**[2022] JMCA Crim 20**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE STRAW JA**
**THE HON MRS JUSTICE V HARRIS JA**
**THE HON MRS JUSTICE BROWN BECKFORD JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO 70/2017**

**APPLICATION NO 194/2021**

**ALTON BAKER v R**

**Leroy Equiano for the appellant**

**Mrs Christine Johnson-Spence and Mrs Nickeisha Young Shand for the Crown**

**9 November 2021 and 8 April 2022**

**V HARRIS JA**

## Introduction

[1] On 17 March 2017, the appellant, Mr Alton Baker, was convicted on an indictment that contained two counts of murder following a trial before a judge ('the trial judge') and jury in the Saint Elizabeth Circuit Court. He was sentenced on 7 July 2017, on both counts, to life imprisonment at hard labour, with the stipulation that he should serve 30 years before becoming eligible for parole. Those sentences were ordered to run concurrently.

[2] The appellant applied for leave to appeal his conviction and sentence. On 29 December 2019, a single judge of this court granted him leave to appeal his conviction but refused leave to appeal his sentence. Consequently, the appellant's pursuit of his appeal against conviction is before us.

[3] At the outset of the hearing, counsel for the appellant, Mr Leroy Equiano, sought, by way of a notice of application for court orders filed 22 October 2021, an extension of time to file submissions. Mr Equiano also sought leave to abandon the original grounds of appeal and argue instead the supplemental grounds of appeal filed on 22 October 2021. Crown Counsel, Mrs Nickeisha Young Shand, indicated that the Crown was not opposing the applications. Accordingly, we made the following orders:

> "1. Extension of time is granted to the applicant to file submissions. The submissions filed on 22 October 2021 [are] to stand as properly filed.
>
> 2. The applicant is granted permission to abandon the original grounds of appeal.
>
> 3. Leave to argue supplemental grounds of appeal filed 22 October 2021 is granted."

[4] Having heard submissions from counsel for both parties on the substantial appeal, we reserved our decision, which we now provide. We wish to register our gratitude to both counsel for their industry and very helpful submissions.

**The evidence at the trial**

[5] The harrowing discovery, which ultimately led to the trial and conviction of the appellant, occurred on 8 January 2014 in the parish of Saint Elizabeth. These are the undisputed facts. On that tragic day, at approximately 4:10 pm, Mr David Williams (a witness for the prosecution) arrived at his home in Thornton District. Shortly after, he noticed that his son, Deswick Williams, was not home as expected. He enquired of his whereabouts but received no reassuring answer.

[6] Likewise, Mr Jocelyn Coke realised his son, Ashnell Coke, was missing when he had not returned home at approximately 7:00 pm on that same day. The last time Mr Coke saw his son was at approximately 12:30 pm earlier that day at their home. Subsequently, they both left. He spoke with Ashnell on the phone at about 3:30 pm. As the night approached, Ashnell was nowhere to be found. Mr Coke went in search of him.

Ashnell, he said, would always go to Mr Williams' house, and so he went there first to enquire of his whereabouts. Needless to say, he was met with the startling realisation that Deswick was also missing.

[7] At about 10:00 pm that night, Mr Williams and five other persons, including Mr Coke, went in search of the two boys. They went to a river by "Donkey Pasture" or "Jackass Pasture", about three miles from Mr Williams' home. It was Mr Williams' evidence that Deswick would always go fishing there. Nearby the river, Mr Williams noticed Deswick's bicycle "lean up on the road side". Two chains from the bicycle, he saw Deswick's slippers. Another two chains from the slippers, they came upon a body, face down in the water. As he got closer, Mr Williams observed from the river bank, standing at about three feet from the body, that it was his son Deswick. The rest of his body was covered with "bush", and his feet were under the river bank.

[8] Mr Williams then went to the Siloah Police Station and reported that he found Deswick's body, having earlier reported to the police that he was missing. He led them to where the body was found. When police officers from Mandeville arrived, they removed the "bush" from Deswick's body and discovered another body lying on top of him. This second body was identified as that of Ashnell.

The prosecution's case at trial

[9] The prosecution's case was that the two 15-year-old boys, Ashnell Coke and Deswick Williams ('the deceased boys'), were murdered by the appellant. In support of its case, the prosecution called eight witnesses, namely, Mr David Williams, Mr Joscelyn Coke, Miss Shanna Codner, Detective Corporal Davion Beezer, Miss Janice Graham, Mr Kenroy Lewis, Corporal Howard Richards and Detective Corporal Courtney Carty.

[10] The prosecution depended predominantly on statements allegedly made by the appellant to a civilian (his grandmother) and the police, as well as circumstantial evidence. The parties agreed that the post-mortem and forensics reports were to be admitted into evidence without calling the expert witnesses. However, since the jury were

required to draw inferences from certain circumstances, as well as for utmost clarity and understanding of the proceedings below, the prosecution's evidence, as far as is relevant to this appeal, is outlined in some detail as follows.

*Miss Janice Graham*

[11] Miss Graham's evidence was that she had been a resident of Thornton District in Saint Elizabeth for over 40 years. In January 2014, she had a neighbour, Miss Millicent Robinson, whose house was demonstrated to be about 40 feet away from her home. The appellant was identified in the dock as Miss Millicent Robinson's grandson. Miss Graham knew him from his birth. He was also known as "Don Man". When at home, Miss Graham would see the appellant visit his grandmother at least once per day. They would greet each other at times but did not converse. Thornton is a quiet district, so she could stay at her house and hear "what's going on over Miss Millicent's house". She would also hear the appellant speak whenever he visited with his grandmother.

[12] On 8 January 2014, at around 4:00 pm, Miss Graham was in her bedroom watching television when she heard the appellant calling out to his grandmother. She found it strange that he was shouting and so she lowered the volume on her television and looked through an open glass louvre window. In re-examination, she explained that she turned down the television because the appellant was talking loudly and cursing, and she had never seen him in that sort of rage before.

[13] She saw the appellant go to the back of the house with a long machete in his right hand. He was at a distance of 20 feet away, and her view of him was unobstructed. She observed his face, hair and upper body and confirmed that it was the appellant. Miss Graham's account of what she heard the appellant saying is as follows (page 58, lines 11 to 25, and page 59, lines 1 to 10 of the transcript):

> "HIS LORDSHIP: Tell us what he was cursing say.
>
> THE WITNESS: 'Ah kill the two bloodclaat boy dem who a nyam out mi grung [a colloquial word for farm].'

Q. Tell us exactly.

A. Yes, he was saying, 'ah kill di two bloodclaat boy dem weh a thief out mi grung.'

…

Q. Anything else?

A. Yes. 'Mi chop dem in ah dem bloodclaat head and a same so if me ketch Kenroy me a go push di machete through him neck.'

HIS LORDSHIP: Kenroy?

THE WITNESS: Kenroy.

HIS LORDSHIP: Me a go push di machete what?

THE WITNESS: Through him neck. Yes, 'cause him drive down him car pon me and a same so if no pickney in deh me ah go kill di whole ah dem too.'

HIS LORDSHIP: Any pickney what?

THE WITNESS: In ah di car him a go kill di whole a dem too."

[14] Subsequently, the appellant's grandmother told him to calm down and offered him food which he asked her to put away until later. Shortly after, he left. About 20 to 25 minutes had passed from the time Miss Graham first saw the appellant to when he left. She observed his face for that entire period. She also testified that the distance between Miss Millicent's house and Jackass Pasture was approximately 20 minutes when walking quickly.

[15] During cross-examination, Miss Graham described how the appellant was dressed. Her evidence was that he wore a brown long sleeve jacket, a black undershirt, black pants and a cap; she could not see his shoes. When questioned about the window she looked through, Miss Graham insisted that she was looking through the side bedroom window. She was confronted with the statement she had given to the police where it was recorded that she had said, "I was looking through my glass louver [sic] blade window,

in my front bedroom, which is to Miss Millicent's premises". She explained that it was a window in the front bedroom, but she would not have called it the front window.

[16] It was revealed in the evidence that about two and a half years before the trial, Miss Graham began wearing glasses because she was having problems with her eyes. Miss Graham explained in re-examination that she has diabetes, and it began to affect her vision, but she could see clearly until 2016 (her observations of the appellant took place on 8 January 2014).

[17] Miss Graham admitted that she did not remember the appellant's first name and that it was about a week after the incident, having called her daughter (who went to school with the appellant), that she was reminded of it. This call to her daughter occurred after she gave her statement to the police. However, Miss Graham said she had spoken to her nephew, a Corporal stationed at the Mandeville Police Station, before giving her statement to Detective Corporal Carty. Miss Graham also stated that when she had spoken with a District Constable on 9 January 2014, she did not give him the appellant's name. It was suggested to her that she gave her statement to the police 12 days after the day of the incident, and she agreed that this was correct.

*Mr Kenroy Lewis*

[18] Mr Lewis testified that on 8 January 2014, around 3:00 pm, he was driving on the main road in Thornton District with school children in his car. He pulled over to the left-hand side of the road so that two children could exit the vehicle. He observed a man walking up the road on the left-hand side as he had stopped about a chain behind him. The man turned to him, and he recognised the appellant, whom he had known since he was a young boy and by the alias "Don Man". The appellant angrily asked him if he was driving down the car on him. Subsequently, Mr Lewis drove off.

*Corporal Howard Richards*

[19] Corporal Richards testified that in January 2014, he was stationed at the Siloah Police Station in Saint Elizabeth. On 9 January 2014, at around 2:10 am, upon receiving certain information, he, along with at least four other police officers (including at least two police officers from the Scene of Crime Unit), accompanied the deceased boys' parents to Jackass Pasture in the Thornton community. They arrived at about 2:30 am and had to use a flashlight because the area was very dark. They were guided to a shallow river, like a stream. There, Mr Williams pointed out a body in the river near the river bank. He noticed the body was covered with bushes that appeared to be freshly cut.

[20] When trying to remove that body, another body was seen. Both bodies were removed from the water onto the land. While police personnel from the Scene of Crime Unit were taking photographs, Corporal Richards observed multiple chop wounds to the deceased boys' bodies, especially to the back of their heads. He also saw a large bloodstained spot about 10 feet from the river that trailed to the river. The police had the bodies of the deceased boys transferred to the Black River Public Hospital.

[21] Based on information received, at about 3:00 am that same morning, Corporal Richards, along with Detective Constable Watson ('Det Cons Watson') and District Constable McCurdy ('DC McCurdy'), went to the appellant's home in a district called Bagdale Mountain. The appellant was removed from his home and taken to the Siloah Police Station, where Det Cons Watson questioned him.

[22] During cross-examination, Corporal Richards stated that Bagdale Mountain was within walking distance, less than a mile from the river. On arrival at the appellant's home, the police had surrounded the house, and Det Cons Watson, who had a search warrant, knocked on the door. The appellant's father answered the door, and enquiries were made for the appellant, who was later seen lying in bed. Det Cons Watson proceeded to question him, but Corporal Richards did not hear the line of questioning.

As a result, he could not say whether DC McCurdy noted the conversation. They then took the appellant to the Siloah Police Station.

[23] They arrived at the Siloah Police Station around 4:00 am, although Corporal Richards admitted he did not know the exact time. The appellant was further questioned by Det Cons Watson, who took notes. He went back to the appellant's home with Det Cons Watson and the appellant between 5:00 am and 5:30 am. There, the appellant showed Det Cons Watson a pair of water boots, items of clothing and three machetes that belonged to him. These were all placed in separate plastic bags. They then returned to Siloah Police Station, where the appellant was arrested on reasonable suspicion of murder.

*Detective Corporal Courtney Carty*

[24] Detective Corporal Carty ('the investigating officer' or 'Det Cpl Carty') testified that in January 2014, he was stationed at the Balaclava Police Station in the parish of Saint Elizabeth, which is part of the "Siloah police area". At around 10:00 am on 9 January 2014, he received a phone call and, as a result, proceeded to the Siloah Police Station. He arrived in Siloah around noon. At that time, he spoke with Det Cons Watson. He received "five black plastic bags containing pieces of clothing items and three machetes" from him. He secured those bags at the Siloah Police Station. At around 1:00 pm, he and other police personnel proceeded to Jackass Pasture in Thornton District. He observed a shallow stream with a "cleared farmland" on one side, with a few crops and a plot of ganja plants. There was a track on the farmland that led to the stream. Another policeman pointed him to an area, about 18 feet away, where he observed what appeared to be dried bloodstains on the river bank.

[25] On 10 January 2014, at around 1:00 pm, he went to the Santa Cruz Police Station in the parish of Saint Elizabeth. There, he spoke with the appellant, who was in custody. He identified himself to the appellant and told him he was investigating the murders of the deceased boys. He informed him that he was the suspect. The appellant did not respond. The investigating officer asked the appellant if he was called "Don Man", and

he confirmed that he was. He then asked him where he was on the day in question. The appellant responded, "Mi feel bad inna mi belly officer, mi cyaan talk to yuh now", as he clenched his stomach. This complaint was reported to the police personnel at the station so that the appellant could receive medical attention. Det Cpl Carty then left him in custody.

[26] On 20 January 2014, at around 10:00 am, the investigating officer made "intensive inquiries" in the Thornton District area. Having received certain information, on 21 January 2014, at around 2:00 pm, he returned to Santa Cruz Police Station to speak with the appellant. Their conversation was recited as follows (page 143, lines 4-13, and page 144, lines 5-21 of the transcript):

> "Q. Now, so far as you recall, tell us step by step exactly what words were said between yourself and Mr. Baker?
>
> A. I told him I was there to speak to him about the murder of Deswick Williams and Ashnell Coke, which was committed close to his farm at Jackass Pasture, in Thornton on the 8th -- on Wednesday the 8th of January, 2014, and that he was a suspect. He replied, 'dem a thief officer.' I cautioned him at this point.
>
> ...
>
> Q. So you told us that you gave him, you administered this caution. What next happened, sir?
>
> A. He was hesitant sir, then. I then told him that I was informed that he had confessed to killing two little boys close to his farm at Jackass Pasture on Wednesday the 8th of January, 2014. To this he replied, 'mi ketch dem a thief out mi grung, A long time dem a do it soh mi gi dem two out a mi machete'. I asked him repeatedly if he meant that he chopped up the two boys, he did not respond. He then made a sudden outburst in an angry manner say, 'nobody nuh waan hear weh mi haffi seh. A long time dem two boy deh a thief out mi grung'. His aggressive behaviour intensified and as a result I became concerned.
>
> Q. Was anything else said between yourself and Mr. Baker?
>
> A. No, sir."

At this stage, Det Cpl Carty ended the conversation and left the police station.

[27] On 25 January 2014, at around 4:50 pm, the investigating officer conducted a question and answer session with the appellant and his duty counsel, Mr Yushane Morgan. The scribe, Constable Christian, read the caution certificate to the appellant, which he signed and dated. The investigating officer then cautioned the appellant and asked him 57 questions. The question and answer document ('Q & A') was admitted into evidence as Exhibit 2. In that document, the appellant admitted that he had a farm in Jackass Pasture, Thornton, since 2011 and would visit his farm daily once he was in Thornton. He also admitted that there is a river close to the farm. It would take him 15 minutes to walk from his home to Jackass Pasture. He was asked (question 52), "Did you have an argument with Kenroy Lewis on Wednesday 8th of January, 2014?" to which he answered, "Yes, yes, yes". He was also asked (question 53), "What was your argument about?" and the answer was, "Because him drive down him car on me and nearly bounce me off the road". When asked (question 57), "Why did you kill Dezrick Williams and Ashneal [sic] Coke?" the appellant responded, "I didn't kill anyone, sir". He was then charged with two counts of murder and cautioned separately on each count. Upon being cautioned at this point, the appellant said, "Mi nuh know nutten bout dat. Me overheard it at the Siloah Police Station, dem never tell me weh dem tek me fah".

[28] During cross-examination, the investigating officer maintained that he received six bags, not five as he had previously said. Having refreshed his memory from his notes, he then outlined the items received from Det Cons Watson that were sent to the lab as follows:

(i) one long-sleeved Harvey Bernard brown shirt (marked 'B');

(ii) one pink Ocean Pacific torn trousers (marked 'C');

(iii) one dirty light blue jeans (marked 'D');

(iv) one black short sleeve polo shirt (marked 'E');

(v) one black JL jeans (marked 'F');

(vi) right foot of a pair of boots (marked 'G')

(vii) left foot of a pair of boots (marked 'H')

(viii) a machete with the handle wrapped with red and cream coloured cloth (marked 'I');

(ix) a machete with the handle wrapped with black cloth (marked 'J'); and

(x) a machete with the handle wrapped with cream coloured cloth (marked 'K').

[29] There was no item marked 'A' in his notes, which he explained was an oversight. When describing the items in court, the investigating officer stated that the handle of one of the machetes was wrapped in a beige and orange cloth (an inconsistency). None of the machetes could be located at the time of trial. The forensic report revealed that the only item that blood was detected on was the brown shirt. That blood came from an unidentified male contributor, as the deceased boys were excluded as being the source.

[30] Regarding the Q & A, the investigating officer was challenged during cross-examination about when he got in touch with duty counsel. He explained that based on information he received from Miss Graham, he thought it was of the utmost importance to speak with the appellant at the earliest possible time. For that reason, he said he began looking for duty counsel from 10 January 2014 so as to have a formal interview with the appellant. He made efforts to seek a duty counsel during the 11-day period the appellant was in custody but was unsuccessful. As a result, he was alone with the appellant when they spoke on 21 January 2014 in an office. He eventually received the contact information for Mr Morgan and contacted him after that visit.

[31] The investigating officer maintained, notwithstanding the suggestion by Queen's Counsel, who represented the appellant at trial, that the appellant had told him that, "long time dem a thief out me grung". He agreed that the appellant was asked what he had done with the machete used to kill the deceased boys, and he replied in a loud tone, "di police have it sah".

<u>The defence's case</u>

[32] At the close of the prosecution's case, the appellant's trial attorney made a no case submission. Her main argument was that the only evidence that implicated the appellant was that of Miss Graham. The trial judge disagreed and found that the appellant had a case to answer.

[33] The appellant made a brief unsworn statement from the dock in which he said that he did not commit the murders and he knew nothing about them. He also denied making the statements Miss Graham and the investigating officer attributed to him.

**The appeal**

[34] As earlier indicated, the appellant argued seven supplemental grounds of appeal filed on 22 October 2021. His general contention is that he was denied a fair trial because of various failures and/or errors on the trial judge's part. The supplemental grounds are:

> "1. The learned trial judge failed to give the jury adequate guidance and instructions on how to approach and treat with the evidence of the witness Janice Graham in respect of the conversation she claimed to have overheard that was presented to the jury as a confession. ('Treatment of the overheard statement')
>
> 2. The learned trial judge failed to give the jury adequate guidance, warnings and instructions on how to treat with the statement alleged to have been made to Det. Cpl. Carty on the 21st January 2014 at the Santa Cruz police station. The importance of the circumstances, voluntariness, accuracy and subsequent denial are issues that were not clearly put before the jury. ('Treatment of the oral admission')

> 3. The question and answer [sic] was admitted into evidence in its entirety, the learned trial judge failed to give adequate and cogent directions to the jury on how to approach and apply this evidence. ('Treatment of the Q & A')
>
> 4. The Appellant having challenged the evidence of the witnesses Janice Graham and Det. Cpl. Carty in respect of statements attributed to him, the Crown's case was purely circumstantial. It was therefore important that the learned trial judge present the evidence in the case in his summation to the jury in an organized and coherent manner. The learned trial judge [sic] summation was not organized or coherent and appears to have been rushed. The Appellant was thus deprived of a fair trial. ('Incoherent and disorganised summation')
>
> 5. If the statements credited to the Appellant by the Crown witnesses, Janice Graham and Det. Con. Carty are to be accepted, they both show a high degree of provocation that would have caused the Appellant to snap at the moment. Therefore, manslaughter rose on the Crown's case and should have been left to the jury for consideration. The failure of the trial judge not to leave manslaughter to the jury deprived the Appellant of the opportunity to be found guilty of the lesser offence. ('Treatment of the evidence of provocation')
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> 6. The Appellant was entitled to a good character direction and the judge erred by not giving such a character direction. ('Good character direction')
>
> 7. The Appellant was deprived of a fair trial because the jury was pressured into arriving at a quick decision [due] to the convenience of time. ('Late retirement of jury')"

**Discussion**

Ground 1 - Treatment of the overheard statement

*Submissions*

[35] In this ground of appeal, the issue is that the trial judge's directions to the jury on how to treat the statement attributed to the appellant in Miss Graham's evidence (set out at para. [13] above) was inadequate. On the appellant's behalf, Mr Equiano submitted that, in the court below, voluntariness and credibility were essential elements to be

considered by the jury. He urged us to agree that the alleged admission should not be regarded as a confession since Miss Graham was eavesdropping on a conversation. He argued that the accuracy of what she heard was essential to the statement's reliability. The trial judge, counsel contended, should have instructed the jury to consider Miss Graham's ability to recall what she overheard as well as the conditions under which it was alleged to have been said. The appellant would not have been talking directly to Miss Graham, so it could not be said that she accurately represented what she heard.

[36] Issue was also taken with the trial judge referring to the statement as a confession. He argued that the trial judge should have instructed the jury that they first have to decide if what Miss Graham said she heard was actually what was said. Counsel stated that Miss Graham may have been an honest witness and a credible person, but the jury was not warned of the importance of that aspect of her evidence.

[37] Crown Counsel, Mrs Young Shand, submitted that the trial judge's treatment of Miss Graham's evidence was appropriate since the confession was not made to a person in authority and was absolutely denied by the appellant. Correspondingly, there were no issues of voluntariness and fairness, so the trial judge was under no duty to direct the jury about those issues. Reliance was placed on **Patricia Henry v R** [2011] JMCA Crim 16 to support that proposition. It was further argued on behalf of the Crown that when Miss Graham's evidence was led, there was no objection on the basis of its admissibility. Accordingly, it was contended that the trial judge was only obligated to put the issue of credibility to the jury, and he discharged that duty when he directed the jury that it was for them to decide if they believed Miss Graham.

*Law and analysis*

[38] Contrary to Mr Equiano's submission, voluntariness was not an issue in relation to this evidence. Miss Graham was not a person in authority capable of pressuring the appellant into making such a statement. As the evidence disclosed, she did not even speak to him on the relevant day. Additionally, his rebuttal is an absolute denial that he made that statement. Therefore, the circumstances under which Miss Graham

purportedly heard the appellant confess to the murders (to his grandmother) gave rise to two issues, the correctness of her identification and the accuracy of what she overheard.

[39] Mr Equiano has not taken issue with Miss Graham's two-fold visual and voice identification of the appellant. So the remaining concern is the jury's perspective of Miss Graham's credibility as a witness. Since her evidence was pivotal to the prosecution's case, credibility was a live issue. The trial judge directed the jury on credibility in these terms (pages 254-256 of the transcript):

> "It is your decision that is important, you must decide what you accept of the evidence as true.
>
> You take into account the way in which each witness gave their testimony. And this is one of the issues in the case, that is of credibility. That's one of the main issue [sic] in this case, credibility. So what you are going to do, Madam Foreman and members of the jury, try to recapture what is called the demeanour or the body language of the witness when they gave testimony. You looked at them, try and recapture how they behaved when they were tested by cross—examination. Because it is not only what a person says, it is how the person says it that is going to assist you in determining whether to accept the witness as reliable or telling the truth, or whether you reject that witness. So the demeanour or the body language of a person is important when it comes to credibility, very important.
>
> Many of you might be parents, or work, and sometimes children give problems and you talk to them, even at the work place, you might say no John or Mary, what you are saying is not true, or part of it is true and part is not true, same thing at the workplace. So it is the same principle you are going to examine the witness on. So same as how you examine your children to see if they are telling the truth, the same way you examine the witnesses to see if they are telling the truth or not. So that is how you come to your decision if a person is speaking the truth. Since I am on the issue of demeanour or body language, as we call it, you should also take into account the level of the person's intelligence. All of us have different

> levels of intelligence. We might not want it to be so, but the good Lord made it so, we can't question it.
>
> You must also take into account the witness' ability to put accurately into words what he or she has seen and the witness' power of observation. For each of us has different levels of observation powers. Some of us have a great level of vocabulary, some of us can deliver ourself [sic] in all sorts of way, some can't. There are things that you can look at in a jiffy and give an accurate account, some can't, so these are some of the things you have to look at. We all have different qualities, some persons, as I have said before, can make a quick observation, some can't.
>
> In looking at a witness, Madam Foreman and members of the jury, and in decideng [sic] what evidence to accept and what evidence to reject, you must bear in mind you may accept all of what a witness says, if he has spoken the whole truth, if you are satisfied that that person spoke the truth. You may reject all of what the witness says too, say you are a total liar. You may reject a part and accept a part, you might say you speak the truth in this part but not the other part."

[40] The testimony of Miss Graham was that when the appellant visited his grandmother's house on 8 January 2014, she overheard him speaking loudly and angrily. She also observed him from her window. She heard him admit to Miss Millicent that he had used his machete to kill the two boys he found stealing from his farm. The trial judge, after reciting that evidence, briefly reminded the jury of his directions on credibility as follows (page 284, lines 12-15 of the transcript):

> "As I told you, it's a matter for you to say if he made that statement. If you find that he did not make it, that's the end of it. If you find that he made it, is it true?"

[41] Upon completing his review of the evidence in the case, the trial judge gave the jury specific directions on how to treat the "confessions". He said (page 323, line 18 to page 324, lines 1-4 and lines 11-13):

> "Madam Foreman and your members, you will have to look on the law that I told you about how to deal with confession if you believe he made it or not. You have to look at all those

> things that I told you. You have to review all the evidence. You have to look at what inference can be drawn, if any. You will have to look at the credibility of these witnesses, the inconsistencies and the discrepancies that have taken place. You will have to look at the time, the various times; the gaps in the various times.
>
> …
>
> As I said before, credibility is very important. You look at whether these witnesses are truthful or not."

[42] In the case of **Kevin Bandie v R** [2021] JMCA Crim 41, a prosecution witness testified that the applicant called him and reported that he and the deceased had a fight, he squeezed her throat, and she died. About two to three days later, the witness visited the applicant, and he once again admitted to killing the deceased. The judge in the court below invited the jury to consider the character of the witness based on how he presented himself to the court when he was giving his evidence. He also thoroughly reviewed the evidence and explained the issue of voice identification to the jury since the confession was initially made over the telephone.

[43] This court held that, given the circumstances and the significance of that evidence, the judge was required to give guidance to the jury as to the need to properly assess the witness' credibility and determine whether the applicant had, in fact, made what amounted to a confession. The judge had directed the jury in the following terms:

> "... So after deciding what the statement means, you then say to yourselves, what weight and what value is to be attached to it. If you are not sure that he did so, ... you must disregard it. On the other hand, if you are sure he did make that statement and that it was true, you may take into [sic] account when you go to consider your verdict."

Satisfied with the judge's directions, this court held that he adequately discharged his duty.

[44] The obvious distinction between **Kevin Bandie** and the present case is that the statement, in this case, was overheard by Miss Graham. The fact that it was overheard

is compounded by the distance from which she heard it. For those reasons, the accuracy of the statement was brought into question. In determining this issue, the jury would consider her evidence and the other evidence in the case. For instance, Miss Graham's account of the encounter between the appellant and Mr Lewis was supported by evidence from Mr Lewis and the appellant himself. If that part of the statement was accurate, it could be inferred that the rest of the statement was likewise true. That would be a finding of fact for the jury.

[45] It is unfortunate that the trial judge did not expressly direct the jury to assess the weight and value to be attached to the evidence. Still, we do not think that omission is sufficient to ground the criticism that his directions were inadequate. The trial judge properly and adequately directed the jury on how to assess the credibility of the witnesses. He prefaced his review of Miss Graham's evidence by reminding them that credibility was one of the crucial issues in the case before them. He also briefly told them to consider if the appellant made that statement and whether it was true. His concluding remarks on confessions would have also highlighted for the jury, among other things, the need to consider the credibility of the witnesses and the inferences that could be drawn from their evidence. We neither find that his general description of the statement as a confession had any significant prejudicial effect on the appellant's case. It was for the jury, having accepted Miss Graham's evidence, to determine what they made of the statement and whether, in the circumstances, it amounted to a confession or admission of the offences.

[46] Even in the face of the deficiencies in the trial judge's directions, we cannot say that the jury would have arrived at any other conclusion. The jury had an opportunity to observe Miss Graham's demeanour and determine whether she was a witness of truth. The verdicts that the jury returned clearly indicated that they accepted the evidence of Miss Graham and that they found her to be a credible witness. Consequently, we are satisfied that the conviction is safe on this basis, and the appellant has not suffered any substantial miscarriage of justice. Accordingly, this ground fails.

Ground 2 – Treatment of the oral admission

*Submissions*

[47] This ground has sought to impugn the trial judge's directions to the jury on how they were to treat the oral admission attributed to the appellant by the investigating officer (see para. [26] above).

[48] Mr Equiano, on behalf of the appellant, submitted that a confession or admission is only admissible if it is voluntary. He said this was to safeguard an accused person and his right against self-incrimination. The trial judge, he argued, should have directed the jury that if they found that the statement to the investigating officer was coerced or induced, then it was not voluntary and should be disregarded. He further contended that the jury was also to be directed that if they found the statement was given voluntarily, they were to consider its accuracy and only use it in collaboration with the other evidence. Accordingly, the argument continued, directions on credibility alone were insufficient.

[49] The investigating officer's evidence was also challenged on the basis that, at the time the appellant is said to have admitted to the murders, they were alone. Moreover, he made no written record of it in his notebook or elsewhere. Additionally, counsel argued that what the investigating officer reported was not a confession in the "legal sense", and the learned trial judge should have directed the jury as such. Criticism was also made of the circumstances under which the oral admission was made. Counsel argued that the appellant was in custody for a long time and was having health issues. He was also without legal representation when the investigating officer misled him into believing that he had a statement from Miss Graham that identified him as the person who killed the deceased boys. Finally, counsel acknowledged that the evidence was nonetheless admitted without any objections at the trial but maintained that the trial judge needed to do more than merely recite it.

[50] Crown Counsel contended that when the investigating officer's evidence regarding the oral admission was led, there was no objection based on its admissibility. Throughout

his summation, the learned trial judge emphasised the issue of credibility and that it was for the jury to decide if they believed the investigating officer.

*Law and analysis*

[51] The authorities have long established that a confession is an admission relevant to the issue of guilt. Therefore, the first point of clarity is that the evidence of the appellant's oral admission to the investigating officer after being cautioned could properly be regarded as a confession. Therefore, we disagree with Mr Equiano that the words the appellant uttered to the investigating officer were not "a confession in the true legal sense", especially when their context is considered against the background of all the other evidence in the case.

[52] The appellant denied making any admission in his unsworn statement from the dock. There was no evidence suggesting that the words ascribed to him by the investigating officer were extorted by coercion, oppression or inducement of any kind by a person in authority. Neither did the appellant make any such assertion. Despite that, the main criticism posited in this ground was that the trial judge failed to direct the jury to consider whether the oral admission was given voluntarily. We do not think that such a direction was necessary in the light of the appellant's defence. Since the appellant denied making the oral admission, the question was not whether he made it voluntarily, but rather whether he made it at all. If there were any issues as to its voluntariness, counsel was required to bring it to the trial judge's attention before the admission of the evidence, so that a *voir dire* could be held to determine its admissibility (see **R v Hemsley Ricketts** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 111/1983, judgment delivered 9 May 1985 and **R v Steven Palmer** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 83/2000, judgment delivered 6 April 2001). In the absence of being notified of any such issues, had the trial judge directed the jury on the voluntariness of the oral admission, it would not only have been highly inappropriate but also a source of confusion for the jury.

Therefore, the trial judge was correct in not directing the jury on the voluntariness of the oral admission, it being an issue that did not arise on the evidence.

[53] The circumstances under which the oral admission was purportedly given were also subject to challenges. It is peculiar that the investigating officer made no record of it in his notebook or elsewhere upon receiving such an admission. Furthermore, since the appellant was a suspect, ideally, the investigating officer's conversation with him should have been in the presence of an attorney-at-law in keeping with the principles formulated in the **Practice Note (Judges' Rules)** [1964] 1 WLR 152. That being said, the appellant made the oral admission after the investigating officer told him of his right to remain silent.

[54] Mr Equiano submitted that despite being cautioned, the appellant would have made the oral admission under duress. Counsel cited the length of time the appellant was in custody and his complaint of experiencing stomach pains. Again, it is worth mentioning that the appellant did not advance this position at trial. If this were the thrust of his case, we expect that it would have been explored at the trial, given that he was represented by a very experienced and senior Queen's Counsel who was highly regarded for her thoroughness and competence (as amply demonstrated in the trial transcript). Therefore, there being absolutely no evidence of duress or that the stomach pains the appellant complained of on 10 January 2014 continued up to 21 January 2014, we will certainly not venture into the realm of speculation, as it would seem we are being invited to do. We will now examine the issue concerning the undocumented oral admission.

[55] In the Privy Council case of **Leroy Burke v R** (1992) 42 WIR 250, both the prosecution and the defence were surprised by the police sergeant's evidence that when the appellant was arrested and cautioned, he overheard him saying to another police officer, "A no me alone kill the man". It was agreed that this was an admission, although it was not documented. It was, at any rate, inconsistent with the appellant's written statement and his unsworn statement at the trial. In the circumstances their Lordships held:

> "In this situation, at the very least, the judge in his summing-up was under an obligation to warn the jury in the clearest possible terms to approach that evidence with caution. In fact, the summing-up contained no such warning and the judge's treatment of the alleged oral confession could well have encouraged the jury to attach considerable weight to it. This was a course which would have been perfectly appropriate if the existence of the alleged oral confession had not been revealed in such surprising circumstances, but which was wholly inappropriate in the circumstances which are now known."

[56] The court also found that the alleged oral confession was highly prejudicial to the appellant since it was the only evidence implicating him as an active participant in the killing. Consequently, their Lordships directed this court to quash the conviction of murder, and a verdict of guilty of manslaughter was substituted. The distinguishing feature in the present case is that both the prosecuting and defence counsel were aware of the oral admission prior to the trial. Therefore, there was no element of surprise for either the prosecution or the defence. Additionally, unlike in **Leroy Burke**, in the instant case, there was other evidence that placed the appellant at the site where the deceased boys were found and alluded to his involvement in the murders.

[57] The decision in **Leroy Burke** was considered in this court in **Vernaldo Graham v R** [2017] JMCA Crim 30, where it was held:

> "… where the Board held that a judge was obliged to direct the jury to approach evidence of an undocumented oral confession with caution. Even though what was alleged to have been said by the appellant in this case was not a confession, it was an undocumented, unsupported assertion that the appellant said something from which the jury could draw an inference adverse to the appellant. It required no less a caution in our view."

[58] Undoubtedly, in our view, there are imperfections surrounding the evidence of the appellant's unrecorded oral admission. In summing up the investigating officer's evidence to the jury, the trial judge merely read his evidence relating to the oral admission. He did not expressly caution the jury, and neither did he remind them how to treat the oral

admission. However, the trial judge's failure to do so was not fatal to the convictions for the following reasons.

[59] Firstly, this evidence would not have taken the defence by surprise; secondly, once admitted, the crucial issue for the jury was credibility. The jury's duty was to assess the investigating officer's evidence, including the circumstances mentioned earlier, and determine whether they accepted his evidence as accurate and representing the truth of what the appellant said. We must acknowledge, at this stage, that the trial judge did not impress this upon the jury after reviewing that evidence. Nevertheless, we believe that his directions on credibility, confessions as well as those which specifically addressed the overheard statement (discussed in ground one) would have adequately guided the jury on how to treat the evidence of the oral admission.

[60] In our view, the oral admission would properly be treated as a pre-trial mixed statement containing incriminating and exculpatory evidence. This is so since the appellant admitted to killing the deceased boys and also explained that they had been stealing from his farm. This provided the prosecution with an admission of guilt and evidence of motive. In addition, the investigating officer's evidence also gave some insight into the appellant's state of mind when confronted with information that incriminated him.

[61] Lord Lane CJ in **R v Duncan** [1981] 73 Cr App R 359 explained the evidential significance of mixed statements, which has been approved by the House of Lords in **R v Sharp** [1988] 1 All ER 65. He said:

> "…the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies."

[62] In the Privy Council case of **Whittaker v R** (1993) UKPC 35, their Lordships held that whether or not the accused remains silent or gives evidence in his defence at trial,

a pre-trial mixed statement made by him to the police had the same evidential value as outlined in **R v Sharp**.

[63] In another Privy Council case, **R v Von Starck** [2000] UKPC 5, the appellant was charged with the murder of a woman in whose company he had been seen while visiting Montego Bay, in the parish of Saint James. When the detective found the appellant and identified himself, the appellant immediately admitted to killing the deceased. The detective then cautioned him, and the appellant continued, "I have a knife which I used to kill her", and handed the detective a pouch that contained a knife and a little jar. It was agreed that the jar contained cocaine. Upon handing over the pouch, the appellant said, "Is the cocaine that caused me to do it". Later in the evening, he also made a statement at the police station, similarly implicating himself in the murder. At the trial, he made an unsworn statement in which he suggested that he did not kill her, although not outrightly denying it.

[64] Their Lordships found that the evidence of the oral admissions was properly admitted and substantial in weight. It was held:

> "Where an accused person makes an unsworn statement and a mixed statement, the mixed statement is to be admitted in totality. Even if the accused in his unsworn statement at the trial denies making the earlier admissions or explanations and sets up an entirely different defence, he does not thereby deprive himself of the benefit of the exculpatory aspects of the mixed statement."

[65] Considering all of the above, the oral admission in its entirety was correctly admitted into evidence. However, as stated earlier, the trial judge's failure to caution the jury on how to approach this evidence was not a fatal omission. Taking into account his directions on credibility and confessions, as well as his repeated reminders to the jury that they were the judges of the facts and that the prosecution bore the burden of proof, it cannot be said that any shortcomings in his directions rendered the verdicts unsafe, especially in the light of the other evidence relied upon by the prosecution. We are,

therefore, of the view that the appellant has not suffered any substantial miscarriage of justice. This ground also fails.

Ground 3 - Treatment of the Q & A

*Submissions*

[66] The complaint registered in this ground of appeal is that the trial judge's directions to the jury on how to approach the Q & A were inadequate. Counsel, Mr Equiano, submitted that, rather than simply reciting the Q & A, the trial judge ought to have instructed and assisted the jury on how to assess its significance in the context of the totality of the evidence. Furthermore, since Crown Counsel identified specific questions which addressed critical issues, the trial judge should have highlighted the answers. The cases of **R v Curtin** [1996] Crim LR 831 and **R v Silverman** (1988) 86 Cr App R 213 were cited in support of these submissions. Counsel also contended that the suggestive questions in the Q & A evoked misleading answers "clothed as confessions". Therefore, the trial judge needed to direct the jury on how to treat the ambiguous Q & A and the prejudicial nature of certain parts of it. He relied on the case of **R v Bethelmie** [1998] 2 Cr App R 161 in support of this argument. It was further argued that the trial judge should have pointed out to the jury that the Q & A also contained the appellant's defence, which was a denial that he killed the deceased boys. That Q & A, coupled with the statement he made after being charged and his unsworn statement, were paramount to the appellant's defence. As a result, Mr Equiano proposed that the trial judge's failure to instruct and assist the jury deprived the appellant of a fair trial.

[67] Crown Counsel argued that there was no objection to the Q & A being admitted into evidence at the trial. It was further submitted that the trial judge was not required to do more than review the evidence given by the appellant in the Q & A session. He also was not required to direct the jury on exculpatory statements made by the appellant during the Q & A. Reliance was placed on the case of **Edward Bitter v R** [2016] JMCA Crim 10.

*Law and analysis*

[68] The question that immediately arises is, what are the requisite directions, if any, that a trial judge must give to a jury to enable them to assess the evidence elicited through the appellant's Q & A. As previously established, on 25 January 2014, 16 days after the appellant was arrested, the investigating officer conducted a Q & A with him under caution in the presence of his attorney-at-law. The appellant was asked 57 questions, and his answers were recorded in writing. The defence did not object to that document being tendered and received into evidence through the investigating officer. It is agreed that the prosecution highlighted a few questions and answers in the document. The trial judge, however, while recounting the evidence of the investigating officer, read the entire Q & A document for the jury (pages 305-312 of the transcript). Still, admittedly, he gave no specific direction as to its significance.

[69] The case of **Lescene Edwards v R (CA)** [2018] JMCA Crim 4 is helpful on this matter. Brooks JA (as he then was), at para. [84], cited with approval the dicta of F Williams JA (Ag), as he then was, in **Edward Bitter v R** [2016] JMCA Crim 10, and had this to say:

> "[84] Where, in the record of the interview, there appear answers that are exculpatory, the trial judge should bring those answers to the specific attention of the jury. **If however, the import of the exculpatory statements is repeated during the case for the defence at the trial, it may be said that there is no miscarriage of justice if the trial judge does not give a separate direction in respect of the exculpatory statements made during the interview.** That was the finding in **Edward Bitter v R** [2016] JMCA Crim 10. In that case, F Williams JA (Ag), as he then was, stated:
>
>> '[63] Additionally, when one peruses the contents of the Q & A [in] the transcript, it becomes clear that those contents amounted to a foreshadowing of the unsworn statement. The effect of the Q & A was to deny the allegations that made up the Crown's case and to put

> forward an alibi. The unsworn statement was to the same effect.
>
> [64] In light of this, we shared the Crown's view that there was no injustice occasioned to the applicant, as the main points of the unsworn statement were dealt with adequately by the learned trial judge [in the summation]. …" (Emphasis supplied)

[70] In the case at bar, after reciting the Q & A, the trial judge proceeded with the remainder of the investigating officer's evidence. However, as Brooks JA stated in **Lescene Edwards v R (CA)**, "there is no decided case or other authority, which has been brought to the court's attention in any of the submissions, that supports the position that the document in which the interview is recorded, may not be read to the jury during the summation…" (see para. [83]). Nonetheless, Mr Equiano cannot be faulted in his submission that the jury were not adequately guided on how to treat the Q & A. We agree that appropriate and helpful directions would have taken the form of bringing the exculpatory answers to the jury's attention and assisting them on how they were to assess the Q & A against the background of the cases for the prosecution and the appellant. The failure to do so amounted to a non-direction. The question to now be contemplated is whether or not, as a result of this omission on the part of the trial judge, a miscarriage of justice has occurred.

[71] We wish to point out, at this juncture, that in the recent Privy Council's decision of **Lescene Edwards v The Queen (PC)** [2022] UKPC 11, their Lordships did not reverse this court on this issue (see para. 33 of the judgment that sets out the ground that was argued). In fact, their Lordships at para. 58 stated:

> "58. As for the police interviews, it does not appear that any attempt was made by the defence to exclude the interview records from being placed before the jury (as in the present case); but if they were to be admitted in unredacted form, especially in a document which we understand the jury were allowed to take out with them when they retired to deliberate, then, as the Court of Appeal held,

> the judge should have warned the jury that the questioner's allegations were not evidence."

Therefore, we find that the pronouncements made by Brooks JA above (at paras. [69] and [70]) remain good law and we will rely on them to resolve the question that is currently being addressed.

[72] Continuing the analysis of the issue raised under this ground, we wish to make the following observations. Firstly, the written record of the Q & A can, for the most part, be separated into two categories, inculpatory admissions and exculpatory statements.

(a) Inculpatory admissions

The appellant admitted that one of his aliases is "Don Man" and that he did farming in Jackass Pasture. Once he was in Thornton District, he would walk to his farm daily. There is a river close to his farm. On the day in question, he visited his farm, and he had his machete (wrapped in a white and orange coloured cloth) with him. He visited his grandmother, Ms Millicent Robinson, that same day, and they spoke. At that time, he was dressed in his water boots, black pants, brown jacket and a black T-shirt. He also had his machete with him. He admitted to arguing with Mr Lewis about driving down his car on him. The police took clothes and two machetes from him.

(b) Exculpatory statements

The appellant stated that he went to his farm in the morning and at midday on the day in question. He also visited his grandmother at 9:00 am and 1:00 pm that day. He denied saying any of the words Miss Graham imputed to him. When specifically asked if he murdered the deceased boys, he said, "I don't kill anyone, sir".

[73] Secondly, as it relates to the inculpatory admissions, the trial judge failed to point out the answers that supported the prosecution's case by not highlighting specific aspects of the Q & A. For instance, Miss Graham's accurate description of the clothes worn by

the appellant when he visited his grandmother's house and his possession of a machete at the time. These matters were of some importance because counsel at the trial sought to undermine Miss Graham's identification evidence. Similarly, when considering Miss Graham's credibility, her evidence that the appellant spoke of an argument with Mr Lewis because he drove down his car on him was supported by the appellant's admission that this encounter occurred. The trial judge did not seek to pull together the various strands of evidence that emerged on the Q & A with the rest of the evidence led by the prosecution. This failure undoubtedly favoured the appellant in his defence.

[74] Thirdly, whilst the trial judge did not draw attention to the exculpatory statements to the jury, those statements could properly be regarded as a preamble to his defence. In his unsworn statement from the dock, the appellant stated that he was not involved in the murder of the deceased boys, and he did not make the statements ascribed to him by Miss Graham and the investigating officer.

[75] A trial judge's duty to identify the defence was discussed in the case of **R v Curtin**, on which Mr Equiano relied. In that case, it was held that where the defendant was interviewed but did not give evidence, the judge had to decide how fairly and conveniently he should place the interview before the jury. That interview raised issues regarding the defendant's intention and participation in the final assault. However, the judge failed to refer to the answers relevant to his defence. In the present case, the information contained in the Q & A was precisely the same that the appellant put forward at trial as his defence. There was nothing for the trial judge to further highlight or emphasise in that respect, since the Q & A did not enhance (or add to) the defence. There were, however, other exculpatory statements that the jury would have been mindful of in considering his defence, such as the time discrepancy regarding when he visited his grandmother. Those exculpatory statements were all placed before the jury by the trial judge during his summation, albeit not amplified in any manner.

[76] As earlier stated, in his unsworn statement, the appellant maintained the same stance he expressed in his Q & A. He repeatedly denied admitting to and comthe murders.

Ergo, his Q & A, as in **Edward Bitter v R**, served as a foreshadowing of his unsworn statement. Therefore, in keeping with **Lescene Edwards v R (CA)**, the trial judge's failure to give a separate direction on the exculpatory statements could not be regarded as a miscarriage of justice.

[77] We disagree with Mr Equiano's submission that some of the questions were misleading. He pointed out, as an example, when the appellant was asked, "Where is the machete that you used to kill Deswick and Ashnell?" and he answered, "oonuh have mi two machete and mi nuh know bout any more machete". Rather than being misleading, we find this is a leading question that the police are entitled to ask in these circumstances. Accordingly, we are of the opinion that neither that specific question and the answer given by the appellant nor any of the other examples pointed out by Mr Equiano could properly be regarded as misleading. Also, counsel's contention that some of the questions were too specific is without merit.

[78] We had some concerns with the admission of questions 22 to 27 of the Q & A, which referred to an encounter the appellant had with a Mr Earl Thompson, who was not called as a witness for the prosecution. This aspect of the Q & A was, in the circumstances, totally irrelevant, of no probative value whatsoever and ought properly to have been redacted by the trial judge. However, this particular area of the Q & A was brief, not emphasised by the trial judge to the jury and counsel, both in the court below and before us, did not advance any arguments on it. While we will restrain ourselves from making any definitive pronouncement on this issue, we will simply take the opportunity to remind trial judges that it is their responsibility, in the interests of fairness, to exclude evidence that has no relevance or probative value to the proceedings (see also para. [71] above on the approach that trial judges are to adopt when directing juries on police interviews as stated by this court and approved by the Board).

[79] Given all of the above, we are compelled to the view that there has been no injustice to the appellant, so this ground must also fail.

Ground 4 - Incoherent and disorganised summation

*Submissions*

[80] This ground requires us to review the trial judge's summation in its entirety to determine whether it was presented in a disorganised and incoherent manner. Mr Equiano submitted, on behalf of the appellant, that there was no direct evidence against the appellant, save and except for the alleged admissions. Otherwise, the prosecution relied on circumstantial evidence. He further contended that, for that reason, it was incumbent on the trial judge to set out the evidence in an orderly, cogent and concise manner. Counsel criticised the trial judge's directions regarding inferences by asserting that he did not point out the various interpretations of the evidence to the jury for them to decide which they accepted. Additionally, he argued that there were misstatements and errors in the summation, which suggested that the trial judge was in a haste to complete it within a certain time. Finally, he posited that the trial judge failed to sum up the facts, define the issues and remind the jury of the evidence. The case of **Browner v R** [1995] Crim LR 746 was cited on this point.

[81] It was the Crown's position that the jury had the benefit of hearing the evidence and observing the demeanour of the witnesses. So, despite any deficiency in the trial judge's review of the evidence, there was sufficient evidence on which they could make their decision. Reliance was placed on **Dalton Reid v R** [2014] JMCA Crim 35 to advance the submission that no special directions were necessary in cases of circumstantial evidence. Regarding the expectations of a judge when directing the jury on inferences, the case of **Sophia Spencer v R** (1985) 22 JLR 238 was cited. The trial judge, counsel submitted, adequately directed the jury on how to consider inferences and clearly outlined the weaknesses in the Crown's case, which supported inferences in favour of the appellant.

*Law and analysis*

[82] The impact a coherent and organised summation will have on a jury's ability to assess the evidence and law to determine guilt or innocence is indisputable. It is common knowledge that cases can be built on direct evidence, circumstantial evidence, or a combination of both. Circumstantial evidence was adequately defined in chapter 10-1, section 2 of the Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book), which states:

> "2. In a circumstantial evidence case the prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence and motive. …"

[83] In **Clifton Harrison v R** [2022] JMCA Crim 15, Brown JA (Ag) at para. [32] of the judgment puts it this way:

> "[32] Circumstantial evidence, on the other hand, is evidence of relevant facts, that is, facts from which the existence of facts in issue may be inferred (see Cross & Tapper on Evidence and Blackstone's Criminal Practice 2007 para. F1.10). Put another way, '[c]ircumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts', per Dawson J in **Shepherd v R** [1991] LRC (Crim) 332] at page 337.

[84] The prosecution's case was dependent, in part, on circumstantial evidence. Even so, once the jury accepted the evidence of Miss Graham and the investigating officer as true, the statements attributed to the appellant would be regarded as direct evidence. In any event, the trial judge directed the jury on how to deal with circumstantial evidence (see pages 269-270 of the transcript). Those directions have not been challenged. Nevertheless, the authorities make it clear that special directions on circumstantial evidence are not necessary (see **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 and **Melody Baugh-Pellinen** [2011] JMCA Crim 26 (paras. [39] – [40])).

[85] We fully accept that the order of the trial judge's summation may not have been ideal. That being said, it is a fundamental tenet that each judge is empowered to present his or her summation in the way they see fit. This is subject only to the necessary inclusion of certain primary elements and directions on the relevant points of law. The trial judge is obligated to juxtapose the case for the prosecution and the defence. He must put their respective contentions before the jury in a fair and balanced manner and assist them with possible conclusions which may be open to them on the evidence.

[86] After delivering his directions on credibility, the trial judge correctly directed the jury on how to draw reasonable inferences. His directions in this regard cannot be impugned (see pages 257-258 of the transcript). Mr Equiano has advanced that the trial judge failed to point out all the possible inferences that could be drawn from certain areas of the evidence. However, as the authorities make clear, the critical requirement for this purpose is that the trial judge directs the jury on how to make an inference and assists them by highlighting some of the possible inferences. Edwards JA, delivering the judgment on behalf of this court in **Kevin Peterkin v R** [2022] JMCA Crim 5, made the following observation:

> "[39] … the authorities do not indicate that, in every case, a trial judge is required to identify to the jury all the possible inferences they could draw from the evidence, and there is no specific formula or set of words that a judge must use when directing a jury on how to draw inferences from facts proved. However, some guidance must be given.
>
> [40] The following direction was suggested by Carey JA in the case of **Sophia Spencer v R** (1985) 22 JLR 238. At page 243 of that case, he said the following:
>
>> 'We would have expected the jury to be told at some point in the summing up, something such as: 'Having ascertained the facts which have been proved to your satisfaction, you are entitled to draw reasonable inferences from those facts to assist you in coming to a decision. You are entitled to draw inferences from proved facts, if those inferences are quite inescapable. But you must not draw an inference unless you are quite

> sure it is the only inference which can reasonably be drawn'.
>
> [41] …To that suggested direction, we would only add that where any piece of evidence is capable of two meanings, the judge should draw to the jury's attention the two possible interpretations and leave them to decide which one they accept."

[87] Upon a perusal of the summation in the present case and having regard to the submissions of counsel, it becomes clear that the trial judge reminded the jury of the critical evidence. For instance, he pointed out the significance of Mr Coke's evidence that he last spoke with Ashnell at 3:30 pm, from which it could be inferred that he was still alive at that time (page 279, line 3 of the transcript). The trial judge also assisted the jury in mapping out a timeline of the day by pointing out how that information related to Mr Lewis' evidence that he saw the appellant at 3:00 pm (page 292, line 9 of the transcript) and Miss Graham's evidence that the appellant arrived at his grandmother's house at 4:00 pm (page 282, line 9 of the transcript).

[88] Although the trial judge reminded the jury about specific evidence at critical points, we are constrained to agree that he did not sufficiently assist the jury with how certain aspects of the evidence could possibly be viewed. For example, it was undoubtedly important, in the light of the appellant's defence, for the trial judge to remind the jury that no blood was found on the three machetes taken from him and that the blood found on the black polo shirt (marked 'E'), did not come from any of the deceased boys. Therefore, it was a notable omission that the jury were not directed on the different views, some of which were favourable to the appellant that could be taken of the forensic evidence in the case.

[89] In a similar fashion, the trial judge did not point out some of the possible interpretations of the evidence that were in favour of the prosecution, which unarguably was to the appellant's advantage, such as:

(a) the appellant's farm was right by the river where the deceased boys were found, and he had his machete with him when he visited his farm, in circumstances where the deceased boys had succumbed to machete wounds.

(b) Miss Graham testified about an encounter between the appellant and Mr Lewis. Mr Lewis' evidence and the appellant's answer in the Q & A supported her evidence. The jury was not assisted with how this would have affected Miss Graham's credibility and the jury's assessment of the accuracy and truth of the entire overheard statement.

(c) The statements attributed to the appellant by Miss Graham and the investigating officer were evidence of motive consistent with the nature of how the deceased boys met their deaths.

[90] However, the trial judge highlighted inconsistencies that arose on the prosecution's case. These included Miss Graham's evidence that the only person she spoke to was her nephew and the "DC". She later testified that she talked to her nephew before speaking to the investigating officer (page 290 of the transcript). He also pointed out that Miss Graham said she saw the appellant with a machete in his right hand when he was at his grandmother, but Mr Lewis did not mention seeing the appellant with one, which would have been shortly before Miss Graham saw him at his grandmother's house (page 283, line 23 of the transcript).

[91] We agree that the trial judge indeed uttered some misstatements, but most of these were insignificant such as when he called Ashnell's father "Zacinth Coke" (page 280, line 1 of the transcript). Also, he incorrectly stated that Miss Graham agreed that in her statement to the police, she had said that she was looking out the front window of her bedroom (page 291 of the transcript). This mistake benefitted the appellant.

[92] The most significant misstatement was the trial judge's reference to the appellant having an alibi. The appellant's defence was a bare denial. Nothing on the prosecution's case or the appellant's unsworn statement supported an alibi defence. Nevertheless, the trial judge, in error, directed the jury to consider the appellant's alibi (page 323, lines 14-17 of the transcript). That direction would have certainly caused some confusion for the jury, but it would not have prejudiced the appellant. Instead, it could have helped his case. There were also additional passages in the summation that could lead to confusion. For example, at page 281, lines 14-18 of the transcript, the trial judge said, "[s]he said that Alton lives in Thornton and Alton would visit Miss Millicent, that's the grandmother, and that he would not visit her often. He would visit Miss Millicent one time per day". While we have only highlighted a few of the flaws in the summation, having considered them all, we do not find that they have much bearing on the overall adequacy of the summation.

[93] Therefore, although we are of the view that the summation was not as pellucid and organised as it should have been, we have concluded that the jury would have still appreciated their duty to draw inferences in their assessment of the evidence. Moreover, the shortcomings of the summation were significantly diminished by the overwhelming body of evidence against the appellant. We, therefore, see no basis to form the view that the jury would have inevitably returned verdicts of not guilty if those errors had not been made. Consequently, there is no reason to disturb the verdict because of this ground.

Ground 5 – Treatment of the evidence of provocation

*Submissions*

[94] It is common ground that the trial judge did not leave the issue of provocation to the jury. This court must now determine whether the trial judge erred in failing to leave the lesser offence of manslaughter, on the basis of provocation, to the jury for their consideration.

[95] Mr Equiano submitted, on the appellant's behalf, that the prosecution's evidence disclosed that the appellant was provoked to such an extent that he snapped. If the jury accepted the evidence of Miss Graham and the investigating officer, he argued, the statements attributed to the appellant demonstrated a high degree of provocation as "the motive for the fateful occurrence". Consequently, counsel contended that the trial judge was under a duty to leave the possible defence of provocation to the jury. This failure was exacerbated by the fact that the prosecution brought the issue to the trial judge's attention, but he disagreed. As a result, the appellant's position was that he was deprived of a fair trial.

[96] Mrs Young Shand, on behalf of the Crown, referred us to the case of **Blake (Daryeon) and Blake (Vaughn) v R** [2017] JMCA Crim 15 and acknowledged that given the evidence that was adduced by the prosecution at the trial, it would have been appropriate for the trial judge to direct the jury on the issue of provocation. She further submitted that even if the trial judge believed the evidence of provocation was slight or tenuous, the appellant was entitled to have the issue left for the jury to determine as a matter of fact. Notwithstanding, counsel argued that this is an appropriate case for the application of the proviso in section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA').

*Law and analysis*

[97] It is trite law that the prosecution bears the burden of proving as an essential ingredient of the offence of murder, that the killing was unprovoked. Therefore, where there is evidence that a defendant was provoked or may have been provoked in committing the offence of murder, the prosecution bears the burden of disproving the alleged provocation to the requisite criminal standard. If the prosecution fails to do so, then providing all the other ingredients of murder are proved, the appropriate verdict would be one of manslaughter. Accordingly, it is equally trite that provocation is only a partial defence to a charge of murder. That being so, a judge runs the risk of there being a miscarriage of justice if he or she fails to leave manslaughter for the jury's consideration

once evidence of provocation is detected either on the case for the prosecution or defence.

[98] The courts' approach to the issue of provocation is crystallised in the oft-cited dictum of Lord Tucker in **Joseph Bullard v The Queen** [1957] AC 635 ('**Bullard v R**') at page 644:

> "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."

[99] Evidence of provocation is regarded as words or conduct (or both) that is sufficient to cause a reasonable person to suddenly and temporarily lose his self-control so as to deprive him of his ability to exercise reason (see **R v Duffy** [1949] 1 All ER 932). Central to resolving this issue is section 6 of the Offences Against the Person Act, which provides as follows:

> "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."

[100] The governing principle as to the duty of the judge is that, irrespective of the line of defence put forward by a defendant at trial, once the issue of provocation arises (even indirectly) on the case of either the prosecution or defence, the judge must direct the jury on its treatment and leave it open to them to return a verdict of manslaughter (see **R v Hopper** [1915] 2 KB 431 and **Bullard v R**). In the case of **R v Stewart** [1995] 4 All ER 999, Lord Justice Stuart-Smith expressed:

> "…It is now well established that even if the defence do not raise the issue of provocation, and even if they would prefer not to because it is inconsistent with and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked; and this is so even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight: see R v Rossiter [1994] 2 All ER 752 and R v Cambridge [1994] 2 All ER 760, [1994] 1 WLR 971."

[101] How then will a trial judge determine whether the issue of provocation has arisen on the evidence? Chapter 19-2, section 3 of the Bench Book, provides the following guidance:

> "…(a) is there any evidence of specific provoking conduct of the accused, and (b) is there any evidence that the provocation caused him to lose his self-control? If both questions are answered in the affirmative, the issue of provocation should be left to the jury notwithstanding the fact that in the opinion of the judge no reasonable jury could conclude on the evidence that a reasonable person would have been provoked to lose his self-control [**R v Gilbert** 66 Cr App R 237]."

[102] Surely, before we can conclude that the trial judge failed in his duty to leave the issue of provocation to the jury, we must first determine whether there was evidence from which the jury, properly directed, could reasonably find that the appellant had been provoked to lose his self-control in committing the murders.

[103] Since there was no eyewitness testimony or evidence from the defence alleging that he was operating under a loss of self-control, the jury's attention ought to have been drawn to the significance of the evidence of motive raised by the prosecution. Miss Graham, on whose testimony the prosecution heavily relied, deposed that the appellant was in a rage when she heard him say, "ah kill di two bloodclaat boy dem weh a thief out mi grung". In the same vein, the investigating officer gave evidence that when he informed the appellant that he was a suspect in the murders of the deceased boys, he responded, "dem a thief officer". After being cautioned, the appellant, in response to

further questioning, explained, "mi ketch dem a thief out mi grung, A long time dem a do it soh mi gi dem two out a mi machete". Then, angrily, he continued, "nobody nuh waan hear weh mi haffi seh. A long time dem two boy deh a thief out mi grung".

[104] Mr Kenroy Lewis' evidence was also indicative, to some extent, of the appellant's state of mind, possibly prior to arriving at his farm. He spoke to an altercation with the appellant when he pulled over to the side of the road behind him, and the appellant angrily asked him if he was driving down on him. This was confirmed in the appellant's Q & A when he admitted that he had an argument with Mr Lewis on the day in question because he drove down on him and almost bounced him off the road. Based on the timeline of that day, it could be inferred that the appellant having had the altercation with Mr Lewis, was already aggravated when he came upon the deceased boys in Jackass Pasture.

[105] On account of his oral statements and outbursts heard by Miss Graham and the investigating officer, it is clear that the appellant had prior grievances with the deceased boys stealing from his farm, the same farm that was located close to where their bodies were found. Miss Graham also overheard him telling his grandmother that he had killed the "boys dem" who had been stealing from his farm; he told the investigating officer that he had caught them stealing from his farm and had given them "two out a" his machete. Accordingly, it is pellucid, to our minds, that the appellant, having purportedly caught the deceased boys in the act of stealing from his farm, this was conduct on their part, which could, in all the circumstances, cause the appellant to lose his self-control (or snap as Mr Equiano described it) and kill them. Therefore, against this evidential framework, a direction on the partial defence of provocation was indeed merited.

[106] Having determined that the issue of provocation was live, the trial judge was duty-bound to identify the relevant evidence to the jury and adequately direct them on the matter. Instead, his only assistance to the jury on the relevance of provocation was in the following terms (page 265, lines 1-8 of the transcript):

> "Now the indictment charges this man for murder, what is murder? Murder is the unprovoked killing of another person without lawful justification and excuse with the intention of killing or causing serious bodily harm, deliberately to cause death and from which death in fact resulted. That's what murder is, in law." (Emphasis supplied)

[107] Thereafter, he proceeded to outline the elements or "ingredients" for murder. The directions given to the jury were that the fifth ingredient that they were to consider was whether "the killing was unprovoked". Throughout the remainder of his summation, the trial judge did not highlight the issue of provocation again. We believe that the jury were not given sufficient guidance on this matter. We also agree with Mr Equiano that that omission was further compounded by the trial judge's rejection of the prosecution's suggestion that provocation should be left to the jury (page 325, lines 13-17 of the transcript). This was done in accordance with prosecution counsel's duty, in the face of evidence on which the jury could find provocation, to point it out to the judge as a reminder to leave the issue to the jury (see **R v Cox (Adrian Mark)** [1995] 2 Cr App R 513)

[108] In our judgment, the trial judge's decision had the effect of vitiating any possibility that the jury would have had to contemplate the issue of provocation when determining guilt. Also, even if the jury bore in mind the trial judge's earlier direction that murder must be unprovoked, it is implausible that they would have appreciated that manslaughter was open to them as an alternative verdict without further specific directions. We believe that once the jury accepted the evidence of Miss Graham and the investigating officer (which they obviously did, in the light of the verdicts), the possibility existed that, properly directed, they could have found that the appellant was provoked into committing the murders and returned verdicts of manslaughter. As a result, the trial judge's failure effectively deprived the appellant of a fair trial. Therefore, for that reason, the convictions for murder cannot stand.

[109] Lord Reading CJ aptly put the appellate's court approach in such circumstance at page 436 in **R v Hopper**:

> "We cannot possibly say that a verdict of manslaughter would have been found by the jury, but as the question should have been left to them the appellant is entitled to the benefit of a verdict for the lesser offence. We direct accordingly that the verdict of murder be quashed and a verdict of manslaughter entered."

[110] This court has repeatedly adopted that approach, as empowered by section 24(2) of JAJA, which provides that:

> "Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[111] Accordingly, there is no need for us to apply the proviso, as contended by Crown Counsel. In fact, the case law dictates that where there is a failure on the part of the trial judge to leave the question of provocation to the jury, the court should not apply the proviso (see **R v Whitfield (Melvyn)** (1976) 63 Cr App R 39 and **R v Stewart**). We, therefore, conclude that the appellant has successfully argued that irrespective of how slight or tenuous the trial judge believed the evidence of provocation to be, he was obligated to leave it to the jury. Taking into consideration the strength of the evidence, we cannot say the jury would have inevitably found that the appellant was guilty of manslaughter instead of murder. Still, the appellant, in the circumstances, is entitled to the lesser verdict. There is significant merit to this ground, and so it succeeds.

[112] In the light of the outcome of the appeal on this ground, verdicts of guilty of manslaughter will be substituted in place of the guilty verdicts for murder. As a result, the sentences imposed for the offences of murder will be set aside, and the question of

the appropriate sentences to be imposed for the manslaughter convictions will be discussed below (see paras. [147] – [159]).

Ground 6 - Good character direction

*Submissions*

[113] Upon a perusal of the trial judge's summation, it becomes apparent that a good character direction was not given. Therefore, the appellant's criticism of that non-direction gives rise to two considerations. The first is whether the appellant was entitled to a good character direction, and the second is whether the trial judge erred in failing to so direct the jury.

[114] It is well known that a good character direction has two limbs: the credibility limb and the propensity limb. Lord Steyn, in the case of **R v Aziz** [1996] 1 AC 41, a decision of the House of Lords, expressed at page 50 of the judgment:

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

[115] In addressing the considerations above, Mr Equiano submitted that the appellant's character was brought in issue because he said he would not have done something like that in his unsworn statement. That statement, it was argued, was consistent with the appellant's denial of committing the murders in the Q & A and upon being charged. On account of those exculpatory statements, counsel argued that the trial judge should have directed the jury to consider the appellant's good character. In support of that submission, Mr Equiano referred us to **R v Fulcher** [1995] 2 Cr App R 251. He concluded

that the trial was rendered unfair since the jury did not receive guidance on the appellant's good character.

[116] Crown Counsel acknowledged that the trial judge did not address the jury on the issue of good character raised in the appellant's unsworn statement. Accordingly, it was submitted that a good character direction on the propensity limb ought to have been given. Nonetheless, counsel contended that the absence of a good character direction on the propensity limb is not necessarily fatal to the conviction. The case of **Ricardo Wright v R** [2016] JMCA Crim 15, a decision of this court, was cited in support. Given the overwhelming and cogent evidence against the appellant, counsel contended that the trial judge's failure not to direct the jury in this regard should not be detrimental to the convictions.

*Law and analysis*

[117] The right to a fair trial demands that where there is evidence of a defendant's good character, the trial judge is obliged to direct the jury on how they should treat it. It is also "now fully well settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case" (per Morrison JA (as he then was) in **Leslie Moodie v R** [2016] JMCA Crim 16 at para. [125]).

[118] The law relating to the extent and nature of the good character direction has undergone numerous developments. The recognised starting point is the Court of Appeal of England and Wales' decision in **R v Vye; R v Wise; R v Stephenson** [1993] 1 WLR 471. It was held that where a defendant is of good character, he is entitled to a direction as to the relevance of his good character to his credibility, where he has testified or made pre-trial statements and answers, and to his propensity, where he does not give evidence or made pre-trial statements or answers.

[119] The vast body of case law that has accumulated was carefully examined by this court in **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court

Criminal Appeal No 113/2007, judgment delivered 3 April 2009. In that case, Morrison JA set out the guiding principles extrapolated from the authorities, the third of which (relevant to the current discussion) was:

> "(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged (Muirhead v R, paragraphs 26 and 35)."

[120] It has been widely accepted that where a defendant elects not to give pre-trial statements or sworn testimony that raises the issue of good character but does so in his unsworn statement from the dock, he is not entitled to a direction on the credibility limb. He would, however, be entitled to the benefit of a direction on the propensity limb (see **Michael Reid v R** and **Horace Kirby v R** [2012] JMCA Crim 10).

[121] The position of the courts was once that the trial judge had a discretion as to whether or not to give directions to the jury concerning the good character of a defendant. Presently, as affirmed by the Privy Council in **Teeluck and John v The State of Trinidad and Tobago** [2005] 66 WIR 319 ('**Teeluck v The State**'), that discretion has "crystallised into an obligation as a matter of law". Against this background, the modern approach is that a good character direction is to be given in the circumstances discussed above (see paras. [115] to [118]). However, this principle is not absolute. For example, where a defendant of previous good character is shown to be guilty of criminal conduct, there is a residual discretion to withhold a good character direction, where it would make no sense, or would be meaningless or absurd or an insult to common sense, to do otherwise (see **R v Aziz** and **R v Zoppola-Barrazza** [1994] CLR 833). Brooks JA (as he then was) in **Horace Kirby v R** indicated as follows:

> "[18] The authorities also suggest that a trial judge may have a discretion, in respect of whether or not to give a good character direction, where an accused's previous character

> was not absolute. This could occur where, for example, he has a previous conviction. It would then be a matter of discretion whether a good character direction should be given. In such circumstances the trial judge has to decide whether or not the previous conviction is relevant to the case being then tried. …"

[122] That proposition was also recognised in **R v Hunter and others** [2015] EWCA Crim 631, which held that "[t]he defendant must be a person of good character, or if he had previous convictions, deemed to be a person of effective good character, before he will be entitled to benefit from a good character direction". In deciding if a person is of effective good character, the judge will need to consider if the defendant's previous convictions are old, minor and/or relevant.

[123] How will a judge know if a person is of good character or effective good character? It is the responsibility of a defendant to raise the issue of his good character. That principle was discussed in **Teeluck v The State** and stated by their Lordships as follows:

> "(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846,852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen*, *ibid*." (Italics as in original)

This principle has been consistently applied in several decisions of this court, including **Leslie Moodie v R**, **Tino Jackson v R** [2016] JMCA Crim 13 and **Joseph Mitchell v R** [2019] JMCA Crim 2.

[124] The sole basis for the complaint under this ground is found in the appellant's brief unsworn statement, in which he denied any involvement in the murders of the deceased

boys. The relevant part of that statement which Mr Equiano has sought to argue brought the appellant's good character into issue, reads (page 245, lines 13-20 of the transcript):

> "THE ACCUSED: Alton Washington Baker. Based off a what I have heard from the complainant, well, weh dem ah accuse me of saying and doing, I have done, me never did such act or said such thing. **And differently me wouldn't do that.** Me never did seh so. Me nuh sure about who did commit the act, but it wasn't me." (Emphasis supplied)

[125] The contextual significance of the words "[a]nd differently me wouldn't do that" would suggest that the appellant's character was such that he would not commit such a crime. While we recognise that the appellant would be entitled to a good character direction on the propensity limb, if he raises the issue of his good character in his exculpatory pre-trial statements and answers (see **Joseph Mitchell v R** at para. [34] and **Horace Kirby v R** at para [11]), we cannot help but question whether this somewhat ambiguous utterance would have been sufficient to raise the issue of his good character.

[126] In **Tino Jackson v R**, Brooks JA made the following observations at para. [37]:

> "[37] The question of whether a statement is made as an assertion of good character will sometimes depend upon context in which it is made. Whereas in **Bruce Golding and Damion Lowe v R** SCCA Nos 4 and 7/2004 (delivered on 18 December 2009), the accused's assertion that he was not a gunman but a 'working youth', was held to be an assertion of good character, **it cannot be said in every context that that statement would be an assertion of good character**. The context in that case was that those accused had been charged with the gun-slaying of a man. The accused's statement was therefore, viewed as meaning that he was 'less likely to be involved in incidents such;' as the one leading to the charges against him (paragraph 88 of the judgment)." (Emphasis added)

[127] It is worth mentioning, even if only to remind defence counsel of their responsibility to properly place a defendant's good character before the court. As the

authorities illustrate, a defendant's good character is to be distinctly, not obliquely, raised. So, where a defendant has never been previously convicted of a criminal offence or a criminal offence of any relevance or significance, this is commonly adduced as evidence of good character (see **R v Aziz**). Needless to say, in the present case, this was not done. For example, the appellant did not assert in his unsworn statement that he had never been convicted for an offence or had only been convicted for possession of ganja (which is not a relevant offence and although he denied the conviction at the sentencing hearing). It is also true that evidence of a defendant's personal qualities and contributions to his community can also raise the issue of good character. But, again, no evidence of this kind was elicited on the appellant's behalf on his case or through cross-examination of the prosecution's witnesses. Neither did it come from his unsworn statement.

[128] Similarly, in the case of **Rayon Williams v R** [2020] JMCA Crim 7, a witness for the appellant testified, "I have never seen Rayon in that situation before". He was referring to the appellant's murder charge. It was submitted that he should have been given the benefit of a good character direction as to his propensity to commit the murder. Morrison P, delivering the judgment on behalf of this court, said:

> "[57] We were strongly inclined to doubt whether, on the basis of Mr Robinson's exiguous statement that he had never seen the appellant 'in that situation before', the appellant was in fact entitled to a good character direction at all. …"

[129] Likewise, we find that the statement relied on by the appellant is "exiguous" in nature and, therefore, insufficient to establish his good character. Such a bare, and rather vague statement, in our judgment, could not bring his good character into focus. Consequently, the appellant was not entitled to a good character direction on the propensity limb on this account.

[130] As indicated earlier (see para. [125] above), the appellant would be entitled to a direction on his good character if he had raised this issue in his pre-trial statements and answers. Having examined the evidence, we find that he did not do so. We are, therefore, placed in the curious position of disagreeing with both counsel for the appellant and

Crown on this point. As a result, the trial judge was correct when he did not direct the jury on the appellant's good character.

[131] In any event, it is now well established that a failure to give a good character direction is not fatal to a conviction, where the outcome of the trial would not have been affected by the lack of such a direction (see **Muirhead v The Queen** [2008] UKPC 40). In the case of **Ricardo Wright v R** [2016] JMCA Crim 15, on which the Crown relied, the appellant, while giving his unsworn statement, stated:

> "Your Honour, I am innocent Maam I have never stolen a chain in my entire life. I rather to be hustling or selling rather than to steal chain. I am not a thief your Honour."

[132] It was held that the appellant seemingly put his character in issue and may have been entitled to a propensity direction. P Williams JA, delivering the court's judgment, considered the consequence of the judge failing to give a good character direction. She referred to the test outlined by Morrison JA (as he then was) in **Chris Brooks v R** [2012] JMCA Crim 5, which states:

> "The test is therefore whether, having regard to the nature of and the issues in the case and taking account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at verdict of guilty."

[133] P Williams JA then concluded that the quality and cogency of the prosecution's evidence was such that even if the learned magistrate had given herself the proper direction, the outcome would have been the same.

[134] In **France and Vassell v The Queen** [2012] UKPC 28, Lord Kerr writing for the Board, observed (at para. 46) that there may be some cases where "the sheer force of the evidence against the defendant was so overwhelming…that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict".

[135] Applying the principles gleaned from these authorities to the present case, we are satisfied that even if the appellant were deserving of a propensity direction on his good character and the jury had been so directed, this would have made no difference to their verdicts. We say so because when the overwhelming evidence against the appellant (in particular the admissions) is weighted against the appellant's assertion in his unsworn statement that he was relying on to raise the issue of his good character, those directions would not have altered the jury's verdicts. For those reasons, we have absolutely no basis to interfere with the verdicts on account of this ground.

Ground 7- Late retirement of jury

*Submissions*

[136] In this final ground of appeal, criticism is made of the late hour the trial judge asked the jury to retire for deliberations. Mr Equiano has contended that the jury were unduly pressured to arrive at a verdict. He stated that, although it can be difficult to ascertain whether the time constraints pressured the jury without hearing from the members, an evaluation of the circumstances could assist. He asserted that the court would have to look at the overall circumstances to make this determination. It was further submitted that the trial judge's summation was hasty, as he attempted to condense four days of testimony into a "very concise summation".

[137] Counsel also contended that the jury did not sit beyond 4:00 pm throughout the trial. However, on the day the verdict was given, the jury retired at 3:53 pm to deliberate. Shortly after retiring, they returned with majority verdicts but were asked to deliberate further. A few minutes later, the jury returned with unanimous verdicts of guilty on both counts of the indictment. Mr Equiano argued that the jury may have hastened their decision without any meaningful deliberations because of the pressure of time. This, he said, would render the trial unfair. Reliance was placed on **R v Brown; R v Stratton** [1998] CLR 485 to support these arguments. On this point, counsel suggested that the members of the jury might have been affected by the distance, mode of transportation

and physical conditions they would encounter when they left the court, especially if late in the afternoon or evening.

[138] In response, Crown Counsel relied on the cases of **Holder (Peter) v The State** (1996) 49 WIR 450 and **Shawn Campbell and others v R** [2020] JMCA Crim 10 ('**Shawn Campbell v R**') for guidance on the appropriate time for a jury to commence their deliberations. It was acknowledged that the trial judge, in directing the jury to retire at 3:53 pm, when the court day ended at 4:00 pm, was a departure from the principles stated in the Bench Book. However, counsel asserted that the time a jury is sent to deliberate is a matter of judicial discretion. She further contended that based on the nature of the case, the trial judge may have believed that the jury would have been able to arrive at a decision within a short time (an hour or so). Counsel distinguished the present case from **Shawn Campbell v R**, which addressed more complex issues and involved multiple accused men in a joint enterprise, expert evidence, months of testimony and circumstantial evidence. This difference, she argued, was bolstered by the fact that the jury arrived at a decision in 17 minutes, albeit not unanimous, and declined further clarification from the trial judge on the evidence or any issue of law. For those reasons, she submitted, there was no substantial miscarriage of justice by the late retirement of the jury.

*Law and analysis*

[139] On 16 March 2017, the fourth day after the commencement of the trial, following counsel's closing addresses, the trial judge delivered his summation from 11:50 am to 3:53 pm. He then invited the jury to retire to consider their verdicts. They returned at 4:10 pm with majority verdicts, just 17 minutes after retiring. The trial judge asked if they needed any clarity on the law, which they declined. He then instructed them to return and deliberate. They were sent out for the second time at 4:13 pm. The jury returned seven minutes later at 4:20 pm and indicated that they had arrived at unanimous verdicts.

[140] Best practice dictates, as endorsed in chapter 25-2, section 5 of the Bench Book, that the jury should not be pressured into arriving at a verdict. It reads:

> "5. The jury should not be placed under any pressure to arrive at a verdict. It is for that reason that the summation should not be concluded close to the end of the court day; the jurors should not have any anxiety, for example, about getting home etc, affecting their deliberations. For that reason a 3:00 p.m. benchmark has been adopted. Only in the simplest of cases would it be not unreasonable to send the jury to deliberate after that time. But the time is not an inflexible one. In more complex cases, it may well be unreasonable to conclude the summation during the afternoon session. In such cases, it is best to delay concluding the summation until early the following day in order to give the jury adequate time to consider all the issues before it."

[141] However, it is essential to note that the Bench Book was published shortly after the trial, so the trial judge would not have benefitted from this guidance. Notwithstanding, the overarching principle has long been settled in cases such as **Holder (Peter) v The State**. In that case, their Lordships agreed with the Court of Appeal of Trinidad and Tobago that the late retirement of the jury at 6:40 pm was undesirable. The flexibility of that principle was also confirmed since it was held that the appellant had suffered no prejudice because there was no evidence that the jury was under undue pressure. This court has recently adopted that principle in **Shawn Campbell v R**, on which the Crown relied.

[142] We agree with Crown Counsel that there are several differences between **Shawn Campbell v R** and the case at bar. The former involved five defendants, 17 weeks of trial, 30 witnesses, five unsworn statements, 25 exhibits and complex issues. So, it is not unexpected that a late retirement at 3:42 pm would have attracted questions regarding possible undue pressure. However, this court did not agree that the late retirement resulted in the jury being unduly pressured, and also took the view that the circumstances of the case were such that the departure from the usual practice (of not sending out a jury for deliberations after 3:00 pm) was not fatal to the convictions.

[143] The usual/gazetted time that the court below is adjourned for the day is at is 4:00 pm and the jury, in this case, retired just seven minutes prior. This peculiarity was compounded by the fact that, as pointed out by Mr Equiano, the trial judge adjourned before 4:00 pm on the previous three days of trial. He adjourned at 3:45 pm on 13 March 2017, 3:19 pm on 14 March 2017 and 2:54 pm on 15 March 2017. However, as already indicated, the late retirement of the jury does not in and of itself confirm that the members were unduly pressured in considering the verdicts. To this end, Mr Equiano has also suggested that the jurors might have been concerned about getting home or going to their desired destinations, thus affecting their deliberations.

[144] The question, therefore, is whether, in all the circumstances, the late retirement imposed undue pressure on the jury to return their verdicts. However, there was no evidence of words said by the trial judge either before the first retirement or when the jury was asked to retire for the second time, which could be regarded as pressure. While the matters highlighted by Mr Equiano may have been valid concerns for the jury, in the absence of evidence to support undue pressure being brought to bear upon them, we cannot embark upon the course of speculation that he has suggested.

[145] Furthermore, this was a case in which there were only eight witnesses for the prosecution, and the appellant called no witnesses. The jury was not tasked with assessing complex issues, nor were they at risk of being overwhelmed by the volume of evidence and exhibits. In the circumstances, one can understand why the trial judge would be hesitant to delay the completion of his summation for the jury to deliberate the next day. Additionally, at the time the jury left to deliberate, the closing arguments and summation would have been fresh in their minds.

[146] While we are of the view that the trial judge could have assured the jury that there were no time constraints, it has not been demonstrated that the appellant suffered any prejudice as a result of the late retirement. It follows that we are satisfied that there was no miscarriage of justice, and so this ground also fails.

**Conclusion and sentencing**

[147] We have determined that all the grounds of appeal, except for ground 5, have failed. Under that ground, as indicated earlier, we found that the trial judge erred in failing to leave the issue of provocation to the jury, thereby depriving the appellant of the consideration of the lesser offence of manslaughter. However, having regard to the compelling evidence against the appellant that was presented at the trial, we are of the view that, in the interests of justice, the proper course to adopt is to substitute verdicts of guilty of manslaughter in place of the verdicts of guilty for murder (as this court is empowered to do by virtue of section 24(2) of JAJA). For that reason, it is necessary for us to revisit the sentences that the trial judge imposed.

[148] We invited counsel to submit on the issue of sentencing in the event that verdicts of manslaughter were substituted. Mr Equiano has contended that, in light of the circumstances of the offence and the mitigating factors, such as the appellant being a father who was hardworking and had not been previously convicted of a violent offence, as well as the fact that no other illegal act(s) was committed, a sentence of 15 years' imprisonment would be appropriate. Mr Equiano also referred us to several cases in which the sentences imposed for manslaughter ranged from 13 years and six months' imprisonment to 21 years' imprisonment (**Julian Williams v R** [2021] JMCA Crim 39, **Raphael Russell v R** [2010] JMCA Crim 85**, Daniel Robinson v R** [2010] JMCA Crim 75, **Micheston Burke v R** [2020] JMCA Crim 29).

[149] Whereas counsel was correct that no other illegal act was committed in this case, and it did not involve intimate relationships, one crucial factor that Mr Equiano failed to note was that in the cases he cited, the applicants/appellants had pleaded guilty. Consequently, they would have been entitled to discounts by virtue of their guilty pleas. The appellant, in this case, was convicted following a trial.

[150] Crown Counsel, on the other hand, cited the aggravating factors such as the age of the deceased boys, the extremely violent nature of the offences, including the numerous chop wounds that were inflicted to the back of their heads, and the prevalence

of these offences in this country. It was further submitted that the aggravating features outweighed the mitigating factors. Taking into account the time already spent in custody, a sentence of 18 years' imprisonment was recommended. The case of **Raymond Bailey v R** [2021] JMCA Crim 34 was cited in support.

[151] The statutory maximum sentence for manslaughter is life imprisonment, but the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), suggest a normal range of 3-15 years with a usual starting point of seven years.

[152] However, we find that the decision of this court in **Shirley Ruddock v R** [2017] JMCA Crim 6 ('**Ruddock v R**') is instructive on the approach to sentencing for the offence of manslaughter in the circumstances of the present case. Brooks JA after a detailed analysis of the sentences that were imposed in several cases for manslaughter convictions stated at para. [27] of the judgment:

> "[27] … In considering the submissions of counsel and conducting a review of a number of cases decided in this court over the past six years, it seems that the most common sentence passed for convictions for manslaughter involving personal violence (as this case is) has been one of 15 years. **Although there have been exceptions, the typical range has, however, been from seven to 21 years.**" (Emphasis supplied)

[153] The stark contrast with the cases reviewed by Brooks JA and the present case is that in the former, there was a single victim, while in the latter there are two. As a result, we are of the opinion that while the higher of the typical or normal range of sentences for manslaughter stated in **Ruddock v R** (seven to 21 years as distinct from the normal sentence range of three to 15 years stated in the Sentencing Guidelines) would be the more appropriate sentence range to adopt, we do not find ourselves constrained to do so, in the circumstances. We are of the view, that a sentence range of between 15 to 25 years would be more apt where there are, as in this case, multiple victims involved in the killing.

[154] We have paid due regard to the relevant cases and counsel's submissions. We also take into account the relevant sentencing principles and correct methodology to be employed when determining the issue of an appropriate sentence. As emphasised by McDonald-Bishop JA at para. [17] of **Daniel Roulston v R** [2018] JMCA Crim 20, these are:

> "a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[155] As indicated, we find that the appropriate sentence range in the circumstances of this case, which involves two victims would be between 15 to 25 years. Being mindful of the overwhelming evidence against the appellant and the age and immaturity of the victims, we think an appropriate starting point within the range would be 19 years' imprisonment.

[156] We have taken into consideration the following aggravating factors:

> (i) the prevalence of these offences in Jamaica;
>
> (ii) the use of a machete to inflict the fatal injuries;
>
> (iii) the location of the injuries, which were to the back of the heads
>
> (iv the force used to inflict the injuries; and
>
> (v) the concealment of the bodies.

The aggravating factors would result in an upward adjustment to the starting point, which would result in a sentence of no less than 27 years' imprisonment.

[157] We acknowledge as mitigating factors that he has no previous conviction for a violent offence. We have placed no weight on his previous conviction for possession of ganja, it not being a relevant offence. The antecedent report described him as hardworking and stated that members of his community were surprised that he was responsible for this crime. A psychiatric report that was one of the reports considered at the sentencing hearing indicated that the appellant had been affected by his prolonged use of ganja. As a result of these mitigating factors, the sentences would be adjusted downwards. When the aggravating and mitigating factors are balanced, however, we find that the aggravating factors far outweigh the mitigating factors in the present case and that sentences close to the top of the range would be appropriate.

[158] As a result, when the total offending is looked at, in the round, against the background of the personal circumstances of the appellant, we believe a sentence of 24 years' imprisonment at hard labour on each count of the indictment would be appropriate.

[159] The appellant was on bail before the trial and would not be entitled to any credit for time spent on pre-trial remand.

[160] Accordingly, we make the following orders:

1. The appeal is allowed.

2. The convictions for murder on both counts of the indictment are quashed, judgments and verdicts of acquittal are entered and verdicts of guilty of manslaughter are substituted.

3. The sentences of life imprisonment at hard labour with the stipulation that the appellant serves 30 years before becoming eligible for parole imposed for the offence of murder on both counts of the indictment are set aside and sentences of 24 years' imprisonment at hard labour for manslaughter are substituted.

4. The sentences are to be reckoned as having commenced on 7 July 2017 and are to run concurrently.