direction of where the applicant was standing. Her mother was running behind her aunt, apparently chasing her. Miss Dunkley said she did not see anything in either of the ladies' hands at this time. However, she observed that the applicant had something in his hand which was covered by a handkerchief.

[24] As Miss Stewart ran towards where the applicant was standing, she shouted to him saying "Puss Puss help - you a guh mek de gal kill mi, you a guh mek di gal kill me". Miss Stewart then ran and stood behind the applicant who raised his hand with the object and pointed it in the direction of Mrs Dunkley. Mrs Dunkley immediately turned around and began running away from him, with her back towards him at this time. Miss Dunkley said she heard a loud explosion and saw "fire" or "something gash" coming from the object under the handkerchief in the applicant's hand. The explosion sounded like a "gunshot". She saw her mother's face twist in pain.

[25] The applicant then removed the handkerchief from the object and revealed a gun. Miss Dunkley heard another explosion and saw her mother fall to the ground on her back. The applicant went over Mrs Dunkley and Miss Dunkley heard three to four more explosions. She said he was firing directly into the upper section of her mother's body and then she observed him spitting at her mother.

[26] Miss Dunkley testified that she then saw Mr Stewart running onto the pavement from out of the Dunkley's yard. He had nothing in his hands. He looked in the direction of the applicant. The applicant raised his hand again and Miss Dunkley heard yet

another explosion. The gun at that time was pointed in the direction of Mr Stewart. Miss Dunkley saw her uncle fall to the ground. The applicant ran "unto him" and Miss Dunkley heard another two to three more loud explosions.

[27] Miss Dunkley said the applicant then looked in her direction and pointed the gun at her. She took up the machete and she "rushed him with the machete and swing three to.... [she] don't know how much slashes and he fell to the ground". When he fell, she dropped the machete and a struggle developed between them. She was able to get the firearm from him. She eventually got up and ran in the direction of where her mother had fallen. As she ran towards her mother she saw another cousin, Latoya Reid who spoke with her. After they spoke, Miss Dunkley continued to where her mother was lying.

[28] Shortly thereafter, police officers and soldiers arrived at the scene. Constable Valmore Buchanan was one of the police officers and Miss Dunkley said to him "see the gun here what Puss used to shoot my mother". He instructed her to put the firearm on the ground and when she did so, he retrieved it.

[29] Under cross-examination, Miss Dunkley denied suggestions that she, along with her two sisters, had been armed with machetes from the time her mother had been forced to exit the van when Miss Stewart positioned herself behind it. She, however, agreed that her father had "tried to make peace". She insisted that she had seen, the applicant standing at "Miss Sharon's gate" a little further up the hill; looking on as Mrs Dunkley and his children's mother fought.

[30] She denied seeing her uncle jump over the wall into Miss Sharon's yard, return with a gun and then run towards Miss Stewart with it. She also denied that it was she who had chopped her uncle as she and the applicant were wrestling for the gun. She insisted that she had seen the applicant shoot her mother and her uncle.

[31] Mr Sobers Dunkley's version of the events that took place that day was slightly different from the account given by his daughter. He had arrived home from work that afternoon to see his niece, Kenisha, standing by the gate to their home. She was crying and after making enquiries of her, he went inside and later called her inside. Shortly after, her father, Kenroy, came and spoke with her.

[32] Mr Dunkley saw Anthony Jr and Sanika approaching the home and saw when Kenisha threw some stones at them, hitting Anthony Jr who cried out for his mother. Their mother, Miss Nevlyn Stewart arrived on the scene and began throwing stones at Kenisha. Anthony Jr and Sanika soon joined her in doing so.

[33] Mr Dunkley said that it was at this time that his wife, Dahlia, drove up in her van and parked at the gate. He heard as she called out "mine you throw di stone and mash up anything over mi yard". Mr Dunkley noticed that the applicant was standing at a neighbour's gate a little distance away.

[34] Mr Dunkley said that after he told his wife to drive into the yard, he saw when Miss Stewart stood behind the van preventing his wife from reversing into the yard. When his wife exited the van, Miss Stewart "came up inna [his wife's] face" and chopped at her. A struggle ensued between them.

[35] Mr Dunkley described how "in di battle, [his wife] slide and drop and [her] gun drop out a [her] waist". Miss Stewart took it up and pointed it at Mrs Dunkley after which Mr Dunkley heard a loud explosion. Miss Stewart then threw the gun over Miss Sharon's fence and then ran off and Mrs Dunkley gave chase. He said he saw a "pipe iron" in his wife's hand.

[36] Mr Dunkley testified that he heard Miss Stewart cry out "...Mark, Mark yuh a guh mek dem kill me". At that point he saw the applicant leave from Miss Sharon's gate and point a gun in the direction of Mrs Dunkley who immediately turned around and ran back in the direction of her house. Mr Dunkley did not see anything in his wife's hands at this time.

[37] Mr Dunkley then heard explosions and saw his wife fall to the ground. The applicant ran down to where she had fallen, stood over her and pointed the gun at her. Mr Dunkley heard more explosions.

[38] Mr Dunkley then saw Kenroy Stewart running out of the Dunkley's yard and out on to the road. Mr Dunkley saw as the applicant "go meet him" and point the gun to him. Kenroy Stewart did not have anything in his hand. More explosions were then heard.

[39] Mr Dunkley said that shortly thereafter, he saw the applicant on the ground crying, with Keisha Dunkley over him, chopping at him with a machete. Mr Dunkley noticed that she had a gun in her hand that he said looked like one he had seen the applicant with earlier.

[40] Mr Dunkley testified that he was there when the police officers and soldiers arrived at the scene. He saw when his daughter handed over the firearm to one of the police officers.

[41] Under cross examination, Mr Dunkley also denied seeing Kenroy jump over the wall into Miss Sharon's yard and jump back over with a gun in his hand. He however agreed that his daughter Keisha had been chopping at the applicant but would not say if the applicant was in fact chopped.

[42] The third witness the prosecution called, who gave another version of what had transpired that day, was Miss Latoya Reid. She too was related to Mrs Dunkley and Miss Stewart. They were her aunts. She however did not live on that road. She was on her way to church in that vicinity when she said she "met upon a brawl between offspring of Dahlia and offspring of Nevlyn".

[43] Miss Reid testified that she said good evening to her aunts and cousins and continued on her way. She noticed Mrs Dunkley standing in close proximity to her van. As she walked away she said it seemed like "the quarrelling and stuff had intensified". She turned around and looked back in the direction of the Dunkley's gate and saw "just a crowd of persons just rushing towards and probably throwing blows, [she] can't pinpoint to say this person was whatever".

[44] She however did recall seeing Suzette hit Mrs Dunkley who in turn hit her back. Miss Stewart was at the time standing beside her daughter. Miss Reid turned to continue her journey. Shortly thereafter, she heard an explosion which sounded like "a

gunshot" and she turned around to see persons running away. She saw Miss Stewart running in the direction of where she was standing with Mrs Dunkley walking briskly behind her. Miss Reid did not remember seeing anything in Mrs Dunkley's hand at that point.

[45] Miss Reid saw Kenroy Stewart "appear on the scene" and jump over into Sharon's yard returning with a black object resembling a gun that her aunt Dahlia Dunkley owned. He pointed it in the direction of her aunts who were wrestling nearby at the time. He then turned and fled the scene, running away downhill.

[46] Miss Reid said that almost instantaneously, as Kenroy Stewart was running off, the applicant appeared with an object in his hand, covered by a handkerchief. He was coming from behind her and as he came almost alongside her, he took off the handkerchief revealing a metal object, a gun. He was then about six feet from her. He pointed the gun in the direction of Mrs Dunkley who then turned and started to run back in the direction she had been coming from. The applicant fired several shots in her direction and she fell to the ground. The applicant ran over to where Mrs Dunkley lay and fired shots into her body.

[47] Miss Reid ran to where her aunt fell while screaming and calling for help. The applicant ran off further downhill. Miss Reid went in the direction of the Dunkley's gate intent on getting a phone to call for help and when she got closer to the gate she saw her uncle Kenroy lying on the ground beneath her aunt's van. He had a wound to his face; he had nothing in his hands.

[48] She also saw the applicant lying on the pavement before the gate and saw her cousin Miss Dunkley hitting him with a machete. Miss Dunkley showed her a gun and told her that the applicant "used it to kill her mother and uncle." The gun resembled the one that the applicant had "unveiled from the kerchief". Miss Reid testified that at this point her aunt, Miss Stewart, started throwing stones at Keisha and told the applicant to get up.

[49] Under cross-examination, Miss Reid agreed that at some point prior to the shots being fired she heard Miss Stewart bawling out saying "Mark, Mark, help. You a go mek dem kill me".

[50] Dr Murari Sarangi testified as to the cause of death of Mrs Dunkley and Mr Stewart. He found five gunshot wounds to the body of Mrs Dunkley. The first he described as being located to the left side of the forehead. A bullet was recovered from the back of the head on the right side. The second wound was located on the back of the right shoulder. The third was located on the front of the abdomen. The fourth injury he described as a bullet graze to the outer aspect of the right arm. The fifth wound was located on the lower aspect of the left leg. The doctor was of the opinion that death was due to cranio cerebral damage, accompanied by blood loss subsequent upon gunshot wounds to the head, neck, chest and abdomen.

[51] Dr Sarangi testified that he found two gunshot wounds and one sharp force injury on the body of Kenroy Stewart. The first gunshot wound was located on the centre of the upper lip. The second was located on the front of the chest. A bullet was

recovered from the wound. The third injury was an incised chop wound deep to the leg bone on the front upper part of the right leg. He was of the opinion that death was due to gunshot wounds to the head and chest, with resultant cranio cerebral damage and injuries to both lungs in association with a sharp force injury to the right leg accompanied by blood loss.

[52] There were three police officers who were involved with this case and testified as to their involvement. Constable Valmore Buchanan was the officer who had gone to the location along with other police personnel and members of the Jamaica Defence Force on the afternoon. Once at the scene, he saw persons running towards the security personnel as they arrived. He saw a young woman with a firearm who said to him "Officer see the gun what Puss used to shoot my mother". He instructed her to place it on the ground.

[53] Upon retrieving the firearm he saw it was an old 45 semi automatic rusty looking gun. He kept it in his possession until later when he handed it over to Detective Corporal Derval Alexander, the investigating officer.

[54] Another officer who visited the scene that evening was Detective Constable Linton Gordon. He was attached to the Scenes of Crime office. He found four .45 spent shells and two expended bullets at various sections along the road.

[55] At about 10:30 that same evening he went to the Cornwall Regional Hospital where he saw the applicant and Miss Stewart. He observed that the applicant had bandages on the crown of his head, his chest and both lower arms. He swabbed the

hands of the applicant as also those of Miss Stewart. Later that night he went to the Madden's Funeral Home where he swabbed the hands of Mrs Dunkley.

[56] The following day Constable Gordon returned to the location at Bottom Pen and found another .45 spent shell. All these items recovered from the scene along with the bullets recovered from the bodies of the deceased and the firearm retrieved from Miss Dunkley were eventually handed to the ballistic expert for examination. Deputy Superintendent Harrisingh was the expert and he testified that he conducted relevant tests on all the items. He concluded that all the expended bullets and spent shells had been discharged from the firearm which was a .45 automatic Colt government model, automatic loading pistol in good working order.

[57] Detective Corporal Derval Alexander testified that having received the firearm from Constable Buchanan, he had shown it to the applicant. He told the applicant of the report received. The applicant responded "officer me nuh know nothing bout that sah and officer me nuh know nothing bout no firearm. A de fuss me deh see dat deh gun".

[58] On 18 July 2008, Detective Corporal Alexander arrested and charged the applicant for the murders of Dahlia Dunkley and Kenroy Stewart. He cautioned the applicant separately on each count to which he responded "mi nuh have nutten fi seh, sah".

The case for the defence

[59] The applicant gave a statement from the dock. He said he was on his way to his shop in Bottom Pen that afternoon when he saw his daughter and his son going up the

road. He saw when Kenroy Stewart stopped them and "told Kenisha to lick back [my] son". He saw Kenroy Stewart, however, use an empty beer bottle to hit his son in the back and use a stone to hit him on his right hand.

[60] The applicant said he took out his cellular phone and called Superintendent McGregor who instructed him to take his son to the police station and make a report. He left, with his son, to Norwood where he waited for around 15 minutes trying to get a taxi to go to make the report at the Freeport Police Station.

[61] While there, he heard a lot of shots and he turned back with his son, instructing him to go "up in the yard". He saw Dahlia Dunkley lying down on his right with blood coming from her head. He walked down to Bottom Pen where he saw Kenroy Stewart running with a gun in his hand. The applicant explained how Kenroy pointed the gun at him and said " all [mi] fi dead to".

[62] The applicant described how he was able to hold on to Kenroy's hand and they started "wrassling". Keisha Dunkley came up with a machete in her hand accusing him that it was his child along with Kenroy's child who had caused the death of her mother. Miss Dunkley then chopped him in the centre of his head and he fell to the ground. The applicant testified further that the next thing he knew was waking up in the hospital the next morning with his "foot handcuff on the bed". He was subsequently charged for murder.

The issues

[63] The issues which arise for consideration in this appeal may be succinctly identified as being:-

(1) whether the learned trial judge erred in his treatment of the issue of provocation;

(2) whether the learned trial judge failed to provide proper directions and assistance to the jury regarding how to deal with the discrepancies and inconsistencies that arose in the case;

(3) whether the sentence imposed was manifestly harsh and excessive in the circumstances.

The treatment of the issue of provocation

[64] Miss Anderson submitted that although the learned trial judge gave directions on provocation as it arose in the case of the death of Mrs Dunkley, he failed to address any words and conduct that emanated from a third person. In so doing, she contended, the learned trial judge failed to give directions that the jury could consider that the words or conduct may be aimed at a third person causing the applicant to lose his self-control.

[65] Counsel further submitted that no directions were given concerning provocation in relation to the killing of Kenroy Stewart, although more than one witness testified

that the quarrelling had started between the applicant's children and Kenroy's daughter. Further, she pointed to the fact that the applicant did say that Kenroy had hit his son with a beer can and that Kenroy had been armed with a gun.

[66] In response, Miss Thomas submitted that there was no evidence of provocation from any third party at the relevant time. She pointed out that the evidence disclosed that it was the deceased Mrs Dunkley and her sister Nevlyn who were involved in an altercation shortly before the shooting death of Mrs Dunkley. Thus, counsel contended that the learned trial judge was correct when he directed the jury and focused their minds on what Mrs Dunkley was doing, or saying, or both, at that time which would have caused the applicant to lose his self-control.

[67] Further, Miss Thomas submitted that in relation to the killing of Kenroy Stewart, there was no evidence of provocation from which the learned trial judge could have directed the jury. She noted that the applicant's unsworn statement did not point to any acts of provocation.

[68] Counsel invited this court to consider the classical case of **R v Duffy** [1949] 1 All ER 932, which she submitted, distils the principles of the defence of provocation. She concluded that, from the evidence, the learned trial judge sufficiently dealt with both limbs of the defence of provocation in accordance with that authority.

The law

[69] At common law, provocation was limited to acts done by the victim to the accused. Indeed in **R v Duffy**, Lord Goddard CJ approved the direction given by Devlin

J to the jury and found that on the issue of provocation the summing-up was impeccable. Lord Goddard in delivering the judgment of the court, read a passage from the summation because he thought "it deserves to be remembered as clear and accurate a charge to a jury when provocation is pleaded as can well be made". He read the following from what Devlin J had said:

> "Provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts."

[70] This common law doctrine of provocation was effectively codified by legislation and now what can be regarded as the proper definition of the defence is to be found at section 6 of the Offences Against the Person Act. This section provides:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[71] This provision does not specify that provocative acts need only come from the victim. Hence, things done and said by persons other than the victim may also constitute provoking conduct.

[72] In **Dwight Wright v R** [2010] JMCA Crim 17 this court considered the duty of the trial judge in accordance with the provisions of the section. In delivering the judgment of the court, McIntosh JA (Ag) (as she then was), said at paragraphs [14] to [17]:

> "[14] The section requires that two conditions be left to the jury:
>
> 1. The subjective condition of whether anything said or done caused the appellant to lose his self control, and
>
> 2. The objective condition of whether those things said or done might have caused a reasonable man to have reacted as the appellant did.
>
> [15] The section therefore takes away the power previously exercisable by a trial judge to withdraw the issue of provocation from the jury where there was evidence potentially capable of satisfying the subjective condition if the judge considered that there was no evidence which could lead a reasonable jury to conclude that the provocation was enough to make a reasonable man do as the accused did. It is now for the jury to decide whether the objective condition was satisfied;
>
> [16] ...There is one central theme running through the authorities and that is, that it is the duty of the trial judge to leave the issue of provocation to the jury whenever there is evidence on which they would have found as a reasonable

possibility that the appellant was in fact provoked to lose his or her self control (see **Franco v the Queen** (Antigua and Barbuda) [2001] UKPC 38; **Robert Smalling v The Queen** (Jamaica)[2001]UKPC 12; **David John Cambridge** [1994] 99 Cr. App. R. 142; **Ethel Amelia Rossiter** [1992] 95 Cr. App. R. 326);

[17] However, an issue of provocation could only arise if the trial judge considered that there was some evidence of a specific act or words of provocation resulting in a loss of self-control. (see **Regina v Ascott** [1997] 2 Cr. App. R 94)."

[73] It is therefore the duty of the learned trial judge to assist the jury as to what evidence there might be of acts that could amount to provocative ones. In this regard the trial judge is not obliged to leave for the jury's consideration evidence that "is wholly incredible or so tenuous or uncertain that no reasonable jury could reasonably accept it" (see **Alexander Von Starck v The Queen** [2000] 1 WLR 1270).

Discussion and disposal

[74] Miss Anderson's complaint seems to be based on a consideration of whether the acts and words of the various relatives of the victim should have been noted by the learned trial judge and left to the jury to determine if these could have caused the applicant to lose his self-control, even in the circumstances where the acts or words were not aimed at him.

[75] There is no complaint that the general directions given on the issue of provocation itself were deficient. The learned trial judge did invite the jury to focus on

the words and actions of Mrs Dunkley. The question then, is, whether this was correct in light of the evidence. There is no dispute that the applicant was never directly involved in any fight. He had come on the scene, issued threats and had left.

[76] The evidence reveals that on his return he had stood some distance away watching what unfolded. This distance was estimated as being about one and a quarter chain. While watching, he was seen to have an object covered with a handkerchief in his hand.

[77] It is not clear whether he would have seen when his son got hit on the Crown's version of events. In his unsworn statement, he said he had seen when Kenroy Stewart hit his son. However, on his version of the events, the applicant had left the scene at this point and was on his way to report the incident to the police at Freeport Police Station. The issue of provocation could not have arisen in those circumstances.

[78] The evidence of the Crown's witnesses suggest that what the applicant would have seen from his vantage point on the hill near a neighbour's gate would have been, firstly, the stone-throwing between his family and Kenroy and Kenisha Stewart. This had ended with the Stewarts seemingly retreating into the Dunkley's yard.

[79] The applicant would still have been observing from his position on the hill when Miss Keisha Dunkley said she had been chopped by his children's mother and had some unknown substance sprayed on her by his daughter. This had ended with Miss Dunkley leaving the scene to wash the substance from her eyes.

[80] The applicant was in the same position when his children's mother and Mrs Dunkley were wrestling. It was Miss Stewart who got a gun away from Mrs Dunkley and eventually threw it away. Although there is some discrepancy as to what then happened with the gun, the version that had Mr Stewart picking up the gun and pointing it at the two women as they wrestled had him merely running off with it. Up to this time, the applicant had not moved from his position. It could therefore be said that up to this point, he had not lost his self-control.

[81] In his unsworn statement, the applicant said he had seen Mr Stewart with the gun, pointing it at him. He, however, said at that time he was able to wrestle with Mr Stewart until Miss Dunkley chopped him. Nothing on this version would give rise to his being provoked to commit any acts at all.

[82] The evidence on the case for the Crown was that the applicant acted when his children's mother was being chased by Mrs Dunkley. Although there is a discrepancy as to whether Mrs Dunkley had anything in her hand and also as to what exactly Miss Stewart shouted to the applicant, there is agreement that it was then that the applicant pointed the object he was holding at Mrs Dunkley. Further, there is agreement that upon seeing this, Mrs Dunkley turned and ran back in the direction from which she was coming, away from the applicant.

[83] Given that state of the evidence, it cannot be said that the learned trial judge erred when he pointed to the activities that were taking place at the time the applicant fired the gun at Mrs Dunkley who was fleeing from him. Further, there was no basis on

which the learned trial judge would have left for the jury's consideration, the actions directed at the third party, other than the one closely proximate to the applicant acting in the manner he did. In the circumstances, there is no merit in the complaint and ground one must fail.

[84] The second ground concerns the applicant shooting Kenroy Stewart. The Crown's case was that Kenroy Stewart ran on to the scene after the applicant had shot Mrs Dunkley. Miss Anderson points to the fact that the quarrel started between the applicant's children and Mr Stewart's daughter. There is no evidence that the applicant was present when the quarrel started. He spoke of seeing Mr Stewart hit his son with a beer can and seeing Mr Stewart with a gun. However, his defence was that he had not reacted to either of these things, other than to try to defend himself from Mr Stewart that resulted in his being chopped by Miss Dunkley. The learned trial judge cannot be faulted for not trying to link this statement of the applicant, as to what he saw Mr Stewart do, with the evidence of the Crown witness and then to invite the jury to consider these acts provocative.

[85] In the circumstances, the learned trial judge fairly and accurately left for the jury's consideration, the contentions of both the Crown and the defence. He gave the appropriate directions on the facts which arose, without causing unnecessary confusion in leaving matters which cannot be said to have arisen. In the circumstances this ground also fails.

The judge's treatment of the discrepancies and inconsistencies

[86] Miss Anderson acknowledged that the learned trial judge dealt generally with the discrepancies and also acknowledged that he did address some variations in the evidence which arose between the witnesses. The complaint however was that the learned trial judge failed to give any guidance in keeping with the general directions to the important discrepancies which she identified.

[87] In response, Miss Thomas submitted that the law states that trial judges are not required to highlight all inconsistencies and discrepancies that arise during a trial. She further submitted that it is expected that the judge will explain to the jury the nature and significance of the discrepancies. Counsel relied on **R v Fray Deidrick** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered on 22 March 1991, and **Jason Brown and Ricardo Lawrence v R** [2017] JMCA Crim 20.

[88] Miss Thomas contended that the learned trial judge's directions and approach to the evidence were unassailable. Further, she submitted that the learned trial judge had done enough when he also directed the jury that they could "accept all, accept part, reject part or reject all of the evidence in assessing the reliability of each witness".

The law

[89] In **Jason Brown and Ricardo Lawrence v R**, this court was faced with a complaint similar to the present one. McDonald-Bishop JA (Ag) (as she then was), in delivering the judgment of the court, made the following comment at paragraph [41]:

> "[41] In **Regina v Fray Deidrick** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal No 107/1989 judgment delivered 22 March 1991, relied on by the Crown, it was made clear that trial judges are not required to highlight all inconsistencies or discrepancies that arise during a trial. Instead, it is incumbent upon them to explain to the jury the nature and significance of inconsistencies and discrepancies and to give them directions on how such matters are to be treated."

[90] McDonald-Bishop JA (Ag) went on to note that this guidance given in **Fray Deidrick** has been affirmed in **R v Carletto Linton, Omar Neil, Roger Reynolds** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4, and 5/2002, judgment delivered 20 December 2002 and **Lloyd Brown v R** (unreported) Court of Appeal, Jamaica, Supreme Court Appeal No 119/2004, judgment delivered 12 June 2008.

Discussion and disposal

[91] In his opening remarks to the jury, the learned trial judge said the following at page 322 of the transcript:

> "Discrepancies occur, Madam Foreman and members of the jury when one witness in speaking about a particular event, gives evidence which is different from other witnesses who speaks of the same event.
>
> Now, you as the determinate of the facts will have to make the determination as to whether or not these discrepancies do occur. In my review of the evidence, I will point out evidence for your consideration. When I point out these areas of the evidence, I am not saying that these discrepancies are there; it as for to you [sic] make your determination as to whether or not these discrepancies

> exists. Now, if you should find that these discrepancies exist, you will have to go further. You will make a determination as to whether or not they are serious or slight. Now, having made those determinations, you will have to look at the evidence of the particular witness or witnesses to see how these discrepancies are.
>
> Now, as judges of the facts, Madam Foreman and members of the jury, you can accept all of a witness' testimony, if you find it to be truthful and reliable. You can accept a part, which you find truthful and reliable and reject a part if it is -- does not so satisfy you. Or, you can reject all of it, if you are not satisfied that it is either truthful and/or reliable. So there are three things you may do. You can accept a part and reject a part. You can accept all of it or you can reject all of it.
>
> Now, if you should find that there are discrepancies, you will now determine how it affects it. Will you accept a part of the witness' evidence? Will you accept a part or will you reject all of it? And, you make a determination, based on whether or not you find these discrepancies serious and the number of discrepancies that you have found.
>
> When I am reviewing the evidence, as I `indicated to you, I will point out areas for your consideration so you can make your determination."

[92] This general guidance given by the learned trial judge was sufficiently clear and adequate to alert the jury as to what was required of them. Miss Anderson, however, noted four pieces of evidence in particular and complained of a failure of the trial judge to give the assistance necessary.

[93] The first concerned the issue of whether Mrs Dunkley had an iron pipe when she was chasing Miss Stewart. Miss Keisha Dunkley, whilst testifying that her mother did take an iron pipe from her at some point that afternoon, denies that her mother was

armed with it whilst chasing Miss Stewart. Mr Dunkley however had testified to seeing his wife with the iron pipe when first chasing Miss Stewart in the direction of where the applicant was standing. However, he had said at the time she turned around and ran away from the applicant; she no longer had the iron pipe.

[94] After reviewing this evidence, the learned trial judge had this to say:

> "Is it that one is more observant? Is it that someone is not speaking the truth, or is it that somebody just forget [sic] because of the passage of time? These are things you consider. You look to see whether or not there are discrepancies here, and you decide whether or not they are serious or slight and you determine, you treat them, based on the directions I gave your earlier."

In giving those comments, the learned trial judge clearly assisted the jury, consistent with what was required of him. The complaint that he was unhelpful is without merit.

[95] The second matter raised by Miss Anderson was the issue of whether Miss Dunkley chopped the applicant while he was on the ground. She had denied doing so, whereas her father said he had seen her doing so. The learned trial judge had this to say after reviewing the apparently conflicting bit of evidence:

> "Again, this is something that you look at. Is there a discrepancy here? Is there an explanation for it? What do you make of it? Is somebody lying? Is somebody forgetful, or is it that somebody is more observant than the others?"

These questions posed by the learned trial judge, are in the circumstances sufficient when taking into consideration the general directions that had been given. There is again no merit in the complaint that the learned trial judge was unhelpful.

[96] The third bit of evidence noted by Miss Anderson was - "Sobers Dunkley did not see the applicant fighting with Kenroy". However, she referred to a section of the transcript which actually concerns Miss Dunkley wrestling with the applicant for the gun. The learned trial judge mentioned that Mr Dunkley said he never saw her doing so, whereas she clearly admitted that she had. The learned trial judge said:

> "He said he never saw Keisha wrestling with 'Puss" for the gun. Again you have to look at this because this is what Keisha said she did."

[97] This comment was sufficient to alert the jury to the difference between the two. However he went no further in giving any other assistance by repeating the directions previously give. In the circumstances, there had been sufficient guidance given regarding discrepancies as a whole, such that the failure to do so regarding this one could not be viewed as fatal.

[98] The final bit of evidence highlighted by counsel related to the black object that Miss Stewart had thrown over the neighbour's wall, which was identified as being Mrs Dunkley's firearm. Only one witness, Miss Latoya Reid, had testified to seeing Mr Stewart jump over the wall and return with it in his hand.

[99] The learned trial judge's comments on this matter were as follows:

> "Now, counsel for the defence has asked you to look at this. Is there something wrong here? If she only saw part of the events, because she was on her way, how is it that persons who purport to see all of the event did not see this? Is it that they are hiding something?
>
> These are matters that counsel for the defence is asking you to consider, to look at carefully."

[100] Again, the learned trial judge did not go in any detail, but certainly, he having pointed it out and urged the jury to consider it carefully, did enough. It was made clear to the jury that it was ultimately a question for them, given that they were the judges of the facts.

[101] In the final analysis, the learned trial judge dealt with the discrepancies that arose on the evidence and gave adequate and proper directions to the jury on how to treat with them. This ground must therefore also fail.

The sentence

[102] Miss Anderson submitted that the sentence imposed on the applicant is manifestly harsh and excessive, especially in light of the delay in the matter getting to trial and then for the appeal to be heard. She contended that sentencing involves, inter alia, taking into account (a) time spent in custody and (b) the delay in the hearing of an appeal. She noted that the applicant had spent almost three years in custody from the time of arrest to trial and a further almost six years had passed between conviction and the hearing of the appeal.

[103] Counsel relied on **Tapper v DPP** [2012] UKPC 26, in urging that there had been a breach of the applicant's right to a fair trial and a hearing of his appeal within a reasonable time. She submitted that a remedy for this breach should be a reduction of the sentence.

[104] In response, Miss Thomas began by reminding the court that the applicant was convicted of the murder of two persons. She submitted that the learned trial judge had balanced the mitigating and aggravating factors and took into account that the applicant had exercised some restraint at first. She further submitted that on a review of the totality of the evidence, the learned trial judge applied the appropriate sentence. She referred to the case of **Jason Brown and Ricardo Lawrence** where this court had confirmed a sentence of life imprisonment, with a stipulation that the appellants serve 25 years before being eligible for parole. They had been convicted of the murder of only one person.

Discussion and disposal

[105] The point that Miss Anderson makes about the delays in this matter is well made. The applicant has every right to complain about the length of time it took for his trial to be completed and now for his appeal to be determined. This court has on previous occasions expressed its concern and disapproval of inordinate delays in the disposition of matters.

[106] However, the brazen manner in which this applicant brutally shot and killed persons, to whom he was related through his children's mother, cannot be ignored. The

children who were present when this occurred must have been particularly traumatised to see the manner in which the applicant shot Mrs Dunkley and then even after she had fallen he proceeded to shoot her again at least four more times. Two lives were eventually taken. The learned trial judge when passing sentence took into consideration the circumstances in which the incident unfolded that afternoon and noted what he described as the applicant's initial restraint and the stage at which he joined in.

[107] A sentence of life imprisonment with the stipulation that 25 years be served before parole cannot be said to be excessive in these circumstances; indeed, this sentence may well be viewed as more than reasonable. However, it is true that the learned trial judge did not apparently consider the time the applicant has spent in custody before his trial. In recent times, this court has reiterated the need for credit to be given for such time. A reduction in the time stipulated to be served is warranted on this basis.

[108] It is necessary to appreciate the factors which contributed to the delay of six years between the date of conviction and the hearing of the appeal. The transcript of the trial that had lasted for some six days was requested by this court in July of 2011. It was received on 15 September 2015. A single judge considered the application for leave to appeal and refused it in October 2015. At that time the court had been advised that an attorney-at-law had been retained to present the appeal and a date for hearing was communicated to him. The matter was listed for the week of 2 May 2016. This date was not convenient for the counsel and the matter was taken out of the list at his

request. In April 2017, the court was advised that Miss Anderson was assigned to have conduct of the matter.

[109] The delay of four years awaiting the transcript is therefore a period that can properly be said to be due to the fault of the state. Whilst this delay is still to be considered egregious, the circumstances of this case, which led to the killing of two persons, must be considered in the ultimate determination of whether a further reduction in the sentence is warranted. In our view, it is not. The time spent in custody prior to the trial will be deducted and the applicant will be given credit for the whole of the time spent in custody pending the determination of his appeal. This is sufficient in the interests of justice.

Conclusion

[110] The evidence against this applicant was sufficient to support his conviction. There is nothing in the learned trial judge's directions to the jury that can be faulted and which would render the verdict unsafe.

[111] The application for leave to appeal conviction is refused. Appeal against sentence is allowed and the sentence imposed set aside. A sentence of life imprisonment with the stipulation that the applicant serve 22 years before becoming eligible for parole is substituted. The sentence should be reckoned to have commenced from 20 May 2011.