JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 51/2014

RAYMOND BAILEY v R

Ms Zara Lewis for the applicant

Adley Duncan and Miss Cindi-Kay Graham for the Crown

1, 4 June and 8 October 2021

BROWN JA (AG)

Introduction

[1] Raymond Bailey ('the applicant') was convicted in the Circuit Court for the parish of Clarendon on 6 May 2014 for the offence of murder before a judge ('the learned judge'), sitting with a jury. On 15 May 2014, he was sentenced to 20 years' imprisonment with the stipulation that he serves 15 years before becoming eligible for parole.

[2] The applicant's application for leave to appeal was refused by a single judge of this court on 7 August 2020. As is his right, he has renewed his application before the court. We heard his application on 1 and 4 June 2021. At the end of the hearing, we announced our decision and made the following orders:

> "1. The application for leave to appeal conviction and sentence is granted.

2. The hearing of the application for leave to appeal conviction and sentence is treated as the hearing of the appeal.

3. The appeal is allowed.

4. The conviction for murder is quashed and a verdict and judgment of acquittal is entered for that offence and a verdict of guilty of manslaughter is substituted.

5. The sentence of 20 years' imprisonment at hard labour with the stipulation that the applicant serve 15 years before eligibility for parole imposed for murder is set aside and a sentence of 11 years imprisonment at hard labour for manslaughter is substituted.

6. The sentence is to be reckoned as having commenced on 15 May 2014."

[3] At the time we made the orders above, we promised that our reasons in writing would follow. This is a fulfilment of that promise. However, before setting out the reasons for our decision, it is appropriate to provide the facts which give those reasons context.

The case at trial

(a) Facts not in dispute

[4] Our recount of the facts is somewhat hampered by the absence of sizeable portions of the transcript. This appears to have been a re-trial. Both the prosecution and the defence agreed that the events giving rise to the charge in the indictment, occurred in Mumby District in the parish of Clarendon, on 22 September 2008, at the premises where Fitz Hamilton ('the deceased') resided. The applicant and Miss Emily Shand also occupied separate houses at the same premises.

[5] Quite apart from the convergence of the defence and prosecution on the location, all agreed that the deceased met his death at the hands of the applicant. The deceased died from injuries he sustained when the applicant struck him in the head with a length of iron pipe. Dr Brennon, who performed the post-mortem examination, testified that, in

his opinion, the cause of death was due to laceration to the brain, secondary to multiple skull fractures due to blunt force trauma.

[6] In addition to agreement regarding the injuries the deceased sustained, and at whose hands, it was also agreed that up to the date of the events, the deceased and Horaldo Allen, the mother of the applicant, had been engaged in a visiting relationship. Miss Allen resided at nearby premises. Their relationship, it appears, was somewhat tumultuous. Sometime in the morning on 22 September 2008, there was a dispute between the deceased and Miss Allen during which the applicant was not present. It appears there was a lull in their dispute, which transitioned into a dispute that night.

[7] It was during the later incident that the deceased came to meet his death. Each side gave a different account about how the deceased died. Since the case for each diverged on the manner of the death of the deceased, we endeavour to summarize the case presented by each. We commence with the case for the prosecution.

(b) Case for the prosecution

[8] The case for the prosecution depended primarily on the evidence of the eyewitness, Emily Shand. In her examination-in-chief, she testified that while she was inside her dwelling, she overheard a quarrel taking place between Jason Whyte, Richard Bailey, aka Buba, brothers of the applicant, and the deceased. From the exchange between Bench and Bar, it appears at one point during the quarrel, Miss Shand also heard the voice of the applicant. However, when the examination-in-chief continued, it was disclosed that the applicant's voice was not among the voices she had heard whilst inside.

[9] After hearing the voices, she went and stood at her doorway. She was directed to relate what she saw after the quarrel. Miss Shand said she saw the applicant leave from his doorway with a piece of iron. She said he got the piece of iron from behind his door, which the applicant used to 'cotch' his door. After so arming himself, the applicant headed to the back of the house of the deceased. To get to the back of the deceased man's house, the applicant walked then ran.

[10] Shortly after that, Miss Shand then heard a sound, 'boof', as she described it. The deceased was then heard to say, "Raymond nuh kill mi". The applicant then delivered another blow to the deceased. At this point, Miss Shand said to the applicant, "Raymond weh you a kill Fitz fah?"

[11] According to Miss Shand, after the applicant delivered the last blow, he went and sat on the concrete. She spoke to the applicant, but he made no response. Instead, he only stared into space, according to her.

[12] Miss Shand's version of the incident was challenged under cross-examination. Her evidence that she saw the applicant picked up the piece of iron and went to the back of the deceased house was an omission from her written statement to the police. Other material aspects of her evidence were shown to have been omitted from her police statement, deposition or the transcript of the previous trial. It was suggested to her that she was not a witness to what transpired and that she arrived at the premises when the deceased was being placed in a vehicle.

[13] Detective Corporal Dave Dewar visited the premises the following morning, 23 September 2008, in the company of Detective Sergeant Hutchinson. In his evidence, he stated that whilst at the premises, Detective Sergeant Hutchinson took the applicant to him and, in the presence of the applicant, said, "Dewar, him seh ah him kill de man". The court interjected, then Detective Corporal Dewar continued, "Dewar, Mr Bailey seh a him lick de man with piece a iron". The applicant did not comment when this was said. The applicant then handed a piece of iron to Detective Corporal Dewar, who took him into custody. The length of iron was also taken to the police station, where it was tagged and labelled in the presence of the applicant.

[14] On 24 September 2008, Detective Corporal Dewar charged the applicant for the murder of the deceased. He cautioned the applicant. The applicant replied, "ah wah dis mi get myself into sah". After that, the applicant kept looking down and said, "ah mi kill him". Asked under cross-examination whether he understood the latter comment to have

been a confession, Detective Corporal Dewar said he understood the applicant to be lamenting. By 'lamenting' Detective Corporal Dewar meant, "like he was shocked about what happened". He said the applicant was not arguing, he was looking dazed.

(c) Case for the defence

[15] The applicant gave an unsworn statement from the dock. He said in 2008, the deceased and his mother had a dispute. He went there to talk to the deceased. As soon as he got there, the deceased "back out a cutlis" on him, and he used a piece of iron to defend himself. Neither Miss Shand, Buba, nor Jason White was there. He denied giving to the police the piece of iron that was brought to court. He said that was not the iron. He ended by saying he was sorry the deceased died but that it could have been him.

The appeal

[16] At the start of the hearing, leave was granted to the applicant to abandon the original grounds of appeal and to argue two supplementary grounds of appeal. Those supplementary grounds of appeal are set out below:

> "1. The failure of the defence counsel to lead evidence of the deceased's abuse of the Applicants [sic] mother's [sic] on the day of the incident and other acts of abuse prior to [the] incident during the trial before the jury deprived the Applicant of the opportunity to present his full defence, in particular, as it relates to whether there was available to the Appellant [sic] the partial defence of provocation in addition to the Defence of Self Defence [sic].
>
> 2. The conviction is manifestly unreasonable and cannot be supported having regard to the mismanagement of the case by Defence Counsel in this matter."

Supplementary ground one

[17] Both parties made submissions on ground one. Based on those submissions, it became clear to the court that the issue arising was whether the learned judge erred in excluding relevant evidence and failing to direct the jury in relation to provocation.

[18] At the end of these submissions and the exchanges between the Bench and the Bar, the hearing was adjourned to facilitate the applicant's counsel filing and serving further supplementary grounds, along with written submissions. Time was also allowed for the Crown to respond. The appeal proceeded and was decided based on these further supplementary grounds.

The further supplementary grounds

[19] The following three further supplementary grounds of appeal were filed and leave granted for them to be argued:

> "1. The learned trial judge erred in law in failing to raise and/or leave the issue of provocation to the jury.
>
> 2. The conviction is manifestly unreasonable and cannot be supported having regard to Trial [sic] judge's failure to raise and/or properly direct the jury on the issue of provocation in the matter.
>
> 3. In light of the foregoing the sentence imposed of [t]wenty (20) years at hard labour not eligible [sic] for parole before serving Fifteen (15) years is manifestly excessive."

Applicant's submissions on the further supplementary grounds one and two

[20] Further supplementary grounds one and two were argued together. Miss Lewis submitted that it was the applicant's further contention that the issue of provocation arose on the prosecution's case. Accordingly, the defence of provocation should have been left to the jury. Being handicapped by an incomplete transcript of the trial, Miss Lewis submitted that the exchange between the Bench and the Bar during the trial may be resorted to, in order to gather the evidence material to the complaint. The relevant portions of the transcript were extracted for the court.

[21] Referring to that extract, Miss Lewis next submitted that the learned judge, having incorrectly ruled that that evidence was inadmissible, failed, in her summation, to leave the defence of provocation to the jury. The culmination of that failure was evidenced by

the learned judge's omission to tell the jury that it was for the prosecution to negative provocation in order to prove the charge of murder.

[22] Miss Lewis submitted that the learned judge's failure to give the jury directions both on the definition of murder and at any point in her summation on the issue of provocation, rendered the conviction for murder unfair. In support of this submission, section 6 of the Offences Against the Person Act (OAPA) was quoted, together with **Dwight Wright v R** [2010] JMCA Crim 17; **Bernard Ballantyne v R** [2017] JMCA Crim 23; and **R v Stewart** [1995] 4 All ER 999; [1996] 1 Cr App R 229, citing the dictum of Lord Justice Stuart-Smith at page 236C.

[23] It was further advanced that it was clear that since the applicant was pursuing self-defence at the trial, provocation was not pursued for fear of its impact on the question of motive. Notwithstanding that, Miss Lewis argued, there was evidence which obliged the learned judge to direct the jury on the issue of provocation. It was her submission that, in the presence of the applicant, Jason said to the deceased, "don't come back over my mother's house because you cut the things".

[24] This evidence, Miss Lewis argued, showed the applicant's state of mind and ought not to have been disallowed by the learned judge as it was not hearsay. Since the applicant was present and the evidence went directly to his state of mind, it meant that the defence of provocation was available to the applicant. In this vein, Miss Lewis cited **Joseph Bullard v The Queen** [1957] AC 635 ('**Bullard v R'**) for the proposition that every man on trial for murder has the right to have the issue of provocation left to the jury. A deprivation of that right constitutes a grave miscarriage of justice.

Prosecution's submission on further supplementary grounds one and two

[25] Mr Duncan agreed with the submissions made on behalf of the applicant that the evidence of the conversation about "cutting up the things" was wrongly excluded. That exclusion prevented detailed evidence of the nature and content of the conversation; where the applicant was at the time of the conversation; whether the applicant heard or

could have heard the conversation; and the effect, if any, of the conversation upon the applicant.

[26] In Mr Duncan's view, this evidence was extremely likely to be relevant to important questions concerning the state of mind of the applicant, in addition to giving context to the killing, for the jury's consideration. In declining to admit this evidence, Mr Duncan argued, the learned judge effectively denied the applicant the opportunity to benefit from a direction on provocation and a conviction for manslaughter. He too referred to the portion of Lord Tucker's judgment, quoted by Miss Lewis, and approved by this court in **Dwight Wright v R**.

Issues

[27] In his further supplementary grounds one and two, the applicant complains that the learned judge, by a series of error and omissions, deprived him of the jury's consideration of the partial defence of provocation. In essence, the complaint is that the learned judge wrongly excluded evidence of provocative conduct. That positive error was compounded by her omission of provocation as an element of murder, which the prosecution needed to disprove. Finally, this omission was further compounded by the learned judge's failure to give any direction on provocation in her final charge to the jury.

[28] This compendium of the complaints raised three issues for resolution by this court. Firstly, was the learned judge correct when she ruled as inadmissible, evidence of a quarrel which preceded the death of the deceased? Secondly, was the learned judge obliged to include provocation as an element of the offence of murder to be negatived by the prosecution? Thirdly, was the learned judge under a duty to direct the jury on how to approach the question of provocation in coming to their verdict?

Issue #1: Was the learned judge correct when she ruled as inadmissible, evidence of a quarrel which preceded the killing of the deceased?

[29] It is perhaps instructive to commence the discussion of this issue with what transpired at the trial, in the absence of the jury, leading up to the ruling made by the learned judge. It began with confusion concerning whether a conversation took place in the presence of the applicant. I will now reproduce the exchange between the learned judge and the attorneys-at-law for both sides.

> "MR. CLUE: My Lady, I was not getting the evidence at all, I thought she was saying 'Buba' is Raymond [the applicant].
>
> HER LADYSHIP: Richard is 'Buba' [brother of the applicant]. You would have objected?
>
> MR. CLUE: **I don't know if she is saying he was there, my friend should have asked the question in a different way, then I would have objected.**
>
> HER LADYSHIP: **Madam Crown, I am sure you can see where Mr Clue is going. All of their conversations about stoning, cutting up his mother's things and so on, seem to have been said in the presence of Richard Bailey.**
>
> MRS. MARTIN-SWABY: What I will seek to do [M]y Lady …. …. [sic] that is why I was going to ask the witness certain questions in respect of who she saw. Certainly based on what has been disclosed to my friend in the statements, [M]y Lady, these things would have occurred with other persons there as well, [M]y Lady and that is why I thought to ask the questions the way I did.
>
> HER LADYSHIP: **I think for the first time you have lost me, I am looking at this against the background of that gentleman there who is on trial, he might not have been there when all of this was said and now put this in a certain category of evidence.**
>
> MRS MARTIN-SWABY: **That is why I am seeking to ask the witness a specific question so that it can be very clear what exactly or who was present at the time.**

HER LADYSHIP: But at the same time where the answer is concerned, the accused was not there when all of this was said about, cutting up my mother things [sic] and coming back over the house and so on. Where does that put us?

MRS MARTIN-SWABY: **The thing is based on what the witness has said before she existed [sic] her premises. She heard the accused man's voice, [M]y lady and then she says she went on the outside and it is my submission at the end of the day also that this would mean one transaction and form part of everything that had taken place that night and the issue of the evidence in so far is what was said by Jason and 'Buba' and which, [M]y Lady, amounts to, 'don't come back over my mother's house because you cut up the things' and it is my submission that it is not in any way prejudicial, if it is that at the appropriate time he is of the view, it does not form the view [sic] of the transaction and what occurred that night, but [M]y [L]ady, I wish to ask the witness specifically what she said she heard ....** [sic]

HER LADYSHIP: Why take all of that evidence? It might not be prejudicial, certain things were said as it relates to Richard and the other one and if he was there and the other person, Jason ….. [sic]

MRS MARTIN-SWABY: My Lady, it is relevant in the sense of the incident.

HER LADYSHIP: It can be relevant. I am throwing out, this and not admissible …. [sic]

MRS MARTIN-SWABY: Well this is so, [M]y Lady, but [M]y Lady it is being elicited on the basis not [sic] the truth of the content, but the fact that these things were said and it occurred.

HER LADYSHIP: It is easy to do, lets [sic] go through Subramanian and the D.P.P. [sic].

MR. CLUE**: I will disagree with that, you would have read the deposition and my friend is seeking to establish a motive that what I thought that [sic]was being said he was present and because they were**

contending, don't go back to my mother's yard and so on and as a consequence the deceased received the injuries for exactly that purposes [sic].

HER LADYSHIP: I can see how both of you would disagree as to how it would be admitted.

MR. CLUE: And I am looking at my notes which is not the best and I thought she was using the two names Richard and I don't think she is saying Raymond it is always Richard.

HER LADYSHIP: I am going to ask you to proceed cautiously please, because I am sure we are all aware of the rules of evidence as it relates to hearsay.

MR. CLUE: What I would be asking if she is saying that Raymond was not there that aspect of the notes ought to be instructions [sic], because that is hearsay.

HER LADYSHIP: Again Mr. Clue is asking that that bit of evidence – all of that be thrown out, exponged [sic] -- indicate to the jury they should not look at that, it seem [sic] to be what Mr. Clue is asking.

MRS MARTIN-SWABY: Shall I proceed asking specific questions?

HER LADYSHIP: Of course and I just want to hear your views on that.

MRS MARTIN-SWABY: And at the end of the evidence I will seek to direct the witness to a particular direction.

HER LADYSHIP: I will make a note as to whether or not it should be expunge [sic] from the records. Could you please invite back the jury [sic]." (see pages 6 – 10 of the transcript) (Emphasis added)

[30] After the return of the jury, the examination-in-chief of Miss Emily Shand continued. Her evidence leading up to her description of the infliction of the blows was put in something of a straightjacket. Miss Shand was confined to who she saw when she left her dwelling; clarifying that 'Buba' referred to (Richard); and the voices she recognized, namely those of Jason, Buba and Fitz, not the applicant's. Both prosecuting

counsel and the learned judge ensured Miss Shand gave no evidence of either the nature of or content of the quarrel.

[31] The learned judge excluded or curtailed evidence of this quarrel on the basis that it was in breach of the rules against hearsay. The learned judge's reason for the position she adopted may be subdivided into things said in the absence of the accused and original evidence. The two pillars of her decision will be discussed in that order. But first, a brief statement on the rule against hearsay.

[32] The characterization 'hearsay' is applied to assertions a witness makes while giving oral evidence concerning, typically, out of court statements made either by the witness or other persons, whether or not these other persons are to be called as witnesses in the same proceedings, if the purpose of the assertions is to establish their truth. Cross & Tapper on Evidence, eighth edition, at page 46, offer the following statement of the rule:

> "… an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted*." (Emphasis as in the original)

The learned authors of Archbold 1998, at para. 11-3, cite with approval, Cross & Tapper's statement of the rule, together with a quotation from Phipson on Evidence 14th edition at para. 21-02:

> "Former statements of any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them. The rule at common law applies strictly to all classes of proceedings, and there is no special dispensation for the defendant in a criminal case"

[33] Lord Bridge has been credited with setting out the basic rationale of the rule in **R v Blastland** [1986] AC 41. The problem posed by hearsay evidence is one of the amount of weight (probative value) that should be applied to it, in the absence of the usual safeguards against falsehood ordinarily applied to oral testimony. That is, hearsay statements are neither subjected to the crucible of cross-examination nor the observation

of the finders of fact. This was how Lord Bridge expressed it, at pages 53-54 of his judgment:

> "… Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination …"

Lord Bridge then referred to similar statements of Lord Normand in **Teper v The Queen** [1952] AC 480, at page 486. In those statements, Lord Normand characterized the rule against the admission of hearsay evidence as fundamental. Lord Bridge continued:

> "The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."

[34] By virtue of this rationale, the rule against hearsay operates to exclude statements made in the absence of the person on trial. In addition to the absence of the safeguards, the party against whom it is sought to tender the statements has no means of contradicting them, since he was not present. In Phipson on Evidence 15th edition, at para. 30-3, the problem was put this way:

> "… statements which have been made behind the back of a party, and which, for all he knows, may have been fabricated, misreported or made under circumstances wholly altering their effect, but which he has no means of contradicting, explaining or testing by cross-examination, are, on grounds of fairness, generally excluded for whatever purpose tendered..."

[35] From the extract quoted at para. [31] above, the objection to the admission of the evidence was based on the understanding that the things were said in the absence of the applicant. In a criminal trial, the judge has an overarching responsibility to ensure that

the trial is conducted fairly. So that, as the guardian of the fairness of the trial, the learned judge, it appears, was anxious to discharge that responsibility. Certainly, the learned judge could not have been faulted for adopting that posture if the rule did not admit of exceptions.

[36] The learned prosecutor tried in vain, as it turned out, to advert the learned judge's mind to the fact that the rule against hearsay did not apply, on the basis that the evidence represented a part of a single transaction, or was being elicited not for its truth, but the fact of having been made. The learned authors of Phipson on Evidence has recognized these as two situations in which the operation of the hearsay rule would be excluded.

[37] To say that the evidence which the prosecution tried to lead was part of one transaction, is another way of saying it formed part of the '*res gestae*'. A succinct meaning of this Latin phrase is that it is evidence which is part of the story: Phipson on Evidence 15th edition at para. 34-01. The rationale for admission of this evidence is that it adds the necessary content, context and colour to the circumstances which climaxed into the crime. Perhaps the most well-known judicial exposition of this reasoning is that of Dixon J in **O'Leary v Rex** (1946) 73 CLR 566, at page 577:

> "… Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

[38] The brief facts of **O'Leary v Rex** are that Walter Edward Ballard, the deceased; Charles Patrick O'Leary, applicant; and other fellow employees at a timber camp, took part in a drunken orgy which commenced on Saturday morning and continued late into Saturday night. The deceased and the applicant occupied separate cubicles which were within reasonable proximity to each other. The deceased retired to bed at about midnight. Early Sunday morning, the deceased was found in his cubicle, mortally wounded. He had several head injuries. Kerosene had been poured on him and his clothes set on fire.

Shortly before the discovery of the deceased, the applicant was seen with a bottle in his hand. A pull-over belonging to the applicant was found close to the deceased's cubicle.

[39] At O'Leary's trial, several witnesses gave evidence of his attacks upon and threats to fellow employees during the hours of the drunken orgy. All the assaults were unprovoked and consisted of brutal blows to the head. This evidence was objected to. The Crown's contention was that the evidence was relevant to the issue of whether O'Leary murdered Ballard. Its relevance being that it showed a general disposition to violence or bad character. It was further contended that the conduct constituted a series of similar acts in comparison with the acts resulting in Ballard's death.

[40] The High Court of Australia found this evidence to have been rightly admitted. Quite apart from its potentially prejudicial effect, it had the greater probative value of enlightening the understanding of the fact-finders. According to Latham CJ, at page 575:

> "… Such evidence puts the act of attacking Ballard in a setting which makes it possible for the jury to obtain a real appreciation of the events of the day and night. It is evidence of 'facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued' – per Dixon J in Martin v Osbourne [(1936) 55 CLR 375]."

Therefore, once the challenged events can be shown to be part of the story of the crime, it would be part of the *res gestae*, and so admissible.

[41] In **Ratten v Regina** [1972] AC 378 PC, at pages 388-389, Lord Wilberforce outlined three ways in which the phrase *res gestae* may be used:

> "1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in O'Leary v The King (1946) 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing,

committed by the accused during what was described as a continuous orgy. [His Lordship then went on to cite the quotation from Dixon J, extracted above at para [39].

2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e. are relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander – indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae."

In critiquing the different standards applied in the cases in the third category, Lord Wilberforce identified a misplaced focus on the meaning of the Latin phrase rather than the reason for the exclusion of the evidence, as the culprit. He advanced a dichotomous reason for the exclusion. Firstly, uncertainty of the exact words used by the alleged speaker, since the words are transmitted through a person other than the speaker. Secondly, the risk of concoction by the victim. The probability of fabrication was felt to be the real judicial test. He cautioned against assaying the statement to see whether it was part of the transaction. The relevant test should be the possibility for concoction, taking into consideration matters such as lapse of time between the event and the alleged utterance and differences in location.

[42] We are not concerned in this appeal with Lord Wilberforce's third category as this was not the ground on which the learned judge excluded the evidence as breaching the rule against hearsay. The question is, was the learned prosecutor correct that the matters under consideration fell squarely within the ambit of the first category? This requires an examination of the evidence of Miss Emily Shand under cross-examination.

[43] In sum, Miss Shand's evidence was to the effect that there was a quarrel between Buba, Jason and the deceased, which started in the absence of the applicant. This quarrel was in progress when the applicant came on the scene. A short time after the witness

saw him at his doorway, he exited his house with a length of iron. He then went to the back of the house of the deceased and struck him with the length of iron pipe. It was then that the quarrel came to an end (see pages 46-56 of the transcript).

[44] This evidence from Miss Shand makes it clear that the quarrel was part of the story of the commission of the offence. Being part of the story, or one transaction, in language of prosecuting counsel, what was said during the quarrel was admissible evidence on the authority of **O'Leary v Rex**. The evidence established the parameters of the situation concerning the fact of the killing of the deceased. It specifically laid down the peg where it ended with his death, and painted a picture of events leading up to it.

[45] Although the learned judge was not persuaded by the prosecutor's argument of one transaction, it does appear she was prepared to admit the challenged evidence under the principle in **Subramanian v Public Prosecutor** [1956] 1 WLR 965. In that case, the appellant complained that he had been prevented from giving evidence of a conversation between himself and terrorists. He tried to give that evidence, in the hope of establishing his defence of duress. The Privy Council held that the evidence was not hearsay and was wrongly excluded. At page 970, the Privy Council declared:

> "… Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by that evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made ..."

[46] The prosecutor's alternate argument was that the evidence was "being elicited on the basis not of the truth of the content, but the fact these things were said, and it occurred". A quarrel, by its very definition, is an angry exchange of words in a dispute or disagreement, so that some of the words were spoken by the victim, the deceased, and

others by the brothers of the applicant. The applicant appears not to have taken part in the quarrel but, by his reaction, was clearly affected by what was being said. Hence, his trial lawyer's strident but jaundiced view that the prosecutor was seeking, by that evidence, to establish motive.

[47] It may be that the jury could have formed the view that the applicant had a motive for killing the deceased, but that was not a sufficient basis upon which to deny admission of the evidence (see **O'Leary v Rex**). To have admitted the fact of the preceding quarrel without its contents, deprived the jury of a real appreciation of what took place that night as well as what could have operated on the mind of the applicant at the material time. It was indeed arbitrary and artificial to have curtailed the evidence to the infliction of the blows which resulted in the death of the deceased, without knowing in a broader sense what was happening (see **Ratten v R**).

[48] Evidence that immediately before the physical assault upon the deceased, words, within the framework of quarrel, such as "don't' go back to my mother's yard" were said apparently within the hearing of the applicant was not hearsay but original evidence. The words formed part of the factual milieu of the prosecution's case, as was said in **Ratten v R**, the words were themselves either the *res gestae* or part of the *res gestae*. The pertinent question which the learned judge was being invited to consider was: was the evidence being admitted for its truth or the fact of having been said? In other words, what was the purpose for which the evidence was being elicited? That, ultimately, is the dispositive inquiry whenever the admissibility of a statement is being challenged on the ground of hearsay.

[49] Regrettably, the court did not embark upon this inquiry but was derailed by the stridency of the attorney-at-law appearing for the applicant below. The result was the unnecessary circumscription of the prosecutor's eliciting of the evidence, leading to its ultimate exclusion. The excluded evidence, robbed the circumstances culminating in the killing of the necessary content, colour and context, which could have explained why the applicant reacted in the way that he did. This was, therefore, evidence which both told

the story of how the fact of the killing started and ended. Accordingly, the words that passed during the quarrel were such an integral part of the events as to make them either the *res gestae* or part of it. Also, evidence of what was said during the quarrel between the applicant's brothers and the deceased (in the applicant's presence) would have been relevant to a consideration of his state of mind and conduct at the material time. On this basis, the evidence of what was said to and by the deceased during the quarrel would not have been admissible for the truth of it but rather for the fact that certain things were said in the applicant's presence. In this regard, the assertions would have been original evidence and, therefore, admissible. The learned judge was, therefore, in error when she ruled them inadmissible.

Issue #2: Was the learned judge obliged to include provocation as an element of the offence of murder to be negatived by the prosecution?

[50] We will now turn our attention to the second issue, which arises from the challenge to the sustainability of the conviction for murder. That is, the learned judge failed to include provocation amongst the elements of the offence of murder which the prosecution had to disprove at the requisite standard before the jury could return a verdict of guilty of murder. As was indicated above, the prosecution frankly admitted this omission on the part of the learned judge. What were the directions of the learned judge on the issue?

[51] After reminding the jury of the offence charged in the indictment and the supporting particulars, the learned judge instructed the jury on the constituents or ingredients of the offence, including the intention to kill. The learned judge continued at page 255 of the transcript:

> "The prosecution, they go further to say when he did it, he had no lawful justification or excuse to do so … What was the question you were required to prove? That Raymond Bailey was the one who inflicted the injury and at the time and [sic] when he did so, he intended to cause real serious bodily harm or even death. Also, that he had no lawful justification to do so."

Subsequent to these directions, the learned judge went on to give further directions on lawful justification, relating it to the defence of self-defence raised by the applicant. However, nothing further was said about 'excuse' and its relevance to the jury's deliberations.

[52] At common law, which both birthed and defined murder, there is a distinction between homicide which is justifiable and that which is excused. Justification differs from an excuse in the following way. Where the defendant's act is justified, he has committed no offence. On the other hand, where his act is excused, he avoids liability for the crime charged, but his act remains unlawful (see Card, Cross & Jones Criminal Law 16th edition para. 2.19). The rationale for the distinction was to be found in the impact on the convicted person's property rights. If the killing was merely excusable, the defendant's goods were forfeited (see Smith & Hogan Criminal Law ninth edition, at page 189). According to Smith & Hogan Criminal Law, in that same passage, forfeiture was abolished by an act of 1828. In the modern era, a conclusion that the deceased was killed lawfully has replaced the former conclusion of justifiable homicide where death was the result of either an act of self-defence or to prevent the commission of a crime (see Halsbury's Laws of England fourth edition Re-issue, at para. 938).

[53] While the distinction between justification and excuse no longer carries any proprietary consequences for a convicted defendant, the distinction retains some relevance, especially in the law of homicide in respect of the quality of the act for which he may be found guilty. This is amply demonstrated by the following extracts from Glanville Williams' The Theory of Excuses [1982] Crim LR 733, at page 735:

> "What, then, is an excuse? The answer seems to be that a defence is an excuse when (1) it amounts to a denial of the proscribed state of mind or negligence, or when (2) it affirms that the defendant was not a fully free and responsible agent so as to be fairly held accountable (e.g. when he was under the age of responsibility, or subject to duress, or**, on a charge of murder, was gravely provoked**).

> A defence is justificatory (for the purpose of the criminal law) whenever it denies the objective wrongness of the act (that is, wrongness apart from matters of excuse)." (Emphasis supplied)

[54] Undoubtedly, it was against this theoretical background that it was said that "conduct which cannot justify may well excuse", per Lord Tucker in **Bullard v R,** at page 70. Lord Tucker's statement encapsulates two salient points. First, which accords with the discussion above, justification is the pre-eminent defence since, if it succeeds, it brings within its wake complete vindication. Second, it is quite possible to establish that the defendant's act is excused from the same set of circumstances which failed to justify his conduct. The simple point is, while justification and excuse may connote a similar meaning, in the law of homicide, each word bears a contrasting meaning as regards the defendant's liability.

[55] So that, when the learned judge used the phrase, "no lawful justification or excuse", literally, she may be taken to have been saying to the jury, the killing must not be as a result of self-defence or provocation. This would have been a reasonable interpretation since no other instance of excuse (age of criminal responsibility, insanity or duress) conceivably arose on the evidence at the trial. If only the matter had been left there, but it was not. The learned judge went on to elaborate on "justification", while "excuse" fell by the wayside. The jury was, therefore, left to conclude that "no lawful justification or excuse" meant the same thing, namely, lawful self-defence, hence, the word "excuse" was superfluous and attracted no independent consideration. Specifically, the collective mind of the jury was not directed to provocation as an element of the offence, the absence of which the prosecution had to prove, before they could return a verdict of guilty for murder. Is this omission fatal?

[56] There is no general proposition that a trial judge's omission of an element of the offence of murder will vitiate any resulting conviction. The impact of that omission must be assessed against the background of the live issues in the particular case. In **R v Christopher Blackwood** (unreported), Court of Appeal, Jamaica, Supreme Court

Criminal Appeal No 75/1990, judgment delivered 16 December 1991, the trial judge omitted from his definition of murder the mental element. That is, the trial judge omitted the words, "with intent to kill or cause grievous bodily harm". In that case, the appellant held each of his four victims in their waist and shot them. The trial judge, in addition to telling the jury that murder is committed by a voluntary and deliberate act, said, "if you fire on somebody and kill them that is murder" (see page 2 of the judgment). This court found that the omission of the mental element was not fatal and affirmed the conviction. The words of Carey P (Ag) (as he then was), at page 2, are instructive:

> "… In our judgment, the absence of those words is not fatal. A summing-up, it has been said on more than one occasion, is not intended to be an excursus on the criminal law; it is to make the jury understand the charge against the accused so that they may be able to apply that law to the facts which they find [proved] ..."

[57] Although an "excursus on the criminal law" was not required of the learned judge, in light of the conclusion arrived at on the first issue, provocation ought properly to have been explicitly included as one of the elements of the offence of murder which the prosecution had to negative. However, the full impact of this omission must abide a discussion of the third issue raised by this appeal.

Issue #3: Was the learned judge under a duty to leave the issue of provocation for the jury's consideration?

[58] The complaint here was that the issue of provocation arose on the case for the prosecution, or would have arisen, but for the incorrect exclusion of evidence of the content of the quarrel. Consequently, the learned judge had a duty to leave the issue of provocation for the jury's consideration, notwithstanding it was not the defence specifically raised by the applicant.

[59] A trial judge's duty to leave for the jury's consideration any defence not specifically raised by a person on trial is of some vintage. The law is, whatever may be the line of defence adopted by counsel for the defendant, the judge is bound to put to the jury all

such questions that are properly raised on the evidence. The defence may be accident, which would result in an acquittal, but provocation may also arise, although not raised. In that event, the judge ought to leave for the jury's consideration the question whether he was provoked (see **R v Hopper** [1915] 2 KB 431). Even where two positions (accident and provocation) are put forward, and the former is emphasized in preference to the latter, the judge is expected to fully and accurately present the defence which was not vigorously presented (see **R v Richard Georges** [1915] 11 Cr App R 259).

[60] The duty of the trial judge to leave for the jury's consideration even defences not relied on by the person on trial, but which have evidentiary support, is encapsulated in **Mancini v Director of Public Prosecution** [1942] AC 1. The judge's duty in this regard is neither discharged nor diluted by whatever strategic decisions defence counsel adopts as demonstrative of promoting the best interests of his client. In the opinion of the Lord Chancellor at page 7:

> "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence – a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal – it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they consider it ..."

[61] It seems, therefore, that the critical question for the trial judge, at the close of the case for both sides, is: is there any material which supports any other defence apart from that canvassed by, or on behalf of, the person on trial? It is only if he answers the question in the affirmative that the issue must be left for the jury's consideration. We will

return to the question of the sufficiency or cogency of the evidence that ought to be present before the issue is left.

[62] This general duty of a trial judge to leave all defences supportable by the evidence for the consideration of the jury, foreshadowed the decision of the Judicial Committee of the Privy Council in **Bullard v R**. The appellant, in that case, was employed by the deceased. They had a dispute over the deceased's failure to pay money owed to the appellant. The scene of the dispute shifted from the appellant following the deceased about on foot, hatchet in hand, to the interior of a motor car. During the journey, the appellant inflicted two blows to the head of the deceased. On the case for the prosecution, the appellant launched an attack on the deceased as he sat in the front seat, after shouting twice that he wanted his money. The appellant testified that the deceased turned around and grabbed him by the throat, choking him. He admitted to striking the deceased with the hatchet but said he would not have hit the deceased, had he not been strangling him.

[63] On that evidence, the appellant in **Bullard v R** relied on both self-defence and provocation. The trial judge, however, withdrew provocation from the jury's consideration. The trial judge was of the view that there was no evidence to support provocation. The challenge on appeal was, therefore, the propriety of not leaving the issue of provocation for the jury's consideration. Their Lordships agreed that it was wrong to have withdrawn the issue from the jury's consideration.

[64] Four principles undergird that decision. Firstly, if there is any evidence of provocation, fit to be left to the jury, the trial judge has a duty to leave it for their consideration. Secondly, that evidence may arise on either the case for the prosecution or the defence. Thirdly, the duty to leave provocation to the jury subsists whether or not it has been specifically raised by counsel for the defence. Fourthly, the judge's duty to leave provocation to the jury is independent of the person on trial asserting provocative conduct (see **Bullard v R**, at page 642).

[65] These principles are the natural outgrowth of a judicially recognized right of an accused on trial for murder to a verdict on the lesser offence of manslaughter. That right must, of necessity, arise on the evidence in the particular case. It is not a fundamental right. Having the character of a right, its denial will result in an extraordinary miscarriage of justice. Lord Tucker, at page 644, expressed it this way:

> "… Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

Although the breadth of this proposition was drawn wider than was necessary for their Lordships' decision, it has since become the capstone of the law as it relates to murder and manslaughter.

[66] The issue before their Lordships was, as it is in this case, whether the trial judge was correct in not leaving the issue of provocation for the jury's consideration. However, a verdict of guilty to manslaughter may be returned in other circumstances, for example, where the accused lacked the necessary intent (see **R v Raymond Henry** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 55/1996, judgment delivered 10 November 1997). Therefore, in laying down the proposition, their Lordships went beyond the factual confines of the case. That notwithstanding, the soundness of the proposition has never been doubted. Although **Bullard v R** was decided in the year preceding the passage of the amendment of the OAPA, the spirit, if not the letter, of the principles distilled above, and the general proposition, are enshrined in section 6.

[67] Section 6 of the OAPA is quoted below:

> "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."

[68] The mischief which the legislature sought to cure by the passage of section 6 was two-fold. First, the abolition of the rule at common law that words alone were insufficient to ground provocation. Second, to place within the jury's sole domain the question of whether a reasonable man would have reacted to the provocation in the way the defendant did (see **Phillips v R** [1969] 2 AC 130, at page 134). The judge can, therefore, no longer determine whether the reaction of the defendant meets the reasonable man test, and words alone, conduct alone, or both may constitute provocative conduct (see **R v Peter Davies** [1975] QB 691, at page 700).

[69] The section, therefore, speaks to three things: the provocative conduct, the causative link between the provocation and the loss of self-control and the objective assessment of the defendant's response to the provocation (see **R v Acott** [1997] 1 WLR 306, (HL(E)) at page 310). The second and third encapsulate the two-stage test of provocation laid down by the Privy Council in **Phillips v R**, and applied consistently by this court (see for example **Bernard Ballentyne v R** [2017] JMCA Crim 23, which followed **Dwight Wright v R** [2010] JMCA Crim 17).

[70] There is, therefore, an evidential bar that has to be met before the issue of provocation can be left to the jury for their consideration. According to Rougier J in **R v Acott** [1996] 4 All ER 443 (CA), at page 453, "there must be some evidence of provocation in its active sense", before the jury is asked to consider the issue. This requirement is captured by the draftsman in the parenthesized words, "whether by things done or by things said or by both together". This was how McDonald-Bishop JA expressed it in **Bernard Ballentyne v R**, at para. [43]:

> "The clear wording of the statute imports the fundamental requirement that before the defence of provocation could have been properly left to the jury, there had to be some

> evidence, either direct or inferential, as to what was either said or done or both said and done by the deceased (or someone else) to the applicant, which would have provoked the applicant to lose his self-control at the time the fatal injuries were inflicted..."

[71] The section does not limit the source of the evidence of provocation. Meaning, evidence of provocative conduct may arise on the case for the prosecution, as well as, or, on the case for the defendant (see **Bullard v R**). Neither is the evidence of provocation confined to things done or said by the victim. The provocative conduct may come from someone other than the victim (see **R v Davies**, at page 701).

[72] So then, at the close of the case for the defendant, the trial judge is required to make a global assessment of the evidence and unsworn statement, to ascertain if there is material upon which a reasonable jury may find that the reasonable man test has been met (see Archbold Pleading, Evidence & Practice in Criminal Cases 36th edition, at para. 2508). It is now established that even if the judge considers that the evidence of provocation is slight or tenuous, he ought to leave it to the jury notwithstanding (see **R v Stewart** [1995] 4 All ER 999, at page 1006). Furthermore, the judge is compelled to leave the issue of provocation to the jury, although it was not relied on as a defence, even in circumstances where it may be inconsistent with the primary defence (see **R v Stewart**, at page 1006).

[73] In the latter circumstance, the judge may have a fine line to tread in leaving provocation for the jury's consideration. Care has to be taken not to marshal the evidence in such a manner that it undermines the defendant's primary defence (see ***R v Scott*** [1997] Crim LR 597). However, unless it is obvious, the judge is still required to identify the evidence which might lead the jury to the conclusion that the defendant was provoked to lose his self-control. In **R v Stewart**, at page 1007, Stuart-Smith LJ said:

> "...where the judge must, as a matter of law, leave the issue of provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that

> the appellant lost his self-control. This is particularly important where counsel has not raised the issue at all..."

[74] The import of isolating the relevant evidence, where it is not obvious, is to facilitate the jury answering the two questions which comprise the two-stage test. The first question is one of fact, was the defendant provoked into losing his self-control? The second question, which asks for the jury's opinion, is, was the provocation enough to make a reasonable man do as the defendant did? According to Stuart-Smith LJ, in **R v Stewart**, at page 1007:

> "... If this guidance is not given, the jury will find it difficult to answer the two questions posed, namely did the accused lose his self-control as a result of things done or said and, more particularly, whether a reasonable man would have been so provoked by such things..."

Failure to focus the mind of the jury in this way, particularly where provocation was not relied on as a defence, was held to be a non-direction in **R v Stewart**.

[75] In this case, the challenge to the conviction for murder is that there was a material non-direction, which amounts to a misdirection, in the learned judge's failure to leave provocation for the jury's consideration. It is, therefore, appropriate to commence the review of the decision of the court below with the predicate question: was there evidence upon which a reasonable jury might have come to the conclusion that the applicant was provoked into losing his self-control?

[76] Before setting out the evidence upon which the jury could have been asked to consider the relevant questions, it is important that two constraints are highlighted. The first is that appreciable portions of the transcript of both the examination-in-chief and cross-examination of the main witness for the prosecution are missing. The second is the exclusion of evidence which was, arguably, part of the *res gestae.*

[77] That said, one of the examples identified in **R v Stewart**, at page 1007, where evidence tending to show provocation would be obvious, is if there is evidence of a row.

In this case, the evidence is that there was a quarrel between the deceased and brothers of the applicant about the conduct of the deceased towards their mother, with whom he had a romantic relationship. It was while this row was in progress that the applicant armed himself with the length of iron pipe, went to the back of the deceased dwelling and struck him twice. It was that assault which brought the quarrel to an end. As a result of the ruling of the learned judge, all the verbal exchanges were pared away, and only the fact of the quarrel was admitted into evidence.

[78] From the challenge under cross-examination, it is apparent that the witness asserted that the applicant came on the scene during the quarrel and was in a position to have heard what was being said. When this is juxtaposed with the evidence that the applicant just took up the length of iron pipe and went to the rear of the deceased's house, it makes it more probable than not, that something said during the quarrel triggered his reaction. While it cannot be said with any certainty what words were said in the applicant's presence, we do know that the subject of the quarrel was the deceased's abusive conduct towards the applicant's mother. That may have been provocation of a slight or tenuous nature but provocation nevertheless. Even though it may have been slight or tenuous, the learned judge was still required to leave the issue for the jury's consideration (see **R v Stewart**; **R v Rossiter** [1994] 2 All ER 752 and **R v Cambridge** [1994] 2 All ER 760).

[79] Was it that the applicant was provoked so that he lost his self-control? This is a question that was properly for the jury's consideration. A reasonable jury may well have considered that suddenly leaving his dwelling, without any evidence that he was in a rage, together with the savagery of the blows inflicted, was evidence of a temporary loss of self-control. Taking up that evidence in the round with the evidence that after inflicting the blows, the applicant sat down and stared into space, a reasonable jury may well have concluded that the applicant was provoked into losing his self-control. At this stage, as was said in **Bullard v R**, it is idle to speculate whether the jury would have gone on to say a reasonable man would have, or would not have, done as the applicant did.

[80] Although provocation was not the defence raised by the applicant, it arose on the case for the prosecution. The learned judge was, therefore, under a duty to leave the issue for the jury's consideration. This required, in the first place, a direction that the prosecution had to prove that the killing was not provoked, before they could find the offence of murder proved. Secondly, in leaving the issue for their consideration, the jury ought to have been directed that if they were in doubt whether the applicant was provoked, that doubt should be resolved in the favour of the applicant (see **R v McPherson** (1957) 41 Cr App R 213). The learned judge's failure to so direct the jury amounted to a material non-direction, which rendered the verdict for murder unsafe. We formed the view that it cannot be said that the jury, properly directed on the issue of provocation, would have inevitably returned the same verdict, guilty of murder. We formed the view that in all the circumstances and in the interests of justice, the conviction for murder should not stand. Accordingly, we quashed the conviction for murder, substituted a conviction for manslaughter, and set aside the sentence for murder as indicated above. It was, therefore, necessary for the court to consider the appropriate sentence that should be imposed for the offence of manslaughter.

Issue # 4 – what is the appropriate sentence to be imposed?

[81] On the question of sentence, Miss Lewis quoted section 9 of the OAPA and commended the approach to the sentencing exercise recommended by this court in the watershed decision of **Meisha Clement v R** [2016] JMCA Crim 26. Also prayed in aid was appendix A of the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines').

[82] Against that background, Miss Lewis submitted the following. The applicant received a favourable social enquiry report which described him as humble and quiet, and sharing a positive interaction with his community. He was further described in that report as one who avoided confrontation and became aggressive only when provoked. Miss Lewis also submitted that the applicant had one previous conviction which the learned judge rightly did not take into consideration, by virtue of its antiquity.

[83] Taking all those matters into consideration, Miss Lewis urged the court to impose a sentence of seven years' imprisonment. This is the sentence, she submitted, that would have been imposed on him had he been convicted of manslaughter. The practical effect of such a sentence would be the applicant's immediate release, having been incarcerated since 15 May 2014.

[84] Mr Duncan acknowledged that the sentence proposed by the applicant's attorney-at-law is within the normal range of sentences for this offence. In his submission, there were no factors to increase the sentence from the usual starting point, as well as none to take the sentence out of the normal range. Those submissions appear to rest on the learned judge's acceptance of the applicant as a fit candidate for rehabilitation and that there were no aggravating features.

The sentence

[85] Miss Lewis did not rely on any of the several cases from this court in which persons were sentenced in similar circumstances. In **Shirley Ruddock v R** [2017] JMCA Crim 6, Brooks JA (as he then was) conducted a review, dating back six years, of sentences imposed for the offence of manslaughter. That review disclosed a range of between seven and 21 years, with 15 years being the most common, where personal violence was used (see para. [27] of the judgment).

[86] Brooks JA found that a common thread running through the cases in which a sentence of 15 years was imposed, was an antecedent relationship between the perpetrator and the victim. In support of this fact, **Daniel Robinson v R** [2010] JMCA Crim 75; **Carlos Benjamin v R** [2012] JMCA Crim 4; **Ketey Lawrence v R** [2012] JMCA Crim 15; **Tafari Johnson v R** [2012] JMCA Crim 18; **Durrant Morris v R** [2012] JMCA Crim 42; and **Bertell Myers v R** [2013] JMCA Crim 58 were cited.

[87] In the light of the helpful guidance provided by Brooks JA in **Shirley Ruddock**, we concluded that the killing, in this case, would fall within the category of cases that would justify a sentence somewhere in the range of 10 to 15 years. Applying the principles

established by the Sentencing Guidelines and **Meisha Clement,** we used 12 years as our starting point within the sentence range. In so doing, we had regard to the circumstances of the commission of the offence, which include the object used to inflict the injuries and the use of excessive force. We noted, as an aggravating factor, the prevalence of this type of offending. On the other hand, we took into consideration the matters from the social enquiry report highlighted by Miss Lewis. We considered it appropriate to disregard the one previous conviction recorded against the applicant, which was neither recent nor relevant. Accordingly, he was treated as having no previous conviction. We also took into account the favourable community and antecedent reports. Having balanced the aggravating and mitigating factors, we concluded that the latter outweighed the former, and so, a sentence of 11 years' imprisonment should be imposed for manslaughter.

Summary and Conclusion

[88] From the available transcript of the trial, the applicant was entitled to have the lesser offence of manslaughter left to the jury for their consideration. The evidence to support such a verdict was unfortunately severely curtailed, with the result that the alternative verdict was not left to the jury. After considering it, the jury may well have rejected it. That would have been within their province. As the authorities show, it is now idle to speculate what they would have done. Equally clear, is the proposition that not to leave manslaughter for the jury's consideration resulted in a grave miscarriage of justice. It was against this background, which we endeavoured to demonstrate above, that we granted the application for leave to appeal conviction and sentence; treated the hearing of the application as the hearing of the appeal; quashed the conviction for murder and made the consequential orders detailed at para. [2] above.