[2014] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 122/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

ALVIN DENNISON v R

Leroy Equiano for the applicant

Mrs Tracey-Ann Johnson for the Crown

27 January and 17 February 2014

MORRISON JA

Introduction

[1] On 27 October 2010, after a trial before Beswick J (as she then was) and a jury, the applicant was convicted of murdering Jemar Coleman ('the deceased'). On 11 November the learned judge sentenced the applicant to imprisonment for life, stipulating that he should serve a minimum of 19 years of his sentence before being eligible for parole.

[2] The applicant's application for leave to appeal was considered on paper, and refused, by a single judge of this court on 4 April 2013. This is therefore his renewed

application for leave to appeal. The two issues which arise on this application are (i) whether the learned trial judge's directions to the jury on the value of the unsworn statement from the dock given by the applicant were appropriate; and (ii) whether the sentence imposed by the judge was manifestly excessive.

[3] Before going to the facts of the case, a few words by way of background on the origins of the unsworn statement might be helpful in framing the first issue. Historically, the right of the defendant in a criminal trial to make an unsworn statement from the dock was part and parcel of what Professor Peter Murphy once described (in A Practical Approach to Evidence, 4th edn, para. 1.1.3) as various "judicial attempts, during the formative years of the modern law of evidence, to mitigate some of the harshness of criminal law and procedure towards the accused". It is in this context that, in a system in which serious penalties (including death) were prescribed for many felonies, but in which the defendant was entitled neither to representation by counsel (until 1836), nor to give evidence in his defence (until 1898), the right to make an unsworn statement developed.

[4] The incapacity of a defendant to give evidence in his defence was removed in England in 1898 (by section 1 of the Criminal Evidence Act, 1898) and in Jamaica in 1911 (by section 3 of the Criminal Evidence Law, 1911, now section 9 of the Evidence Act). However, in Jamaica, as in England, the right of the defendant to make an unsworn statement from the dock was expressly preserved (Evidence Act, section 9(h)). In 1967, Professor Cross described the right (in Cross on Evidence, 3rd edn, page 160) as "a harmless survival from a former age when it was a valuable concession"; and, as

Lord Steyn would later say in ***Mills and Others v R*** [1995] 1 WLR 511, by "the late 1970s and 1980s the right to make an unsworn statement was already regarded in England as an historical anomaly". It was finally abolished in England in 1982 (by section 72 of the Criminal Justice Act 1982).

[5] But, as the principal issue raised by this application attests, the right of the defendant to make an unsworn statement remains an important feature of the system of criminal justice in this country (as to which, see a valuable article by Richard Small, Unsworn Statements from the Dock – The Jamaican Situation, West Indian Law Journal, May 1984, pages 83-98).

The prosecution's case

[6] As told to the court by Mr Jermaine Williams, the deceased's cousin, who was the sole witness to the incident which resulted in the deceased's death, the matter arose in this way. On 27 October 2008, the applicant was just two weeks short of his 16th birthday and the deceased was 17 years old. At that time, they were both residents of Seaton Crescent, Savanna-la-Mar, in the parish of Westmoreland. At about 4:30 pm that day, they were both engaged along with others in a game of football at the New Market Oval Football Field, which was a ball ground close by. They were part of a group of about 20 young men, which was divided into two teams of 10 and they were on opposite sides.

[7] The game got rough at a point and the applicant and the deceased began to tackle one another for the ball. The applicant kicked the deceased in the back of his

heel, whereupon the deceased "run guh fi two big stone". The applicant then removed a ratchet knife from his pocket and he and the deceased came close to each other, as though they were about to fight. They were parted by others on the ball ground, after which, as a result of the threat of violence, "the game mash up, everybody start walk off the field". The deceased walked out the gate of the ball ground, a short distance away.

[8] A further altercation then threatened between the applicant and another youth, known as 'Balty', as the applicant rushed at him, knife in hand, offering to cut him in the face. The applicant's father came onto the scene and had a word with Balty, right after which the applicant also left the ball ground, headed in the same direction as the deceased had gone.

[9] Mr Williams, who was a distance of about 2 chains away from them, then saw the applicant and the deceased talking to each other outside the ball ground. The deceased was positioned about 4-5 feet in front of the applicant, with his back to him. Mr Williams was not able to hear exactly what they were saying to each other, but he "could a see dem mouth moving". The applicant still had the knife in his hand, while the deceased, for his part, had "two big stone in a him hand". This is Mr Williams' account of what happened next:

> "A. Well, after mi si the accused talking like argument, mi just si him mek one big step and jook Jemar in a him neck and run off.

Q. Now, you say him jook Jemar, right? Tell us what that place name wey him jook him?

A. Right in a him neck.

Q. At the time that Jemar get the jook in a him neck, did Jemar attack the accused?

A. No.

Q. At the time that you saw the accused man jook Jemar, about what distance were you from the accused men?

A. As mi tell yuh I was about a cricket pitch and a half.

Q. Same distance. At the time that the accused jook Jemar, what position was [sic] Jemar's hands in?

A. Him did have one a the stone in him right hand like this a....

Q. Just tell me what you saw.

A. Him did have the big stone like him ready fi lick the accused."

[10] Exhaustively cross-examined by counsel for the applicant, Mr Williams stuck to this account of what took place that afternoon. But he was successfully challenged on several matters of detail in which his evidence differed, either from evidence which he had given previously, or from his statement to the police. Notably, he agreed when pressed that, before being spoken to by the applicant's father, Balty had also armed himself with two stones; and that his statement to the police that he had left the ball ground after Balty had made his exit was not true, as he had in fact left the ball ground before Balty. Finally, it was suggested to Mr Williams that he was a "lying witness" and that he had not witnessed "any stabbing" that day.

[11] After the incident outside the ball ground, the deceased somehow managed to run to his home, where he was met by his father, Mr Paul Coleman. Bleeding profusely from the neck, the deceased was taken by his father in a taxicab to the Savanna-la-Mar Hospital, where he died later the same day. Subsequently, on external examination of the deceased's body, the pathologist observed an incised stab wound, 2 centimetres long and 0.5 centimetres wide. The wound, which appeared to have been inflicted by a knife, had caused injury to the left jugular vein and the left external carotid artery, resulting in loss of blood in the neck muscles on the left side of the neck. His opinion was that death was due to haemorrhagic shock consequent upon these injuries.

[12] On 28 October 2008, the day following the death of the deceased, the applicant, accompanied by his father, visited the Savanna-la-Mar Police Station. He was seen by Detective Constable Martin Mullings, who had already begun an investigation into the deceased's murder. Detective Constable Mullings informed the applicant of the investigation, advised him that he was a suspect and cautioned him. In response, the applicant said, "Mi know officer." The applicant was then placed in custody and on 11 November 2008, after Detective Constable Mullings had collected the necessary statements, he was formally arrested and charged with the murder of the deceased. Cautioned again, the applicant said, "I have nothing further to say."

[13] That was the case for the prosecution, at the end of which counsel for the applicant made an unsuccessful no case submission on his behalf. The applicant was accordingly called upon to answer.

The defence

[14] The applicant opted to make an unsworn statement from the dock. It is difficult to do justice to the applicant's unsworn statement, during the making of which he was assisted by some helpful prodding by the judge, without reproducing it in its entirety:

> "ACCUSED: My name is Alvin Dennison, I'm 17 years old. On the ball field I was playing football and my cousin...
>
> HER LADYSHIP: Start again. You say you are Alvin Dennison, you are 17 years old, what else are you saying?
>
> ACCUSED: I was on the ball field playing ball when a nasty game develop on the field and a guy said to me him a guh lick me in...
>
> HER LADYSHIP: Hear what, you are going to come up a little nearer. Although he has not taken the oath just for ease of hearing, let him come up here. The last thing I have you saying, 'a nasty game...'
>
> ACCUSED: Nasty game develop between me and Jemar Coleman.
>
> HER LADYSHIP: Is that how you talk? If there is ever a time in your life that you have to talk is now. All these people have to hear you. Whether you are guilty or not guilty, may well depend on what they are hearing, talking up. 'A nasty game developed...'
>
> ACCUSED: Between me and Jemar Coleman, ma'am.
>
> HER LADYSHIP: Wait. Go on.
>
> ACCUSED: And same time him come to me, your Honour and seh him a guh lick mi in a mi face. Same time him come to me and say him a guh lick mi in a mi face and same time him have the ball and I kick...

HER LADYSHIP: Same time him have the ball and what?

ACCUSED: I kick after the ball.

HER LADYSHIP: Okay, wait. Yes.

ACCUSED: After I kick off the ball, I kick back a him heel back.

HER LADYSHIP: You kick him back on his heel back, is that what you said?

ACCUSED: Yes, ma'am.

HER LADYSHIP: Yes

ACCUSED: After mi kick him on the heel back, him run off the field and guh fi two stone.

HER LADYSHIP: After you say you kick him on him heel...

ACCUSED: Mi and him deh 'pon the field and him start tell me some word and mi a tell him back some word.

HER LADYSHIP: Yes

ACCUSED: Then him run off the field and guh fi two stone, your Honour.

HER LADYSHIP: Wait.

ACCUSED: Then him come in a mi face, your Honour and mi father and other friends were there and come and part it. Him come back in a mi face.

HER LADYSHIP: He come back in your face?

ACCUSED: He come back in mi face with the two stone, your Honour.

HER LADYSHIP: Wait.

ACCUSED: My father come and say mi must guh home and dem start to part the fight, your Honour.

HER LADYSHIP: Wait. Hold on a minute, let me just check if what I hear is what you said. You said 'my father come and say mi must go home and dem start part the fight'?

ACCUSED: Yes. My other friend dem weh did deh 'pon the ball field, lot a dem, some a hol' him and mi father seh mi must guh home and then some a hol' him.

HER LADYSHIP: Yes.

ACCUSED: As I walk off, your Honour and guh to my yard, same time a guy name 'Balty' jump up and seh, 'Yuh 'fraid fi buss him head?'

HER LADYSHIP: 'Balty' jump up and say, 'Yuh 'fraid fi buss him head,' and Jemar Coleman must come buss mi head and mi seh dat him fi come do it.

HER LADYSHIP: You are talking too fast in some parts. The last thing I have is, 'Balty' jump up and seh, 'Yuh 'fraid fi buss him head?' What was the next thing you said?

ACCUSED: I said, 'Why you don't come do it?'

HER LADYSHIP: Yes.

ACCUSED: And mi father see 'Balty' and seh, 'Yute, guh a yuh yard.'

ACCUSED: 'Balty' still continue and a tell mi seh him a guh kill mi and a threaten mi.

HER LADYSHIP: Yes.

ACCUSED: And mi father hol' on pon him hand, mi father hol' on 'pon one a him hand dem because him have the stone.

HER LADYSHIP: Wait.

ACCUSED: Him have the stone in a him hand and mi was - mi father shake dem out a him hand, mi father shake the stone dem out a him hand and same time, mi father tell mi fi guh gwaan walk and I keep on walking.

HER LADYSHIP: Yes.

ACCUSED: I continue walking until I reach up front a Jemar Coleman, I see Jemar Coleman tek up two stone, your Honour.

HER LADYSHIP: Wait. Yes.

ACCUSED: And then I reach out the gate.

MR HARRISON: After he said, 'keep on walking', what comes after?

HER LADYSHIP: 'I see him pick up the two stone'.

ACCUSED: Your Honour, I pick up two stone.

HER LADYSHIP: If you decide what – if you are going to talk, you have to talk so you can be heard. It nuh make nuh sense if is just the toe nail hearing what you are saying, open your mouth and talk whatever it is you want to talk. Okay, talk up now and slowly, whatever you want to say.

ACCUSED: I reach to the gate, your Honour, I reach to the gate and when I reach to the gate, I take the left side of the road, your Honour.

HER LADYSHIP: Wait.

ACCUSED: And I was continue [sic] walking your Honour, until Jemar Coleman tun 'round back. I was walking through the gate and Jemar have the two stone in a him hand. I tek the left hand side. Jemar Coleman and him turn 'round and si mi and seh, 'Hey bwoy, mi a guh kill yuh, yuh nuh.'

HER LADYSHIP: Yes.

ACCUSED: He continue walking up to my face, your Honour.

HER LADYSHIP: Wait.

ACCUSED: Jemar Coleman continue walk up to my face.

HER LADYSHIP: He continue walking up to your face?

ACCUSED: Not in my face, walking up to me with the stone, your Honour.

HER LADYSHIP: Wait. Yes.

ACCUSED: After that, your Honour, he started to raise him hand, your Honor.

HER LADYSHIP: Yes.

ACCUSED: And I draw closer to him, your Honour, when time I draw closer to him, your Honour...

HER LADYSHIP: Yes.

ACCUSED: ... I see blood start to come out a him neck, your Honour.

HER LADYSHIP: Okay.

ACCUSED: Then I run off, your Honour, then I run off, after I jook him I run off and then he run after mi, your Honour, and fling one stone after mi, your Honour.

HER LADYSHIP: Yes.

ACCUSED: And that day I guh home, your Honour, I only hear him seh him a guh come back fi kill mi, your Honour.

HER LADYSHIP: Let me make sure. You said, 'That day I guh home, I hear him seh him a come back fi kill mi?'

ACCUSED: Yes, your Honour, and I continue. I never know that he was going to die, your Honour. I run to my father rescue but mi father was not at home, your Honour.

HER LADYSHIP: Yes

ACCUSED: And I reach and deh 'round mi back yard, your Honour. After I deh 'round deh then I get a phone call and seh, "Weh you deh?" and seh mi kill Jemar Coleman, seh mi kill the man pickney.

HER LADYSHIP: Wait.

ACCUSED: Mi father seh, 'Alvin, wha' mek you stab the man pickney?' I said 'Daddy, I never mean fi stab him.'

HER LADYSHIP: Wait. You said, 'Daddy, I never mean to stab him'?

ACCUSED: Yes, [sic] Honour. And then I go home, your Honour, with mi father and my father siddung and reason wid mi and seh him going to bring mi in, in the morning, your Honour, and I said, 'Yes, Daddy.'

ACCUSED: And di morning mi faada bring mi in di following morning to di police station, your Honour, and a went in di station dey ask mi mi name and dey ask mi if is me do di incident wid di yute and I told them yes, your Honour, and from dere dey call mi lawyer. Mi lawyer and di affisa dem ask mi some questions and a tell di affisa dem and den mi lawyer said that's all your Honour. Yes, your Honour.

HER LADYSHIP: Finished.

ACCUSED: Yes, your Honour

HER LADYSHIP: Okay, thank you."

[15] And that was the case for the defence.

The summing up

[16] The learned judge summed up the case in largely conventional terms. She explained to the jury the burden and standard of proof; how they should go about the drawing of inferences; how they should treat inconsistencies and discrepancies; and the ingredients of the offence of murder. She then accurately summarised the facts of the case, dwelling in detail on the evidence of Mr Williams, the only eyewitness, and emphasising to the jury the need for them to scrutinise his evidence carefully, so as to

satisfy themselves that he was not "embellishing" his account of the events which had led to the deceased's death.

[17] Turning next to the issue of self-defence, the judge explained that, if the applicant acted in lawful self-defence, "then he is guilty of nothing". So the question for them, the learned judge told the jury, was this: "Did this accused man honestly believe that it was necessary to defend himself, or may he have honestly believed that it was necessary to defend himself out there at that New Market Oval that day?"

[18] The judge then came to the subject of the applicant's defence. After pointing out to the jury what the applicant's options were, the judge said this:

> "Now, madam foreman and your members, I know that you saw I brought him here, which is the witness box, and this is because none of us, or most of us, could not hear him and so I brought him nearer. But, bear in mind, that he never sworn [sic] on any Bible or never affirm. He was simply talking what happened, which is his right. He has that right and you must not say because he did that he is guilty, no, you can't say that, because the law gives him the right to do what he did, but what it means is that you have been deprived of hearing his evidence, his account tested in cross-examination.
>
> Because he doesn't swear and give evidence or affirm and give evidence, you can't get to hear him being cross-examined to find out, to expose the same things, discrepancies. There was no opportunity given to expose any inconsistency that may be, because he chose to exercise that right, but he has that right, so you are not to say you don't believe him, because of that, but you bear in mind, that you are deprived of that. You also bear in mind, that when he gives a statement like that, without swearing,

> without affirming, any such statement is not evidence, as it is not sworn evidence and it has less weight than if he had sworn on the Bible. You have to pay regard to it. He has spoken the words, he has shared with you what he said is his account, you pay attention to it, but at the same time, you bearing [sic] in mind that it carries less weight than if he had sworn on the Bible. And in all of this, bear in mind that it is the Prosecution that has the burden to prove to you that he is guilty. He has no such burden."

[19] Further on in her summing up, the judge told the jury to "[r]emember he has not given sworn evidence or affirm [sic], he gave a statement which carries less weight than if he had sworn or affirm [sic]". And then, closer to the end of the summing up, in the context of directing the jury on provocation, the judge said this:

> "Now the evidence that you may well consider as going towards showing provocation for you to consider would be the words spoken, if you believe that they were spoken. Remember the accused man told us some words he never gave evidence. He gave an unsworn statement which has less weight than evidence but he said to us that the deceased told him, 'Hey bwoy, mi a guh kill yuh'."

The result

[20] At the completion of the summing up on 27 October 2010, the jury, after retiring for half an hour, returned a unanimous verdict of guilty of murder. At that time, the learned judge ordered a social enquiry report and fixed a date for sentencing.

[21] When the matter came back before the court on 10 November 2010, it appears that, for some unexplained reason, the social enquiry report was not available. But the court was provided with a report on the applicant's antecedent history, prepared from

police records, information from the applicant himself and "enquiries". That report confirmed that the applicant's date of birth was 9 November 1992. It also revealed that he had had no schooling beyond primary level, that he was illiterate and that he had no previous convictions. The report ended with the following general comment:

> "Accused had a rough childhood life due to absence of his mother and had to be on the streets from a tender age. He has an attitude which he continues to display against members of the community. The community believes that the accused needs help that is not forthcoming."

[22] The following day, after an overnight adjournment to allow the judge to consider the report and the plea in mitigation made by the applicant's counsel, the learned judge sentenced the applicant, as we have already indicated, to life imprisonment. The court stipulated that he should serve 19 years before becoming eligible for parole.

The application for leave to appeal

[23] At the outset of the hearing in this court, Mr Leroy Equiano was given permission to substitute the following grounds of appeal for the grounds originally filed by the applicant:

> "1. The learned trial judge erred in law in her direction to the jury on how to treat the Applicant's unsworn statement.
>
> 2. The sentence of the court was manifestly excessive."

[24] On the first ground, Mr Equiano submitted that, after rightly telling the jury that in making an unsworn statement the applicant was exercising a right, the trial judge

went on to diminish the statement by telling them that they had been "deprived" of hearing his account tested in cross-examination. By telling the jury more than once that the applicant's unsworn statement carried less weight than sworn testimony, it was submitted, the learned judge eroded the effect of her having earlier told them to pay attention to what the applicant said in the statement. The decision what weight to give to the unsworn statement was a matter for the jury and in the circumstances, Mr Equiano concluded, the applicant's defence was not fairly put before the jury.

[25] On the second ground, Mr Equiano placed great emphasis on the applicant's age at the time of the incident. He observed that this was a matter involving peers who were unable to resolve differences caused by their participation in a contact sport and pointed out that there was no evidence that the applicant's actions that day were premeditated. In these circumstances, it was submitted, the sentence imposed by the judge was manifestly excessive and consideration might have been given to the imposition of a sentence of a determinate period of years, as an alternative to imprisonment for life.

[26] In response, Mrs Tracey-Ann Johnson for the Crown submitted that the judge's directions on the unsworn statement were fair, adequate and, in their totality, in keeping with the authorities. It was submitted that the judge's directions had to be assessed within the context of the general directions in which the jury were told what the burden and standard of proof were. The judge did not tell the jury what value to attribute to the applicant's unsworn statement; rather, she pointed out its limitations to them, as she was fully entitled to do. In any event, Mrs Johnson submitted, the account

given by the applicant in his unsworn statement was not "materially different" from that of the eyewitness, Mr Williams. Accordingly, even if, which Mrs Johnson naturally did not concede, the effect of the judge's directions was to diminish the value of the unsworn statement, the invitation to the jury to look back at the prosecution's case would still have required them to consider the defences which arose from the evidence. In the circumstances, the applicant's defence had been fairly put to the jury.

[27] Both counsel referred us to a number of authorities, to some of which we will come in a moment, on the question of the value of the unsworn statement.

What the authorities say

[28] The earliest of the cases to which we were referred by Mr Equiano is ***R v Frost & Hale*** (1964) 48 Cr App R 284. In summing up to the jury in that case, in which one of the defendants gave an unsworn statement, the trial judge asked and answered his own rhetorical question (page 290): "But what value is there in a statement which is unsworn, which is not evidence in the case? It is merely comment, that's all; I do not see what value there is in repeating it." Delivering the judgment of the court, Lord Parker CJ said this (pages 290-291):

> "In the opinion of this court, it is quite unnecessary to consider what is really an academic question, whether [the unsworn statement] is called evidence or not. It is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand, it is evidence in the sense that the jury can give to it such weight as they think fit…it is quite clear to-day that it has become the practice and the proper practice for a judge not necessarily to read

> out to the jury the statement made by the prisoner from the dock, but to remind them of it, to tell them that it is not sworn evidence which can be cross-examined to, but that nevertheless they can attach to it such weight as they think fit, and it should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty."

[29] In ***Director of Public Prosecutions v Walker*** (1974) 12 JLR 1369, the Board was invited by this court to give guidance on the "objective evidential value of an unsworn statement", since, as Lord Salmon observed (at page 1373), "it has for some time been standard practice in Jamaica to keep the accused out of the witness box". This was the Board's response to this invitation (page 1373):

> "There are…cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it; that it is for them to

> decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

[30] As Gordon JA observed in ***R v Michael Salmon*** (SCCA No 45/1991, judgment delivered 24 February 1992, page 3), "[t]hese directions have been followed in these courts and when they are applied no challenge to a summing-up can be successful". But there have nevertheless been occasional deviations. In ***R v Hart*** (1978) 27 WIR 229, for instance, after directing the jury in terms which Kerr JA described (at page 231) as "impeccable" and fully in keeping with the advice given by the Board in ***DPP v Walker***, the trial judge went on to tell them the following:

> "Now an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence. Its potential effect is persuasive, in that it might make you Mr Foreman and members of the jury see the proven facts and inferences to be drawn from them in a different light; so that when you come to consider the statement made by the accused man, he cannot prove anything in his statement. If there is evidence given on any particular point, then his statement may be used to explain it, to understand it, you see it in a particular light, but the statement is not evidence, it cannot prove any fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever."

[31] As Kerr JA pointed out, the learned trial judge's additional directions were clearly influenced by the then recent decision of the English Court of Appeal in ***R v Coughlan*** (1976) 64 Cr App R 11, in which Shaw LJ made the following statement (at pages 17-18):

> "What is said in [an unsworn] statement is not to be altogether brushed aside; but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. Inasmuch as it may thus influence the jury's decision they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case."

[32] Commenting on this dictum in ***R v Hart***, Kerr JA said this (at page 232):

> "In that case the learned judge was endeavouring to distinguish between evidence on oath by an accused and an unsworn statement from the dock but in a context in which he was considering the effect of an unsworn statement by one accused with relation to the position of a coaccused. To persons learned in the law his earnest efforts may seem commendable; to those desirous of learning the law, helpful, but it seems to be asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has 'no evidential value whatsoever' – and all this after telling them at the outset that their verdict must be according to the evidence."

[33] Thus, while allowing that the directions in ***R v Coughlan*** may have been warranted by the facts of that case, Kerr JA went on to conclude (at page 234) that "in the ordinary case a trial judge should avoid the *Coughlan…*prescription, which, as worded seems to go too far and to go beyond the context of that case"; and that, in the ordinary case, trial judges should follow the guidance provided by the Board in ***DPP***

v Walker. (Kerr JA also referred to ***R v Frost & Hale***, pointing out that it did not appear to have been cited in ***R v Coughlan***.)

[34] In ***R v Michael Salmon***, the trial judge, obviously unaware of what this court had said in ***R v Hart*** some 13 years earlier, again directed the jury in accordance with the '***Coughlan*** prescription', as Kerr JA had memorably characterised it. Thus, the jury was told to bear in mind that the unsworn statement had no probative value and could not prove anything "not spoken to by the rest of the evidence in the case". After retracing the ground covered in ***R v Hart***, Gordon JA pointed out (at page 3) that an accused person's unsworn statement "is his defence and it is the jury's function in considering their verdict to give it 'such weight as they may think it deserves'". Thus, the statement may "(a) convince them of the innocence of the accused, or (b) cause them to doubt, in which case the defendant is entitled to an acquittal, or (c) it may and sometimes does strengthen the case for the prosecution". The learned judge went on (at page 4) to remind judges that the court in ***R v Hart*** had stated clearly that the '***Coughlan*** prescription' should not be followed in these courts; and to stress "that the authoritative decisions of this court must be followed and applied in the lower courts". In the court's view, the judge's directions effectively deprived the appellant of a fair consideration by the jury of his stated defence and therefore amounted to a misdirection in law. We will return to a further aspect of this decision (see para. [48] below).

[35] This is not to say that this court has invariably required slavish adherence by trial judges to the ***DPP v Walker*** formulation. For example, in ***R v Cedric Gordon*** (SCCA No 109/1989, judgment delivered 15 November 1990), it was held that although, as Carey JA observed (at page 13), the judge "did not parrot the language of [the Board]", the directions on the value of the unsworn statement could not be faulted. In that case, the trial judge had told the jury this:

> "...That unsworn statement Mr. Foreman and members of the Jury, has not been tested by cross-examination. You don't know how it could stand up under cross-examination. Is it right to do that? The law guarantees him that right, but as twelve judges of the facts, you also are entitled to ask yourselves the question: why did he choose to make an unsworn statement? Why didn't he expose his story to the light of cross-examination? Why? Is it that he was averse to taking the oath, he doesn't swear on the Bible? Couldn't be, because there is provision that you can affirm. He has not got to use the Bible. Is it that he has something to hide? Matters for you. Is it that he is afraid that any untoward advantage would be taken of him? Couldn't be, because he was represented by counsel who does not apologise for his vehemence in defending his case. He would be up there objecting if anybody was going to do anything. It could not be that the judge would sit down here and see advantage being taken of him and don't say anything, because I have to hold the scales evenly, and you are entitled to ask yourselves, Mr. Foreman and Members of the Jury. Why did he not put his testimony or his explanation under the crucible, under the bounds and burner of cross-examination? But when you are doing that, you must recollect that the law gives him that right to do that.
>
> You have to consider the unsworn testimony, give it what weight you think it deserves, because although it has not been sworn, it is still a part of the proceeding. So you have

> to give it what weight it deserves. It has not been subjected to cross-examination."

[36] On appeal, objection was taken to the suggestion in this passage that the defendant had something to hide. Carey JA observed (at page 14) that "the whole thrust of these guidelines is to satisfy the natural curiosity an intelligent juror would have where an unsworn statement is being made". Carey JA accordingly considered that the judge's question whether the defendant had anything to hide by making an unsworn statement was no different from the question implicitly sanctioned by the Board in ***DPP v Walker*** ('what had he to fear?') expressed in, as he put it (at page 13), "homely Jamaican language". It was therefore held that the judge's directions were well within the guidelines, although Carey JA could not resist the final comment (at page 14) that, "Parliament, we trust, will one day abolish this vestigial tail of the law of evidence".

[37] We turn next to ***R v Ian Bailey*** (SCCA No 12/1996, judgment delivered 20 December 1996). In that case, the judge, having told the jury, unexceptionably, that "…you must only give [the unsworn statement] what weight it deserves because it is not tested by cross-examination", added that -

> "…you must realise that he has not said anything because the only evidence that you have heard in this case comes from K.C. and the other people who gave evidence and the doctor. What he (the accused) tells you is not evidence. He made a statement."

[38] The appellant's appeal to this court was allowed on the ground that the judge had misdirected the jury and a new trial was ordered. Delivering the judgment of the court, Bingham JA said the following (at page 4):

> "On a careful examination of the passage cited in our judgment there can be no question that, as learned counsel for the appellant has contended, these directions may have left the jury with the clear and distinct impression that as they were told 'you must realise that he has not said anything' so, therefore, you (meaning the jury) must totally ignore his unsworn statement. This direction, in our view of the matter, went too far, eroded the earlier one, amounted to a material misdirection and breached a fundamental and well-established principle that a defence ought to be fairly and adequately left to the jury. As a result of this the conviction cannot stand.
>
> Until what is without doubt a long overdue revision of the law in this area takes place, our advice to trial judges is, if comment they must, that they ought to faithfully adhere to the guidelines in [***DPP v Walker***], tailored to fit the facts of the particular case, and by so doing avoid the pitfalls that arose in this matter."

[39] Finally in this group of cases, we would mention ***R v Robert Morris*** (SCCA No 24/1998, judgment delivered 12 July 1999). There, the trial judge told the jury – again unexceptionably - that they should consider the content of the appellant's unsworn statement in relation to the entire evidence and decide what weight to attach to it. But, she went on to add, "[i]t does nothing to rebut, contradict or explain any of the evidence that any of the witnesses for the Crown had given here". Delivering the judgment of the court, Panton JA (Ag), as he then was, after referring to ***DPP v Walker***, stated as follows (at page 6):

> "Having correctly instructed the jury to give the statement what weight they think should be attached to it, the learned trial judge erred in telling them that the content of the statement did nothing to rebut, contradict or explain any of the evidence in the case. In effect, the jury was being told that the content of the statement was of no value. That was a matter solely for the assessment of the jury." [Emphasis in the original]

[40] However, as Mrs Johnson pointed out, the learned judge of appeal went on to quote (at pages 6-7) the very dictum from ***R v Coughlan*** (para. [31] above) which had inspired the trial judge's erroneous directions, as this court held, in ***R v Hart*** (para. [32] above).

[41] It seems clear that, in ***Robert Morris v R***, this court did not have the benefit of its own earlier decisions in ***R v Hart*** and ***R v Michael Salmon***, in both of which, as has been seen, this court disapproved the use of the '***Coughlan*** prescription' (see paras [31]-[34] above). But, that aside, it appears to us from the context that the real reason for the reference to ***R v Coughlan*** must have been to emphasise that part of Shaw LJ's dictum in which it was said, fully in keeping with the decision in ***R v Hart***, that "[i]t is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense...[i]t is material in the case". Were it otherwise, that part of Panton JA (Ag)'s judgment, in which the learned judge stated (again entirely in keeping with ***R v Hart*** and the earlier authorities) that it was for the jury to determine the weight to be attached to the unsworn statement, would be impossible to reconcile with what we have been describing as the '***Coughlan*** prescription'.

[42] Mrs Johnson also invited us to consider the decisions of the Privy Council in ***Mills and Others v R*** and ***Alexander von Starck v R*** [2000] UKPC 5.

[43] In ***Mills and Others v R***, it was held that where a defendant did not give evidence, but raised an alibi defence in an unsworn statement from the dock, the judge in summing up is only required to give directions to the jury, in keeping with ***DPP v Walker***, on the evidential value of the unsworn statement. In such a case, the judge is not required to tell the jury additionally that rejection of the alibi does not by itself lend support to the identification evidence.

[44] Of particular relevance to the present discussion is Lord Steyn's reference to ***DPP v Walker*** (at page 520) as having "…elucidated the evidential status of an unsworn statement in terms which qualitatively treated it as significantly inferior to oral evidence and permitted trial judges to direct juries to explain [sic] the inferior quality of an unsworn statement in explicit terms".

[45] And in ***Alexander von Stark v R***, Lord Clyde, after commenting (at para. 11) that the appellant had "only made an unsworn statement", went on to observe (citing ***Mills and Others v R***) that "[i]t is well recognised that such a statement is significantly inferior to oral evidence".

[46] Before ending this brief discussion on the authorities, we should perhaps add one other; that is, the decision of the Privy Council in ***Solomon Beckford v R*** [1987] 3 All ER 425. That case established, as is well known, that the true test for self-defence is

that a person is entitled to use such force in the defence of himself or another as is reasonable in the circumstances as he honestly believes them to be. The decision therefore resolved the question whether the test is objective or subjective, in favour of the latter.

[47] In the instant case, the learned trial judge's directions on self-defence were fully in keeping with the decision in ***Solomon Beckford v R***, so nothing in particular turns on it from a substantive point of view. But, in concluding his judgment in that case, Lord Griffiths did say something (at page 433) about the use of the unsworn statement that may be relevant, albeit only tangentially, to the current discussion:

> "Before parting with this appeal there is one further matter on which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the Crown that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely on a statement from the dock, a privilege abolished in this country by s 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends on a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

[48] In ***R v Michael Salmon***, to which we have already referred, these observations led the trial judge into the error of telling the jury, in a case of self-defence, that "simply by putting it by way of an unsworn statement that does not necessarily make

[self-defence] an issue". After reminding the jury of his earlier directions on the requirement in self-defence for an honest belief on the defendant's part, the judge then went on to tell the jury further that "[y]ou can infer honesty…if he comes up here and gives evidence on which he is cross-examined, but when you do that from the dock, you cannot properly infer any honest belief in the mind of the accused". Gordon JA concluded (at page 5) that the trial judge had, in this passage, misinterpreted Lord Griffiths' observations and again deprived the appellant of a fair consideration of his defence as contained in his statement:

> "It is still the province of the jury, not the judge, to consider the unsworn statement and give it such weight as they think it deserves."

Conclusion on the authorities

[49] In a variety of circumstances, over a span of many years, the guidance provided by the Board in ***DPP v Walker***, which also reflected, as ***R v Frost & Hale*** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether

the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law.

[50] The latitude afforded by ***DPP v Walker*** to trial judges "to explain the inferior quality of an unsworn statement in explicit terms", as Lord Steyn put it in ***Mills and Others v R***, must, in our view, be circumscribed by the considerations generally of the kind referred to in the Board's guidance. Thus, as Lord Salmon explained in ***DPP v Walker***, the judge could quite properly go on to say to the jury that they may perhaps be wondering (in keeping with what Carey JA described as "the natural curiosity an intelligent juror would have") whether there was anything behind the defendant's election to make an unsworn statement, such as a reluctance to put his evidence to the test of cross-examination. But at the end of the day, as this court has repeatedly emphasised, the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment. Given that the defendant's defence is more often than not stated in the unsworn statement, a failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence. This is therefore essentially a fair trial issue.

[51] Carey JA's characteristically trenchant description of the right to make an unsworn statement as a "vestigial tail" of the law of evidence may well reflect a view shared by many, though certainly by no means all, persons involved in the system of criminal justice in this jurisdiction. But, in our view, for so long as it remains a right available to defendants, it is incumbent on trial judges to direct juries as to its effect fully in accordance with the authorities. This view of the matter remains unaffected, it seems to us, by Lord Clyde's dismissal of the unsworn statement in ***Alexander von Starck v R***, echoing Lord Steyn in ***Mills and Others v R***, as "significantly inferior" to oral evidence. As has been seen (at para. [47] above), Lord Griffiths expressed a similar view, perhaps less definitively, in ***Solomon Beckford v R***, in his observation that the unsworn statement "is acknowledged not to carry the weight of sworn or affirmed testimony". Whether this is so or not from an objective standpoint, the fact remains that (a) as Gordon JA put it in ***R v Michael Salmon*** (at page 3), "[i]n our law an accused has a right to make an unsworn statement in his defence"; and (b) the value of an unsworn statement in a particular case is still purely a jury matter.

[52] The rule is no different in cases in which the defendant relies on self-defence. Lord Griffiths' observations in ***Solomon Beckford v R***, do not require that such a defendant must, in order to show honest belief, give evidence on oath. Rather, they speak to the strategic consideration that a jury may more readily find that the defendant had an honest apprehension of imminent danger if it is asserted from the witness box, rather than in an unsworn statement from the dock. But, at the end of the day, it is a matter for the defendant and his legal advisors to determine the best course

to adopt and, if they opt for an unsworn statement from the dock, the question of its weight is a matter for the jury. As Gordon JA put it in ***R v Michael Salmon*** (at page 5), "[i]t is still the province of the jury, not the judge, to consider the unsworn statement and give it such weight as they think it deserves".

Resolving the case

[53] It is, we think, relevant to bear in mind that in this case self-defence arose even on the Crown's case. Mr Williams, it will be recalled, had testified (see para [9] above) that, just before he was stabbed, the deceased had a big stone in his right hand "like him ready fi lick the accused". It is against this background that the applicant came to put forward in his unsworn statement, in far greater detail than has become the norm, his defence. His account was that after the deceased, armed with two stones, turned around to him and said, "Hey bwoy, mi a guh kill yuh, yuh nuh", the deceased continued walking in his direction ("up to my face"), still armed, and started to raise his hand, whereupon he then drew closer to the deceased, after which he saw blood coming from the deceased's neck.

[54] In reviewing the applicant's defence, the learned judge quite properly reminded the jury that, as was his right, he had not gone into the witness box. Mr Equiano was critical of the judge's repeated use of the word 'deprived' in telling the jury that they had not had an opportunity to hear his account tested in cross-examination. But, while we tend to agree that this may have been a rather loose choice of word, we doubt that, had that stood alone, it would have given rise to serious objection.

[55] However, it is in this context that the judge first told the jury that the applicant's unsworn statement "is not evidence, as it is not sworn evidence and it has less weight than if he had sworn on the Bible". Then, after inviting the jury to "pay attention to" the unsworn statement nevertheless, the judge then issued a second reminder to them to bear in mind "that it carries less weight than if he had sworn on the Bible". Despite telling the jury at that point – correctly - that the burden of proof was on the prosecution and that there was no burden on the applicant, the learned judge then, for the third time, reminded them again that he had made an unsworn statement, which carried "less weight than if he had sworn or affirm [sic]". There would in fact be a fourth reminder, when the judge invited the jury to recall that, although the applicant had told them "some words", he did not give evidence, but gave an unsworn statement, "which has less weight than evidence".

[56] These extracts from the summing up demonstrate, in our judgment, that, contrary to the proscription in all of the authorities, the learned judge was plainly substituting her own opinion of the weight to be attached to the applicant's unsworn statement for that of the jury. It is true that the jury were asked more than once – again correctly - to consider whether the applicant honestly believed that it was necessary to defend himself on the afternoon in question. However, it appears to us that the judge's repeated qualification of the value and weight of the applicant's unsworn statement, which was his chosen vehicle for the purpose of conveying his defence to the jury, resulted in the defence not being fairly and adequately left to the jury. Had this not occurred, given the fact that the cases for the Crown and the defence

were not far removed from each other on the evidence, it seems to us that the applicant might have stood a fair chance of an acquittal at his trial. The applicant was accordingly deprived of a fair consideration of his defence.

Disposal of this application

[57] For these reasons, we have come to the view that the applicant's conviction cannot stand. Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers the court in these circumstances to quash the conviction, and direct a judgment and verdict of acquittal to be entered; or, if the interests of justice so require, order a new trial at such time and place as the court may think fit. At the completion of the argument at the hearing of the application for leave to appeal on 27 January 2014, we invited submissions from counsel on which of these courses the court should adopt in the event that the application and the appeal were to succeed. Both counsel took the view that a new trial ought not to be ordered in the circumstances of this case. Mr Equiano submitted that the issue of self-defence "loomed large" on the Crown's case; that the incident occurred over five years ago; and that the applicant, who was tried and convicted in 2010, has been in custody since that time. With admirable candour, Mrs Johnson acknowledged that the Crown had always had an "uphill battle" to negative self-defence in this case and therefore did not feel able to ask that a new trial be ordered.

[58] In the oft-cited case of ***Reid v R*** [1979] 2 All ER 904, the Privy Council proffered guidance, at the invitation of this court, on the factors that should inform the decision whether to order a new trial where the interests of justice so require. While it is not necessary for present purposes to set out the full text of Lord Diplock's guidance, the relevant factors for present purposes would include, in no particular order of importance, (a) the seriousness or otherwise of the offence;(b) its prevalence; (c) the expense and the length of time for which the court and jury would be involved in a fresh hearing; (v) the position of the defendant, who ought not to be forced to undergo the ordeal of a trial for a second time through no fault of his own unless the interests of justice require that he should do so; (vi) the length of time that will have elapsed between the commission of the offence and the new trial if one be ordered; and (vii) the strength of the case presented by the prosecution at the previous trial. The relative significance of each of these factors will naturally vary - sometimes widely - from case to case and, as Lord Diplock was careful to observe, the list is hardly exhaustive.

[59] In considering our decision on this aspect of the matter, we have naturally borne in mind that murder is an offence of the utmost seriousness, and that the ground on which this appeal is being allowed is 'judge error' (both considerations which might ordinarily militate in favour of a fresh trial). However, the factor that has weighed most heavily with us is the one on which both counsel are agreed; that is, the relative strength, or lack of it, of the Crown's case, particularly as regards its burden of proving that the applicant did not act in self-defence. When the length of time that has elapsed

since the incident is added to this, we have come to the view that the interests of justice do not require that the applicant should be put through a new trial in this case.

[60] In the result, the application for leave to appeal is granted and the hearing of the application is treated as the hearing of the appeal. The appeal is allowed, the applicant's conviction is quashed, the sentence is set aside and the court directs that a judgment and verdict of acquittal be entered. In the light of this outcome, the second ground argued by Mr Equiano no longer arises.

[61] Before leaving this matter, we must place on record our gratitude to counsel on both sides for the industry and care with which they assembled an impressive body of material for the court's consideration in this case. They were (for reasons which it is not now necessary to rehearse) called upon to do so at very short notice, but neither their preparation nor their presentations in court suffered as a result.