[2020] JMCA Crim 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 42/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA

ADRIAN FORRESTER v R

Miss Gillian Burgess for the appellant

Miss Paula Llewelyn QC and Miss Paula Sue-Ferguson for the Crown

28 February, 1 March 2019 and 2 October 2020

EDWARDS JA

Background

[1] The appellant, Adrian Forrester, was charged on an indictment containing one count of murder which alleged that, between 10 and 11 August 2006, in the parish of Saint James, he murdered Bryan Johnston, the deceased. After a trial in the Home Circuit court, before Campbell J (the trial judge) sitting with a jury, the jury returned a verdict of guilty of murder. The appellant was sentenced by the trial judge to life imprisonment at hard labour, with the stipulation that he would not be eligible for parole before serving 35 years.

[2] This was the second time that the appellant had been tried for the murder of the deceased, the first trial having ended with a hung jury.

[3] The case against the appellant was, by and large, circumstantial. On 9 August 2006, the deceased, who was an Australian national, checked into the Gloucestershire Hotel in Montego Bay, in the parish of Saint James. He checked in alone. He was assigned to room 212 and given an identification armband numbered 6018. On 10 August 2006, the appellant checked into the same hotel and was given an identification armband numbered 3016. He was assigned to room 202. A female later checked into the same room as the appellant, joining him there. At the end of the case, it remained unclear from the prosecution's evidence whether or not she was in fact given an identification armband, and if so, what number it bore. However, the appellant maintains that his companion was given identification armband 3017. On 11 August 2006, at around 3:30 pm, the deceased was found in his hotel room by a room attendant. He had been brutally murdered.

[4] The report for the post mortem conducted on the body of the deceased showed that he had received a number of stab wounds, including to the head and chest. Some of the wounds were severe enough to have resulted in immediate death. The body also had cuts to the hand and forearm, which were described as 'defensive wounds'. Based on the evidence of the state of the deceased's hotel room, there were indications of a "massive struggle". The room was searched by law enforcement officers and a number

of items were found. Blood samples, as well as other items, were taken from various sections of the room and bathroom by the forensic expert for forensic examination.

[5] According to the evidence presented by the prosecution, amongst the items found and collected by the police in the deceased's hotel room were:

i. a white electrical extension cord marked with the number 202;

ii. a blue and white armband marked with the number 3009;

iii. an armband marked with the number 3016; and

iv. a room key with 202 marked on the tag.

These items were all admitted as exhibits, except for the electrical cord.

[6] From the blood samples collected, the evidence revealed that there were four full deoxyribonucleic acid (DNA) profiles found in room 212. These included those of the appellant and the deceased. The third DNA profile matched a reference profile of a female which was provided. The fourth was unknown. DNA evidence was led at the trial that established the presence of the appellant in the deceased's room. The appellant admitted in his unsworn statement from the dock, to having been in the deceased's room, but gave an explanation to the effect that the deceased was alive when he left the room, and as to why his blood, armband, and the key to room 202 were left in the room. It was also part of the prosecution's case that, although the appellant had initially checked into the

hotel for an overnight stay on the "breakfast plan", he left the hotel before the time he was booked to leave.

[7] In his unsworn statement, the appellant stated that, on 10 August 2006, he met a young lady in Montego Bay who told him that her name was Keisha Davis. Later that same day, they checked into the Gloucestershire Hotel to "get acquainted". They checked into the hotel together at about 12:00 pm and they were issued two armbands numbered in consecutive order. He later left the hotel and went to purchase food for himself and his female companion. Whilst heading back to his room, he heard two people arguing. He said he saw the door to room 212 wide open, and he saw a "big black woman" and a "white man" "tussling and grabbing up together fighting aggressively". He said he instinctively went and parted the fight. He had to physically separate them. After he parted them, the white man told him that he, the appellant, was bleeding. He then saw blood running down his armband, whereupon, he pulled it off and asked to use the bathroom.

[8] He went into the bathroom, placed the armband down and washed his hands in the sink. Whilst washing his hands he was still paying attention to the couple, who was now calm and sitting on the bed. He did not see any towel, so he moved the shower curtain. He saw a rag there which he used to dry his hands. This, he did, whilst still watching the couple. He left room 212 and was on his way to his room, when he realised that he did not have his key. As a result, he had to return to room 212. He spoke to the

couple and they searched for the key, but they did not find it. He said he told them that if they found it, they should return it to his room or to the front desk.

[9] The appellant further stated that, when he left room 212 that day, it was not in the condition described by the prosecution witnesses. After he left room 212, the lady, Keisha Davis, let him back into his room and he told her about what had happened. They remained in the room for a couple hours after that. They showered and then decided to leave the hotel sometime between 5:30 pm and 6:00 pm. When they were leaving the hotel, there was no one at the front desk, so he did not get to explain to anyone at the hotel about the key. He said the lady with him took off her armband, which was numbered 3017, and left it on the counter of the front desk. They then left the hotel together. His companion went her way, and he went home.

[10] On 9 November 2006, he said that, whilst walking in downtown, Montego Bay, he was "snatched" by two plain clothes officers and "thrown" into a police vehicle. He was taken to the Freeport Lock-up where he saw Detective Sergeant Hamilton. He said he was told by Detective Sergeant Hamilton that his name "came up" in the rape and murder of a woman that took place in Negril. He was also told that the only way to clear his name was to give a blood sample. He said he immediately agreed to do so. The officer took him to the Cornwall Regional Hospital the following morning, where his blood was taken. He did not find out that the matter involved the murder of a tourist at a hotel at Bottom Road until weeks after when he was charged. He said he did not participate in the murder and knew nothing about it.

[11] The appellant also relied on the evidence of Miss Arlene Younger, a laundry attendant at the hotel. Her evidence from the previous trial was admitted into evidence pursuant to section 31 C of the Evidence Act. Her evidence, in essence, was that on 10 August 2006, at about 6:25 pm, she was sitting in front of the laundry area facing room 212. She said that her co-worker, Lorraine, was also there. At that time, she said, she saw a white man and a black woman going toward room 212. She saw the man with a key which he used to open the room door. The man and the woman went inside the room and closed the door. She did not know what transpired in the room. She left work at about 7:25 pm, but could not say if the couple was still there at that time.

[12] The appellant contended that based on the evidence of Miss Younger, it supported his contention that the deceased had been in the company of a black woman.

Grounds of appeal

[13] At the hearing of the appeal, counsel for the appellant, Miss Gillian Burgess, sought and received the permission of this court to abandon grounds 1, 3, 4.2 and 5 of the amended supplemental grounds of appeal filed 12 March 2018, and was permitted to argue the remaining grounds as follows:

> "1.1 The trial judge deprived the appellant of a fair trial by giving an unbalanced summation to the jury; in which he bolstered the case for the prosecution by failing to remind the jury of a key piece of evidence on which the appellant was relying and made unfair comments which may have had the effect of prejudicing the minds of the jurors, particularly with reference to the credibility of the appellant;

2 The learned trial judge failed to give directions that sometimes people tell lies for reasons other than a belief that they are necessary to conceal guilt;

2.1 The learned trial judge deprived the appellant of a fair trial by inverting [sic] his comments on the evidence so that it left the jury to question whether the unsworn statement was capable of belief instead of whether the prosecution had discharged its burden of proving that the appellant had participated in the killing of the deceased;

2.2 The learned trial judge gave little or no assistance in relation to the discrepancies and inconsistencies which arose on the Crown's case and was unhelpful as to how those discrepancies and inconsistencies were to be dealt with so as to arrive at a proper verdict. The learned judge, instead juxtaposed the Crown's case with the Defence case to highlight the areas of discrepancy while simultaneously omitting to leave the evidence of Miss Arlene Younger to the jury which supported the appellant's case.

4. The learned trial judge failed to treat adequately with the DNA evidence;

4.1 The learned judge deprived the appellant of a fair trial by failing to direct the jury that the DNA evidence on its own could not conclusively prove the guilt of the appellant. At its highest the DNA could only prove that the appellant had been in room 212 at some point**. R v Ogden**.

6. That evidence of the accused [sic] bad character was inadmissible in the circumstances in which it was led and amounted to a substantial miscarriage of justice. The introduction of this evidence was a material irregularity which renders the convictions unsafe. The evidence led by Crown Counsel through Sgt Gabblin Wright had no probative value and could only be used to paint the appellant in a bad light. The admission of the Fingerprint form in evidence, euphemistically called the "signed document" could not assist the jury in resolving the issues in the case save to say that this person was of bad character. The situation was compounded when the appellant referred to his deportation;

> 7. The summation of the learned judge was inadequate to deal with the inadmissible evidence of bad character and he ought properly to have discharged the jury;
>
> 8. That the sentence of 35 years before parole, including the 4 years spent in custody, is manifestly excessive."

Discussion

[14] The issues raised by the grounds of appeal will be dealt with under their respective headings. In determining this appeal, we bear in mind section 14(1) of the Judicature (Appellate Jurisdiction) Act, which outlines this court's jurisdiction and the applicable test in dealing with criminal appeals. Section 14(1) states:

> "14 - (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury **should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law**, **or that on any ground there was a miscarriage of justice**, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." (Emphasis added)

[15] In order for the appeal to succeed, therefore, the appellant would have to show that: (1) the jury's verdict was unreasonable or cannot be supported by the evidence, or (2) the judge erred on a question of law, or (3) there was, for some other reason, a miscarriage of justice. The appellant would also need to show that, in any event, this is not a fit case for the application of the proviso in section 14(1).

[16] I will now consider the issues raised by the grounds of appeal in order to determine if they have any merit.

Whether the trial judge deprived the appellant of a fair trial by giving an unbalanced summation to the jury and bolstered the case for the prosecution by (1) failing to remind the jury of a key piece of evidence on which the appellant was relying, and (2) making unfair comments which may have had the effect of prejudicing the minds of the jurors, particularly with reference to the credibility of the appellant. (ground 1.1)

(1) The trial judge's failure to remind the jury of the evidence of Miss Arlene Younger

Appellant's submissions

[17] Miss Burgess complained that although the evidence of Miss Arlene Younger (given at the previous trial) was read into evidence pursuant to section 31C of the Evidence Act, the trial judge did not give any directions on it. She submitted that this omission was fatal, as Miss Younger was an independent witness whose evidence was important to the appellant's case. This evidence, she said, supported the appellant's evidence that the deceased had been in the company of a black woman, although he, the deceased, had checked in alone. Counsel also pointed out that in the previous trial Miss Younger had given evidence, and at the end of the trial, the jury were unable to reach a verdict.

[18] Counsel directed this court to Supreme Court Practice Direction No 1 of 2016, made on 16 September 2016, which, she said, outlines the approach a trial judge should take in directing the jury in relation to the various types of evidence, including evidence admitted pursuant to section 31C of the evidence Act. Counsel further argued that this

practice direction represented a common sense approach to the issue of directing the jury on assessing evidence which was read to them.

Respondent's submissions

[19] The Director of Public Prosecutions, Queen's Counsel Miss Paula Llewellyn (the DPP), submitted on behalf of the Crown that the trial judge had given a balanced and reasoned summation, and that the trial judge is not required to review all the evidence elicited during the trial. She also contended that, based on the relevant practice direction, a trial judge was only required to explain to the jury the effect of evidence adduced pursuant to section 31C, "where necessary", and that in this case, it was not necessary.

[20] The DPP further contended that Miss Younger's evidence was not lengthy, and the significance of her evidence was that, on 10 August 2006, at about 6:25 pm, she saw a white man and a black woman go into room 212. Queen's Counsel argued that although this was in accordance with the defence's case, it was not helpful to anything the jury had to decide in the case. In any event, it was argued, the evidence did not corroborate the appellant's version of events, since his assertion in his unsworn statement that he left the hotel about 5:30 or 6:00 pm, would have meant that the deceased was seen with the woman after the appellant had already left the hotel.

Analysis

[21] A defendant's right to a fair trial can be breached if the trial judge fails to provide proper or adequate guidance to the jury based on all the circumstances of the case. In **R v Lawrence** [1981] 1 All ER 974; [1982] AC 510, at page 519 of the latter report, Lord Hailsham LC, in giving judgment in the House of Lords, felt compelled to give the following guidance as to the purpose of the trial judge's directions to a jury and what they should generally contain in order to be efficacious:

> "It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about primary facts ..."

[22] The authorities on this point also make it clear that there is no set way in which a judge should sum up to a jury and it is apparent that the content of the summing up is more important than the format. There are recommendations and guidance in the case law aimed at making the directions more coherent and easy to understand, however, the summation, at the end of the day, will have to be tailored to each case. There is no set formula.

[23] The ultimate aim of the trial judge must be to give directions that will assist and guide the jury based on the issues in the case. The judge's approach should ensure that the appellant gets a fair trial, inclusive of a balanced and fair summation. Whereas there is no obligation to rehearse all the evidence in a case, where a trial judge decides to recount the evidence, he should remind the jury of the evidence for the defence. The defence must be adequately put to the jury, including evidence relied on to support it. The failure to refer to a piece of evidence, however, is not generally fatal as there is no obligation to rehash all of the evidence. In summing up a case, a fair balance should be struck between the prosecution's case and the defendant's case by the trial judge.

[24] In Archbold: Criminal Pleading, Evidence and Practice 2001, at paragraph 4-376 on page 456, the editors, in commenting on this issue, stated that:

> "Where the judge considers that some reference to the evidence is appropriate, as is invariably the case, he should remind the jury of the evidence of the defence: R v Tillman [1962] Crim LR 261, CCA, and R v Weiner, The Times, November 3, 1989, CA, whether or not the defendant gives evidence: R v Jarman (1962) 106 SJ 838."

Citing the authority of **R v Reid**, The Times, 17 August 1999, the editors made the following point:

> "Where the case against a defendant is strong and his defence correspondingly weak, a trial judge must be scrupulous to ensure that the defence is presented to the jury in an even-handed and impartial manner; justice is not served by a one-sided account given to the jury shortly before they retire to consider their verdict."

[25] In the instant case, the appellant complains that the trial judge gave an unbalanced summation, in that:

1. he omitted to mention the evidence of Ms Younger which supported his case; and

2. he failed to give the jury any directions on section 31C of the Evidence Act.

[26] Firstly, we should point out that the practice direction referred to by counsel for the appellant was introduced in September 2016, sometime after the appellant's trial, and would not have been available to the judge at the time of trial. In any event, the practice direction simply directs that a trial judge sitting in the Circuit Court should, "where necessary", explain to the jury the effect of evidence adduced in different forms, one form being statements read into evidence by virtue of the Evidence Act.

[27] In the light of the other complaint, it is necessary to look firstly at the appellant's defence at the trial. The appellant gave an unsworn statement from the dock, as is common in this jurisdiction, and as he is lawfully entitled to do. In his unsworn statement the appellant categorically denied committing murder or participating in the murder. He explained how he came to be at the hotel and how he came to be in the deceased room. He also sought to explain the presence of his blood, the key to room 202 and his arm band in room 212.

[28] The appellant complains that Miss Younger's evidence supported his case that the deceased had been in the company of a black woman, therefore, the trial judge's omission had the effect of weakening his defence and bolstering the prosecution's case.

[29] Miss Younger's evidence given at the first trial was read into evidence at this trial. It was evidence, therefore, that was heard by this jury for their consideration. Her evidence, which was the last heard by the jury, before the judge's summation commenced, was that whilst she was at the front of the laundry room she saw a "white man and a black lady" enter hotel room 212 at around 6:25 pm.

[30] It is true that the trial judge did not repeat the evidence of Miss Younger in his summation. This, however, must be assessed in the context of whether or not this omission, based on the applicable principles, must have necessarily led to a miscarriage of justice as contemplated by section 14 of the JAJA. It is necessary, therefore, to examine the import of Miss Younger's evidence to the appellant's case.

[31] The body of the deceased was found on 11 August 2006 at approximately 3:30 pm. The pathologist's evidence was that based on the injuries he would have died immediately or shortly after receiving the stab wound to his chest. There was no evidence of exactly how long he had been dead. He had last been seen alive the night of 10 August, sometime after 11:00 pm, going up to his room. However, the evidence of the forensic scientist, Dr Mowatt, who visited the crime scene on 12 August 2006, is that based on the state of hardening of the pool of the congealed blood spilled from the deceased in the room, it had been exposed to air for a minimum of 24 hours. It could fairly be

determined, therefore, that the deceased was killed between 10 August, after he was last seen alive, and 11 August when his body was found.

[32] In his defence, the appellant said he entered the appellant's room several hours before he left the hotel. He said he left the hotel between 5:30 pm and 6:00 pm on 10 August 2019. Miss Younger's evidence was that she saw a white man in the company of a black woman entering room 212 that evening at about 6:25 pm, which would be after the appellant said that he left the hotel. Miss Younger did not leave the laundry area until after 7:00 pm that night. Her evidence was that room 212 was located above the laundry area where she was, but she did not know what transpired in the room, and she gave no evidence of seeing either the white man or black lady again after they had gone into the room.

[33] Whilst Miss Younger's evidence appears, at first blush, to give some support to his claim that Mr Johnston was in the company of a black lady, there was a huge disparity between the time he said he saw the black lady in the deceased's room and the time Miss Younger claimed she saw a black lady going into room 212 with a white man.

[34] We do not see how this evidence from Miss Younger could have provided any positive support for the appellant's assertion that the deceased was in the company of a big black woman in his room hours earlier. The time at which Miss Younger says she saw a white man with a black woman enter room 212, was several hours after the appellant claimed to have seen a big black woman in the deceased's room, and almost half an hour after he claimed to have left the hotel.

[35] Miss Younger also did not identify the deceased. Neither did she purport to identify the body found in room 212, on 11 August, as the same man she saw going up to the room with a black lady on the evening of 10 August. Further, she did not identify the black lady as someone she had seen earlier in the hotel, with the same white man or at all. At its highest, that aspect of Miss Younger's evidence would only serve to cause the jury to speculate as to whether the white man seen entering the room at 6:25 pm on 10 August with a black lady was the same white man found dead in the room on 11 August. They would also have to speculate that the black lady seen with the white man at 6:25 pm was the same black lady and white man the appellant claimed to have seen in the room earlier in the day. The time frames given in the evidence by Miss Younger did not match the time frame given by the appellant in his unsworn statement for any proper inference to be drawn, and certainly did not sufficiently match for Miss Younger's evidence to provide support for the appellant's version of events regarding a black woman in the deceased's room earlier in the day.

[36] Although the short evidence of Miss Younger, given after the appellant's unsworn statement, was not repeated by the trial judge, we do not believe that it had the effect claimed by the appellant. In any event, the jury would have heard the evidence of Miss Younger read out as the last bit of evidence given in the case before they retired. They would have heard the unsworn statement given by the appellant from the dock including the statement about the big black woman being in the room. Miss Younger's statement, read into evidence thereafter, consisted entirely of the location of room 212, her seeing a white man and a black woman going towards room 212 at 6:25 pm, the white man

using a key to open the door to room 212, and both the man and woman entering room 212. The jury was entitled to determine what support, if any, it gave to the appellant's case, and what impact that evidence had on the prosecution's case. The trial judge told the jury on a number of occasions that they are the ultimate finders of fact and that they needed to look at the case as a whole. He also drew the jury's attention to the appellant's unsworn statement and his defence several times throughout the summation.

[37] Furthermore, the trial judge told the jury, at page 781 of the transcript, that he would not be going through all of the evidence. He reminded them that, as the supreme judges of the facts, if they believed there were areas of the evidence that he left out which they considered important, it was open to them to bring it out in their deliberations. The trial judge did, except for Miss Younger's evidence, mention all the witnesses and the import of their evidence. The evidence of Miss Younger was read in on the defence's case. It clearly did not take the prosecution's case any further. It also did not support any other evidence put forward by the prosecution.

[38] In the final analysis, whilst it was desirable for the trial judge to have repeated Miss Younger's evidence to the jury, the jury were left with no doubt that they were to consider all the evidence. The assertion of the presence of a black lady in the room was part of the appellant's case and was raised in his unsworn statement. The unsworn statement was repeated to the jury. There was no likelihood of the jury ignoring Miss Younger's evidence that a white man was seen going into room 212 with a black lady in the evening after the appellant claimed he had already left the hotel. It would have been

clear to them that this was at a significantly different time than the siting referred to by the appellant. In our view, they would have given this evidence the weight they thought it deserved, in light of all the other evidence in the case.

[39] The jury would also have been entitled to weigh the evidence of Miss Younger and the appellant against the evidence of the security guard. The security guard, Mr Lawrence, saw the deceased twice on the night of 10 August downstairs alone, shortly after Miss Younger said she saw a white man go upstairs with a black lady. The last time Mr Lawrence saw the deceased, he was making his way up to his room after 11:00 pm and Mr Lawrence did not say he saw him with any black lady. The security guard was asked in cross examination, by counsel for the appellant, if any complaint had been made to him by the deceased and he said yes. He was asked if it was a complaint regarding a man or a woman and he said a woman. He was asked if a request had been made by the white man for him to do anything in relation to the woman. He said no.

[40] Miss Fearon was also asked in cross-examination if she received any report from or about any guest complaining of being bothered by a woman between 10 and 11 August and her answer was no. She was also asked if she had heard of anything like that and her answer was no. In the light of all the evidence, the fact that it was part of the appellant's case that the deceased had been in the company of a woman could not have been lost on the jury.

[41] Although this point was not raised by his counsel, the time at which the appellant claimed to have left the hotel, in our view, was also of great significance with respect to Miss Younger's evidence.

[42] The trial judge did make an observation to the jury which, in our view, was even more significant than the alleged support offered by the evidence regarding the presence of a black woman. This was the fact that the deceased was seen alive after the appellant claimed he left the hotel on the evening of 10 August 2006. This is how the trial judge put it to the jury at page 775 of the transcript:

> "[T]here was evidence on the Prosecution's case that security guard said that they saw Mr. Johnston later that night. So, if you accept what this accused was saying, he was well away and gone about his business before anything of this nature; before the killing took place. It was going to be [sic] matter for you. That was a crucial issue in the case that has evolved."

Again, at page 791 of the transcript, after going through the evidence of the security guard, Mr Lawrence, the learned judge said:

> "I think this is the last time that somebody is seeing him alive, 11.30 p.m. on the 10th. And, you will recall, as I have already pointed out, the time when the accused man said he came to the hotel and he departed."

[43] Therefore, with the evidence of Miss Younger saying she saw the deceased with a black woman after the time that the appellant said he left the hotel, and the judge pointing out that there was evidence on the prosecution's case that the deceased was seen alive after the appellant said he left, it was left to the jury to decide what they believed. It is clear that the jury must have rejected the appellant's account of the time

at which he left the hotel, and his account of what transpired altogether. Given those circumstances, it could not be said that there was any "miscarriage of justice" from the omission to review the evidence of Miss Younger, that would cause this court to disturb the verdict of the jury.

[44] This aspect of ground 1.1, therefore, fails.

(2) Did the trial judge make comments which were unfair or which may have had the effect of prejudicing the minds of the jurors, particularly with reference to the credibility of the appellant?

[45] Counsel for the appellant complained that the trial judge made unfair comments about the nature and standard of the hotel, which she said was an attempt to "pour criticism" on the appellant for selecting that hotel for a temporary liaison. Counsel also complained about the judge's references to the appellant's profession as a barber and farmer.

[46] The DPP submitted, on the other hand, that the comments by the trial judge in relation to the nature and standard of the hotel and the appellant's profession or status were unlikely to have the effect of prejudicing the minds of the jurors. The DPP contended that the trial judge's statements were an attempt to have the jurors think critically about whether this is the sort of hotel someone would book for just a "quick acquaintance", and

to consider this in light of the fact that the appellant said he was a barber and a farmer. Further, it was submitted, the statements were not prejudicial or unfair.

Analysis

[47] It is trite that, in every criminal trial, the defendant's case must be fairly put to the jury. In addition to reminding the jury of the salient facts in the case, the trial judge is entitled to comment on those facts. In summing up a case to the jury, the trial judge is also entitled to, along with defining the issues, express his opinion, and in a proper case may do so strongly, so long as the jury are informed that they are entitled to ignore them, and the issues are left to the jury for their final determination. In **Uriah Brown v The Queen** [2005] UKPC 18, at paragraph [33], the Privy Council opined that "a judge is entitled to give reasonable expression to his own views, so long as he makes it clear...that decisions on matters of fact are for the jury alone and does not so direct them as effectively to take the decision out of their hands".

[48] The editors of Blackstone's Criminal Practice 2002 put it this way, at page 1449 paragraph D16.16:

> "Provided he emphasises that the jury are entitled to ignore his opinions, the judge may comment on the evidence in a way which indicates his own views. Convictions have been upheld notwithstanding robust comments to the detriment of the defence case (e.g., *O'Donnell* (1917) 12 Cr App R 219 in which it was held that the judge was within his rights to tell the jury that the accused's story was a 'remarkable one' and contrary to previous statements that he had made). However, the judge must not be so critical as to effectively withdraw the issue of guilt or innocence from the jury' (*Canny* (1945) 30 Cr App R 143, in which a conviction was quashed because the judge repeatedly told the jury that the defence case was

> absurd and that there was no foundation for defence allegations against the prosecution witnesses.) It is the judge's duty to state matters 'clearly, impartially and logically', and not to indulge in inappropriate sarcasm or extravagant comment *(Berrada* (1989) 91 Cr App R 131)."

[49] A trial judge, in making any comment, must be careful that the function of the jury is not usurped and that he does not descend into the arena of advocacy.

[50] In the instant case, the trial judge in recounting the evidence to the jury, made comments which in no way could be classified as "strong" comments. Counsel for the appellant contends the comments were intended as a criticism of the appellant's actions. We do not agree.

[51] The comments of which counsel for the appellant complained have to be viewed in the context of the judge's entire directions to the jury. These comments were made at the time the trial judge was dealing with the evidence of Miss Green, with regard to the hotel and the admission of the deceased into the hotel. Therefore, at page 782 of the transcript, he reminded the jury that the evidence was that the deceased had booked the hotel through an agency, even though the hotel also accepted walk in customers. He told them that it was "in that frame" that they had to view the hotel. He also reminded the jury of the evidence as to the room rate per night, which was US$94.00 and said "so it was not a run-of-the-mill" place. He also reminded them of the evidence that it had about 95 rooms, and so it was that "kind of place".

[52] The trial judge went on to sum up the facts which could impact on the jury's impression of the place, at page 782, saying that:

> "It was a place where bookings were made overseas and persons travelled to come to, having made their reservations. That was the place where the accused—and we will look more closely at him; at what the evidence was. It said he was born in 1974. He was a farmer. I think he said he was a licensed barber. This was where he took his lady."

The trial judge then went on to remind the jury that Miss Green had given evidence of the procedure for bringing in a guest, which the appellant did on the night in question.

[53] At page 785, while recounting the evidence regarding the plan the deceased had purchased from the hotel, and the evidence that a bell man had taken the deceased to his room, the trial judge said this:

> "So, it was the hotel that – sort of standard where you go – where somebody took you, I mean, to the room. She said that he was taken to his room, 212."

[54] In our view, counsel's complaint that the trial judge's comments were made in an attempt to pour criticism on the appellant for selecting that hotel for a temporary liaison is unfounded. At no point in his summing up did the trial judge make any value judgment which could have affected the appellant's credibility and which we could say was unfair or resulted in an unfair trial. This is a completely different scenario from that which obtained in the Privy Council decision of **Broadhurst v R** [1964] 1 All ER 111, for example, where the trial judge commented "freely" on the evidence, often unfavourably to the defendant, and failed to direct the jury that they were not bound by his comments.

[55] In the instant case, early in his summation, at page 761 of the transcript, the trial judge told the jurors to disregard any comments which he might make on the evidence

and that if he made any comment, or expressed any views with which they disagreed, they were to dismiss it. He also reminded them that they were the sole judges of the facts. Later, at page 805, the trial judge again reminded the jury that any comment he might make on the facts in the case is to be "tossed or thrown through the window" if it did not accord with their views. He reminded them that they were the sole judges of the facts, and that it was their experience and common sense which must be used to judge the facts.

[56] The learned judge's comments, viewed in the proper context, cannot be said to be unfair or to have deprived the appellant of a fair trial.

[57] This aspect of this ground of appeal is also without merit.

Whether the judge erred in not giving a Lucas direction and a more adequate direction on the giving of a false alibi – (ground 2)

Appellant's submissions

[58] Counsel for the appellant submitted that there was evidence led that the appellant had allegedly lied about a number of issues, including his address, and about whether he had been at the hotel at all. In those circumstances, counsel submitted, the jury should have been directed in the terms established in **R v Lucas** [1981] 3 WLR 120, which have come to be better known as the **Lucas** direction.

[59] Counsel also complained that the trial judge failed to direct the jury that an alibi is not for the defendant to prove but for the prosecution to disprove and that a false alibi could "contribute" to a genuine defence. This, counsel argued, was relevant to the

appellant's evidence that he had already left the hotel at the time of the murder, as much emphasis had been placed on the fact that the appellant had checked in and paid for the breakfast plan.

[60] In support of these submissions, counsel relied on the principles set out in **R v Lucas**, **R v Goodway** (1993) 98 Cr App R 11 and **R v Burge and Pegg** [1996] 1 Cr App R 163.

Respondent's submissions

[61] The DPP submitted that the lies told by the appellant were not the core of the prosecution's case and were not relied on to buttress other evidence in order to secure a conviction. A **Lucas** direction in those circumstances, the DPP maintained, might have been otiose.

[62] It was further submitted that, in **R v Goodway**, the court accepted that a **Lucas** direction should be given where lies are relied upon by the prosecution and might be used by the jury to support evidence of guilt, as opposed to merely reflecting on the appellant's credibility. It was also submitted that, although in **Eaton Douglas v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 180/1999, judgment delivered on 8 October 2001, this court viewed the decision in **Burge and Pegg** as "very helpful and instructive", the court considered the **Lucas** direction in relation to a case of circumstantial evidence and held that a **Lucas** direction was not required in that case.

[63] It was further submitted, on behalf of the prosecution, that, the fictitious address recorded on the registration card at the hotel would not fall in any of the categories identified in **Burge and Pegg**, and would, therefore, be of little or no significance as far as the need for a **Lucas** direction was concerned. It was pointed out that the investigating officer was challenged during cross-examination, to refute his evidence that the appellant told him that he had never been to the Gloucestershire Hotel. The prosecution also drew the court's attention to the fact that the trial judge had reminded the jury of the appellant's unsworn statement that he had been to the hotel.

[64] The DPP further submitted that the trial judge had told the jury, in very clear language, that the burden of proof was on the prosecution and that burden never shifted. His direction to them was, therefore, sufficient in so far as he warned them that a rejection of the accused's account did not automatically mean that he was guilty, but that they had to consider all the evidence, including what he said, to determine whether the prosecution had proved its case.

[65] It was also submitted that, if this court is of the view that the **Lucas** direction should have been given, the absence of the direction did not result in a miscarriage of justice and, therefore, the court should apply the proviso in section 14(1) of JAJA.

[66] In respect of the complaint as to the judge's failure to properly direct the jury as to the appellant's alibi, it was submitted that, having regard to the fact that the appellant gave no information as to his being at a particular place at a particular time between the time the deceased was last seen alive and when his body was discovered, the trial judge

was only required to give directions as to the burden of proof, and to advise the jury to give such weight as they saw fit to the unsworn statement. The authorities of **R v Turnbull** [1976] 3 All ER 549, **Mills, Mills, Mills and Mills v R** (1995) 46 WIR 240, **DPP v Walker** (1974) 21 WIR 406 and **Roberts and Wiltshire v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 37 & 38/2000, judgment delivered 15 November 2001, were relied on in support of this submission.

Analysis

[67] It has been established by authority that where lies told by the defendant are relied on by the prosecution or may be relied on by the jury as corroboration of the accused's guilt, the trial judge should give a **Lucas** direction, once the requirements for giving those directions are satisfied. The authorities also establish that whilst lies told through a "consciousness of guilt" may provide support to the prosecution's case, they cannot make a positive case on their own (see judgment of Farquharson LJ in **R v Strudwick and Merry** CA (1994) 99 Cr App R 326).

[68] In light of the appellant's reliance on the authority of **R v Lucas** it is perhaps necessary to examine that case more closely. In the case of **R v Lucas,** the English Court of Appeal was confronted with the question of what direction a trial judge should give to a jury regarding what evidence can amount to corroboration of an accomplice's evidence. In particular, it was concerned with the circumstances in which lies could be considered as corroboration. The Court of Appeal noted that the trial judge had explained to the jury that such corroboration could sometimes be found in the defendant's own evidence. The court also noted that the trial judge had correctly directed the jury that, when a defendant

has told lies, there may be reasons for those lies which were not connected with guilt of the offence charged, and that, if the defendant had told lies, one of their tasks would be to decide the question of what was the purpose of such lies. This is the direction which counsel for the appellant, in the instant case, complains the trial judge ought to have given the jury.

[69] Lord Lane CJ in **R v Lucas** made the following observation, at page 1011:

> "There is, without doubt, some **confusio**n in the authorities as to the extent to which lies may in some circumstances provide corroboration...**In our judgment the position is as follows. Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration**. There is no shortage of authority for this proposition...It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate ..." (Emphasis added)

[70] Lord Lane CJ, in continuing, explained the requirements to be satisfied thus:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

[71] Lord Lane CJ also expressed the view that, once the four criteria were satisfied, the lies told in court may be considered by a jury in the same way as lies told out of court.

[72] In **R v Middleton** [2001] Crim LR 251, the court stressed that the point of a **Lucas** direction was to warn against the forbidden reasoning that lies demonstrate guilt, so that where there is no such risk, the direction is unnecessary. A **Lucas** direction is only required if there is a danger that the jury may conclude the defendant lied, and that the lie was probative of his guilt (see generally **Burge v Pegg**).

[73] The necessity of a direction on lies, separate from the issue of the credibility of the appellant, only arises if it is clear that the Crown is relying on those lies in support of its case against the appellant. Also, if there is some other conceivable motive for telling such lies, other than to persuade that he was not present and so avoid detection, that would make it an appropriate case in which to give the directions (see **R v Doheny and Adams** [1997] 1 Cr App R 369, at page 389).

[74] In **R v Goodway**, the court was concerned with lies told by the defendant during police interviews. The court in **Burge and Pegg**, in reference to the decision in **R v Goodway** commented, at page 18, that:

> "In that case, counsel for the appellant and the Court accepted that a Lucas direction should be given wherever lies are relied upon by the Crown and might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility."

[75] At page 19, the court continued:

> "... [A] Lucas direction is not required in every case in which a defendant gives evidence, even if he gives evidence about a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering."

[76] Further, that:

> "Adapting words used by Professor Birch in the Criminal Law Review [1994] Crim LR 683, our view is that the direction on lies approved in Goodway comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt. Normally prosecuting counsel will have identified and sought to prove a particular lie on a material issue which is alleged to be explicable only on the basis of a consciousness of guilt on the defendant's part. This is, as Professor Birch says, a very specific prosecution tactic, quite distinct from the run of the mill case in which the defence case is contradicted by the evidence of prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict, the defendant's account in [sic] untrue and indeed deliberately and knowingly false.
>
> The inappropriateness of a Lucas direction in the latter situation was indeed addressed by this Court in Liacopoulous and Others, unreported, 31 August 1994 where, giving the judgment of the Court at p 15B of the transcript, Glidewell LJ said:
>
> '…where a jury, as is so frequently the case, is asked to decide whether they are sure that an innocent explanation given by a defendant is not true, where they are dealing with the essentials in the case and being asked to say that as a generality what the defendant has said in interview about a central issue, or agreed in evidence about a central issue is untrue, then that is a situation that is covered by the general direction about the burden and standard of proof. It does not require a special Lucas direction.'"

[77] The court summarised the circumstances where a Lucas direction would usually be required, at page 21, as follows:

> " i) Where the defence relies on an alibi.
>
> ii) Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.
>
> iii) Where the prosecution seek to show that something said, either in court or out of court, in relation to a separate or distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.
>
> iv) Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so."

The court also noted that, where a direction is given, it will normally be sufficient if it made clear that (1) the lie must be admitted or proved beyond a reasonable doubt, and (2) the lie in itself is not evidence of guilt, and may only be used to support the prosecution's case if the jury is sure the defendant did not lie for innocent reasons.

[78] The question is whether this present case was an appropriate one in which the jury ought to have been given the **Lucas** direction.

[79] The evidence on the prosecution's side was that, when first questioned by the investigating officer, the appellant told the officer that he had never been to that hotel. The prosecution was left to prove, by the evidence of a handwriting expert, that the male

who had registered and checked into room 202 at the Gloucestershire Hotel, on the material date, was the appellant. In order to do so the prosecution had to show that the signatures on the documents used to register for the room, were the appellant's. The prosecution also had to show that the driver's licence taken from the appellant was the same one used during the registration process, and that a signature on a CIB 4 Form signed by the appellant, matched the signature on the hotel registration form. In the end, however, the appellant denied that he had told the police that he had not been to the hotel, and admitted to having been there in his unsworn statement at the trial. The evidence of the appellant's signature on the registration card at the hotel, therefore, became moot in the light of the appellant's admission that he had been to the hotel, and his denial that he had told the police that he had not been there.

[80] This would have raised two issues. The first was whether the fact that the appellant was a guest at the hotel in any way provided support for the allegation that it was he who had committed the murder. The second was, who was to be believed with regard to whether the appellant had lied to the police that he had not been to the hotel.

[81] The answer to the first issue must be an obvious no. If all the prosecution had was evidence of the fact that the appellant had been a guest at the hotel at the time of the murder, it could provide no support for the charge. The answer to the second is unknown, as it was a question of fact for the jury to decide based on the credibility of the witness, and who they found to be telling the truth. If the jury concluded that the prosecution witness was telling the truth, then they would have rejected the appellant's version.

[82] The appellant denied that he had lied to the police about being at the hotel. He admitted in his unsworn statement that he was at the hotel. The prosecution's version of events was, therefore, irreconcilable with the appellant's, and this was a question of credibility. No **Lucas** direction would be required in such a case. Appropriate guidance is to be found in **R v Hill** [1996] Crim LR 419, where a **Lucas** direction was held not to be necessary where the defendant's lies were not relied on by the prosecution, nor were they a matter the jury had to consider separately from the determination of the main issues. If the jury accepted the evidence of the prosecution, it necessarily meant that they concluded that the appellant's account was untrue. Where the jury have not been invited to, and where there is no likelihood that a jury may think the forbidden, that is, that a lie equates to guilt, then there is no need for a **Lucas** direction.

[83] In **Eaton Douglas**, this court was dealing with the necessity for a **Lucas** direction in relation to circumstantial evidence. This court took the view that the direction was not necessary, as the so-called lie in that case was not relied on by the prosecution in support of its case. This court also held that the **Lucas** direction was not necessary, in that case, where the prosecution was relying on circumstantial evidence. The view was taken that "the probative force of a mass of evidence may be cumulative making it pointless to consider the degree of probability of each item of evidence separately".

[84] Another instance in which this court in **Eaton Douglas** said that no **Lucas** direction would be required, is where:

> "... the evidence or statement of the defence is contradicted by the evidence of the prosecution witness making it

> necessary for the prosecution to invite the jury to find that such statement or evidence of the accused is false. Such a direction would in those circumstances confuse the jury. Indeed in **Burge and Pegg**, Kennedy, LJ at 173C said:
>
> > 'If a **Lucas** direction is given where there is no need for such a direction (as in the normal case where there is a straight conflict of evidence), it will add complexity and do more harm than good.'"

[85] In the instant case, there is no suggestion that any attempt was made to use the appellant's lies to corroborate the evidence of the prosecution. The prosecution did not rely on any proven lie told by the appellant, to establish its case. Neither did the trial judge invite the jury to consider any proven lies told by the appellant as corroborative of the prosecution's case. The aspect of the circumstantial evidence, crucial to the prosecution's case, was the fact that the appellant had been in the deceased's room; that his blood was found in the room, along with the key and electrical cord belonging to his room, as well as his armband; the fact that his explanation as to how he came to be in the deceased's room was not supported by the evidence of the location of the room; and, the fact that he left the hotel earlier than planned without checking out.

[86] The trial judge's only reference to the evidence that the appellant had denied being at the hotel, was at pages 819-820 of the transcript, where, in referring to the police officer's evidence, he said:

> "He says he also removed a Western Union card from the wallet and he told Mr. Forrester that the number of the documents, of the TRN and the other things that he had found and he says, I don't know anything about that. I have never been to that hotel. That's what the officer said the accused told him on this date…I don't know anything about that, I have never been to that hotel. What those words mean? Did

> he say them? It is a matter for you, because and I remind you what he has said before you in his unsworn statement, you may very well think is in total contradiction to this, but he said he was there, he took this lady, that he had recently met there, and got acquainted with her in the room. And at the end of the acquaintance—well, after being acquainted, he went into the room of the deceased, settled a dispute, returned to further acquaintances, and then left."

[87] Here the trial judge did not invite the jury to find that it was a lie and/or used it against the appellant, but instead, he reminded them of the appellant's denial and told them it was a matter for them whom they believed.

[88] The lingering question is whether there was a risk or danger that the jury would have relied on matters proven to be lies told by the appellant in order to convict him, without more. The appellant's denial that he had told the police that he had never been to the hotel raised the issue of credibility. There was no danger that the jury could have used any lies they found proved to support the guilt of the appellant outside of their duty to assess the appellant's credibility, as they would any other witness. It was not likely that the jury would, if they accepted the police officer's evidence, have found this to be supportive of the appellant's guilt without more, and they were not asked to do so. If they accepted the appellant's account that he never told the police he had never been to that hotel, then that would have been the end of that.

[89] The evidence that the address given by the appellant on the registration card was fictitious was given by the police officer, in cross examination but nothing more was made of it. No evidence was led as to why he said it was fictitious. The appellant made no mention of it in his unsworn statement.

[90] In this case, the prosecution was alleging that it was the appellant who killed the deceased, and the appellant was denying that he did so. In light of the appellant's admission that he had been in the deceased's room with the deceased and his account of what took place whilst he was there, this was a credibility issue for the jury to resolve. By virtue of the verdict of guilty, the jury obviously rejected the appellant's account that when he left the deceased's hotel room the deceased was alive and in the company of a woman, and that he was in no way responsible for the deceased's death.

[91] The prosecution did not rely on any lie told by the appellant to prove its case against him but rather, on a series of circumstantial evidence from which the jury was asked to draw the inescapable inference of guilt. In such circumstances, a **Lucas** direction was unnecessary.

[92] On the issue of the failure of the trial judge to direct the jury in terms that an alibi may be made up to bolster a proper defence, this direction is not necessary in every case where alibi is raised (see **R v Harron** [1996] Crim LR 581; [1996] 2 Cr App R 457). It is only necessary where evidence is adduced suggesting or in support of an alibi, and that alibi is shown to be false. The direction is not necessary at all where the defendant gives an unsworn statement from the dock (see **Mills, Mills, Mills and Mills**).

[93] Alibi evidence is evidence tending to show that the accused was at some other place, or in a particular area, at the time the prosecution alleges the offence was committed. This case is not a case of alibi in the strictest sense. The appellant's defence was that he left the deceased alive at the hotel. There is no evidence of when exactly the

deceased was killed, although he was seen alive after the time at which the appellant said he left the hotel. The appellant claimed he had left the hotel and had gone home. There is no evidence of where the appellant was between the time the deceased was last seen alive and when his body was found. Therefore, the defence is a defence of alibi only in a very general sense.

[94] The appellant's defence that he had gone into room 212 to part a fight and thereafter left the deceased alive in the company of a woman before he left the hotel for home, raised the issue of his credibility. In such circumstances, there was, in our view, no necessity for an alibi direction to be given, and any such direction would have only confused the jury. Where, also, there is no basis for rejecting an alibi, except by virtue of acceptance of the evidence of the prosecution, there is no necessity for a **Lucas** direction (see **R v Patrick** [1999] 6 Archbold News 4 CA).

[95] Furthermore, and significantly, in **Mills, Mills, Mills and Mills**, at pages 247 and 248, the Board stated that, where an accused gives an unsworn statement and relies on an alibi, there is no necessity for a direction on the impact of the rejection of the alibi. Instead, the jury is to be told to accord the unsworn statement such weight as they see fit. In this case, the appellant gave an unsworn statement and called no alibi witnesses in support. Therefore, a direction with regard to alibi was not required.

[96] In any event, the defence failed to raise the necessity for a **Lucas** direction even when asked by the trial judge at the end of the summation, if there was anything else,

so it clearly was not at large then, and is no more so now. We would adopt, as apt, what was said by the Court of Appeal in **Burge v Pegg**:

> "...the judge should, of course, be assisted by counsel in identifying cases where a direction is called for. In particular, this Court is unlikely to be persuaded, in cases allegedly falling under number 4 above, that there was a real danger that the jury would treat a particular lie as evidence of guilt if defence counsel at the trial has not alerted the judge to that danger and asked him to consider whether a direction should be given to meet it."

[97] This ground, therefore, fails.

Ground 2.1 – Whether the appellant was deprived of a fair trial because the learned judge made unfair comments which were likely to cause the jury to question whether the unsworn statement was capable of belief instead of whether the prosecution had discharged its burden of proof.

[98] Counsel for the appellant referred the court to several sections of the transcript and complained that the trial judge, in dealing with the evidence of Miss Evadney Green with regard to the location of room 212, improperly questioned the appellant's unsworn statement with regard to how he came to be in room 212. Counsel contended that the trial judge's directions to the jury concerning his unsworn statement would have caused the jury to question whether the unsworn statement was capable of belief instead of whether the prosecution had discharged its burden of proving that the appellant had participated in the killing of the deceased.

[99] On the contrary, the DPP submitted that the learned judge had made it clear throughout his summation that the burden of proof was on the prosecution and that the appellant had nothing to prove. In support of this submission, several passages were

cited from the learned judge's summation, where he addressed the burden of proof and the standard of proof.

[100] It was argued that the trial judge made it clear that, even if the jury did not believe what the appellant had said, it was the prosecution that was to satisfy them of his guilt. In addition, it was argued that the comments made by the trial judge in relation to the unsworn statement, were made to compare it with the evidence of the prosecution in most instances, and was thus intended to help the jurors to assess it.

[101] The DPP submitted further that, although the comments made were not in any way unfair, the trial judge, nevertheless, made it abundantly clear to the jury that their verdict should be determined on the basis of whether or not the prosecution had satisfied them of the appellant's guilt.

Analysis

[102] Having regard to the appellant's assertion in his unsworn statement that he heard and saw a dispute in room 212 between the deceased and a big black woman whilst on his way to his room, the issue which loomed large on the evidence was whether, based on where the deceased's room was located, it was possible for the appellant to have seen or heard anything coming from room 212, whilst on his way to room 202.

[103] Several witnesses for the prosecution gave evidence touching and concerning the location of room 212. One such witness was Miss Evadney Green who had checked the deceased into the hotel. At page 786 of the transcript, the trial judge correctly, in our view, told the jury that Miss Green's evidence was important in assisting them with how

to deal with the appellant's unsworn statement as to how he became aware of what was taking place in room 212. Counsel for the appellant complained that the trial judge's treatment of the unsworn evidence could have caused the jury to take the view that he bore the burden of proof. This direction by the trial judge, however, can in no way be seen as him questioning the appellant's unsworn statement or placing the burden of proof on the appellant. At no point did the trial judge do any more than point out the importance of the evidence regarding the location of the room with regard to the appellant's statement of how he came to be there. He correctly told the jury that it was something that they had to look at in determining the issue before them. At page 786, the trial judge said:

> "This was an important thing from her evidence because, you find that this would be important in making up your mind as to how to deal with the statement, the unsworn statement of the accused; as to how he became aware of what was going on in Room 2-1-2. This was what this young lady said about Room 2-1-2... Room 2-1-2 was on the second of [sic] floor. This room was by itself...2-0-2 was on a different floor...you would have to take a route to get to 212..."

[104] Then, at page 788, he said:

> "So, you have 202 to which the accused is assigned in the main building and at the back, connected by a landing is the room the deceased was in. So if you are going here, is it likely that you will end up over here...Madam Foreman and your members, that is a matter for you. That is something you will have to look at."

[105] We, therefore, see no merit in this aspect of this ground.

[106] The appellant's complaint regarding the trial judge's comments on the evidence of the registration of the appellant's female companion is also without merit. The prosecution's case was that the appellant and his female companion registered in the hotel at separate times. In his unsworn statement, the appellant said they checked in together. Counsel for the appellant cited this passage at page 795 of the transcript, where the trial judge said:

> "The plan that was signed for was the Breakfast Plan. The rate: The room rate was $94.60 cents; that's foreign currency and American currency. So, those were the circumstances; breakfast checked in, according to this clerk; check in first by himself. She said when she was asked that she didn't remember the time difference between the check in of the male and the female. She said:
>
> > 'When the female came, she was going to the same room as the person I had registered earlier.'
>
> So, if this account is true, they did not come in together. If this account is true, that the male came in first and the female subsequently, the registration was done. It was [a] matter for you, Madam Foreman and your Members. She said of the procedure, that the female coming there would have acquired no additional cost. The person would have been completed with an armband and we were told the female got an armband 'now'. It was noted what the armband number was – that was not noted, but it was that the female had joined him in the room.
>
> That testimony was unchallenged testimony, because the evidence was not challenged.
>
> Nobody didn't say that, in fact when the male came, the female was there; the two walked in; came together."

[107] Here, the trial judge simply recited the prosecution witness' evidence, pointing out that there was no challenge to it, leaving it to the jury to make whatever findings from it they wished.

[108] The evidence is that Miss Fearon was the one who had checked in the appellant and then his companion. Again, in recounting the evidence of Miss Fearon regarding the location of the rooms, at page 799 of the transcript, the judge pointed out to the jury that Miss Fearon had said she could not recall if room 212 had a glass door. He also pointed out that it had been suggested by the defence that there was a glass door to room 212. Although, he further pointed out that none of the witnesses who spoke about the room had said anything about a glass door, he, also, pointed out that the appellant had mentioned a glass door in his unsworn statement.

[109] At page 800 of the transcript, he again reminded the jury of the evidence of the witness Miss Fearon about the location of the rooms, and in her own words that "if you are coming from 202, you have no reason to go to 212". That was the evidence and I can see no reason why the trial judge should be faulted for recounting the evidence as given.

[110] Another example of what counsel claimed to have been an unfair comment, is to be found at page 820 of the transcript, where the trial judge was recounting the evidence of a police witness. He reminded the jury that the police officer had told them that, when he told the appellant about the things he found in room 212, the appellant said he did not know anything about that and he had never been to that hotel. The trial judge went

on to remind the jury that the appellant had told them about being at the hotel. In that context he told them that they may well think that it was a contradiction. There is nothing impermissible about this, as the appellant's version was entirely irreconcilable with the police officer's version, and the jury would have had to decide which version they believed.

[111] Counsel also complained about two other paragraphs in the judge's summation. The first is at page 811 of the transcript, where the trial judge in recounting the evidence of the witness for the prosecution said:

> "He also produced a package labelled U, with a purple towel which he says was the only towel in the bathroom. And you will recall that in his unsworn statement, the accused had said in the bathroom he had wanted to wipe his hands and he had to resort to a rag that was there."

[112] Counsel contended that this undermined the appellant's unsworn statement. However, it is clear that all the trial judge did was to remind the jury of the prosecution's evidence and what the appellant said in his unsworn statement.

[113] The second was the following words at page 820 where the trial judge told the jury that:

> "The police officer is saying that he says I don't know anything about that. I have never been to that hotel. He said he asked him if he would consent to a blood sample for comparison to be made and he said yes. Well, what learned counsel, Mr Wilson, has said if he knows he is not involved how – this is not a thing you can force, force him to do, can't force him to give blood – how come he just say yes like that.

> He said he then told him he would make arrangement for it, for him to give blood."

[114] Here again the trial judge simply reminded the jury of the prosecution witness' evidence, and defence counsel's closing remarks to them on this piece of evidence.

[115] In all the references highlighted by counsel for the appellant, the trial judge in recounting the evidence of the prosecution's witnesses, simply reminded the jury of the appellant's statement with regard to those pieces of evidence.

[116] In his summation the trial judge highlighted, throughout, the substance of the case for both the defence and the prosecution. On a number of occasions, he drew the jury's attention to what each side was contending had happened, in order to show the differences between the two, and pointed out that it was a matter for them to determine which version they accepted. The trial judge also made it clear, that it was the prosecution which bore the burden of proof, that the prosecution had to prove the case against the appellant to the required standard, and that the appellant had nothing to prove. Further, in respect of his comments on the evidence, as already stated, the judge advised the jury to dismiss any comment he made that they were in disagreement with.

[117] There is nothing to be gained from picking through the trial judge's summation randomly in order to complain of perceived faults. Having examined the trial judge's comments regarding the appellant's unsworn statement, it cannot be fairly said that the jury would have gotten the impression that the burden of proof was on the appellant.

[118] There is no merit to this ground and it also fails.

Whether the trial judge failed to provide assistance in relation to the treatment of discrepancies and inconsistencies in the Crown's case while juxtaposing the Crown's case with the defence's case to highlight areas of discrepancy and simultaneously omitting to leave the evidence of Miss Younger to the jury (ground 2.2)

[119] Counsel for the appellant argued that the trial judge gave no assistance to the jury on how to treat with discrepancies between the witnesses' evidence, but instead, gave them his preferred view of the evidence. In relation to this point, the appellant complained that there was a conflict between the evidence of two witnesses for the prosecution, Miss Green and Miss Fearon, and the trial judge described the evidence of one of the witnesses as more credible than the other.

[120] The DPP conceded that the trial judge did not give any direction on how to treat with inconsistencies and discrepancies in his summation. However, she argued that the only real inconsistency or discrepancy that arose was in relation to the layout of the hotel and the number of rooms. Further, that whilst the trial judge did not give any direction in relation to how to deal with discrepancies, he did advise the jury that they were entitled to say what evidence they believed and what evidence they did not believe. The DPP submitted that the direction would have been sufficient to deal with any evidence that was discrepant with any other evidence. Additionally, it was argued that the case was based on circumstantial evidence and not so much on the credibility of the two witnesses named by the appellant.

Analysis

[121] It is the duty of a trial judge to indicate conflicts in the evidence, where they appear, and the possible logical consequences of such conflicts. It is the function of the jury to assess the credibility or otherwise of a witness' testimony and to give it whatever weight they see fit. It is also the function of the jury to determine if discrepancies or inconsistencies exist, whether they are material or immaterial, and what if any weakening effect the existence of such discrepancies or inconsistencies might have on the credibility of a witness. Notwithstanding the existence of any discrepancy or inconsistency in the prosecution's case, depending on the circumstances of the case and unless the prosecution's witnesses are totally discredited thereby, a jury is still entitled to return a verdict of guilty.

[122] In this case, the appellant contends that two witnesses for the prosecution gave conflicting evidence in relation to the layout of the hotel and the two relevant rooms. It is true that the witness Miss Green said the hotel had 242 rooms, whilst Miss Fearon said it had 95 rooms. In recounting Miss Green's evidence as to the number of rooms, the trial judge remarked that "the evidence from other persons which have—I think, [sic] were more acceptable was that it has about 95." Nowhere did the trial judge say any one witness was more credible than the other, although the issue of whose evidence was acceptable on any fact was entirely a matter for the jury and not the trial judge.

[123] The more significant question is whether there was any material discrepancy between the evidence of the two witnesses as to the exact location of room 212, in relation to room 202. The trial judge recounted Miss Green's evidence at pages 781 to

788. Miss Green's evidence was that she was a receptionist at the time. It was she who checked in the deceased and assigned him to room 212. Her evidence regarding the location of room 212 may be summarised as follows: room 212 is on the second floor; it is in a corner by itself; it is separate to itself outside; would not say 212 is on a different floor from room 202 but would have to go outside the main building to go into room 212; to get to room 212 you have to go upstairs and go outside; you do not have to pass room 212 to get to room 202; no room is beside or close to room 212; the only other place in that area was the laundry; room 202 is at the front of the hotel and is a room with an ocean view; you can stand on the second floor and see the doors to all the rooms except room 212 as you would have to go outside and see it from the laundry; room 212 faces the laundry.

[124] The trial judge recapped Miss Fearon's evidence at pages 793 to 800 of the transcript. Miss Fearon, in her evidence, said that she was a reservation agent at the hotel who sometimes registered guests at the front desk, and that she knew the hotel's layout. Her evidence regarding the location of the rooms can be summarised as follows: room 212 was on the second floor, as is 202; room 212 was by itself; coming upstairs to second floor room 212 was to the left by itself; could not remember where room 202 was located, but all the rooms numbered 200 were on the second floor, irrespective of which building; room 202 and room 212 are on the same building but room 212 is a room by itself; if you are coming to room 202 you have no reason to pass room 212 or to go to room 212; you do not have to pass room 212 to go to room 202 because the stairs did not pass room 212 or the passage; if coming to 202 you do not have to go down pass

212 because it is by itself; room 212 had a balcony and is liked for quietness; it was a standard room with no view; where it is located the housekeeping department (laundry) is below it; the only view from room 212 is a person coming out from the laundry; if sitting on the balcony of room 212 you would only see the house keeping department.

[125] The evidence of Miss Fearon regarding the location of room 212 in her own words was that:

> "...it's like a room by itself. Some persons might like that room if he just need quietness or if maybe they check in and that is the room that is ready, but its like—it is more like—it's if you are coming to 202, did not have any reason to pass—well, don't have reason to go to 212. You don't have to, because the stairs doesn't pass 212 or the passage. It's like by itself. There is a balcony, too. If yuh coming 202, you don't have to go down past that room number, down past that room number, because it is like more by itself."

[126] The discrepancy in the evidence between the two witnesses, it can be seen, is with regard to the amount of rooms at the hotel, in that, one said it was 242 and the other said it was 95. With regard to the location of each room, there was also a discrepancy, in that, Miss Green said that to get to room 212 you would have to go outside the main building, whilst Miss Fearon gave no evidence of having to go outside to get to room 212 but spoke only of a passageway leading to 212.

[127] In recounting the evidence, the trial judge did not point out any discrepancy between the evidence of the witnesses as to the location of the rooms. Instead, he summarised the evidence of the witnesses with regard to the location of the rooms, and asked the jury to look at it in light of what the other witnesses described. He further

highlighted the evidence of Miss Green, at page 788 of the transcript, where she said that no room was close to room 212, that it was separate to itself, and that to get to it one had to go outside. He then highlighted the evidence of Miss Fearon, at page 799, that the two rooms were on the same floor and on the same building, and that 212 was by itself and there was no need to pass 212 to get to 202.

[128] However, the judge did not highlight to the jury any differences in the evidence of these two witnesses which would amount to a conflict in the evidence. There is in fact no direction on the treatment of inconsistencies and discrepancies to the jury in this case, and the question is whether the inconsistencies and discrepancies identified above were so material as to go to the root of the case, that the absence of any direction on it created the likelihood that a miscarriage of justice occurred.

[129] The fact is that the evidence regarding the location of the two rooms was given by several other witnesses apart from Miss Green and Miss Fearon. There was evidence of the location of room 212 from three police officers, Dr Mowatt, the forensic examiner and Dr Brydson, who conducted the DNA sampling, as well as Miss Younger who was at the laundry on the day in question. Any or all of this evidence, if believed by the jury, would have cast doubt on the appellant's claims regarding how he came to see and hear the deceased in a fight with a black woman in room 212.

[130] Corporal Rodney, who guarded the crime scene at room 212, was asked in cross-examination whether there was an option to the right of the room to go anywhere. His reply was no. He said there was one passage leading to room 212 and that the room did

not adjoin anything or any other room. The evidence of Inspector Hamilton was that, to get to room 202 from room 212, you have to come across a landing from room 212 and take a left down a passage. He said room 202 and room 212 are on the same floor but 'wide apart'. The landing, he said, allowed you to get from the main building to room 212. He also said that room 212 stood by itself at the end of the landing. Inspector Ricketts spoke of a balcony before you enter room 212, a walkway that takes you to a corridor which took you to the other rooms.

[131] Dr Mowatt's evidence, at page 531 of the transcript, was that room 212 was "separate or set apart from the main building", and that "access to the room was extra, a connecting walkway from the main building". The walkway, she said, terminated at room 212. There was no room beside it or on top of it. Room 202, she said, was in the main building, and to get there she had to walk back along the passageway to room 202 somewhere in the main building. Room 212, she said, was not part of the main building and was by itself at the end of the walkway. There were "absolutely" no rooms along the walkway. At page 601 of the transcript, she described how she went from room 212 to room 202, by coming back along the walkway entering the main building and turning either left or right. She also said that leaving the main building along the walkway the only destination would be room 212.

[132] It is clear from the evidence of all the witnesses, including Miss Younger, Miss Fearon and Miss Green, that room 212 was on the second floor, was secluded, and there were no other rooms, elevator or staircase in close proximity. To get to it, one had to

walk along a passageway or a landing leading outside of the main building to the room which stood by itself over the housekeeping department. Room 202 was a room with an ocean view at the front of the hotel overlooking Doctor's Cave beach, and room 212 was a standard room at the back of the building with no view. It is equally clear that the entry door to room 212 faced away from the main building so that one could stay from outside the laundry room and see the guest entering room 212, as per the evidence of Miss Younger. The evidence of Miss Green, that standing on the second floor you could see all the doors to the rooms except for room 212 because it was by itself, and that you would have to step outside to see it as it faces the laundry, finds support in the evidence of Miss Younger, and clearly explains the ability of Miss Younger to see the white man and black lady entering room 212 from outside the laundry where she was sitting.

[133] The difference between the evidence of Miss Green and Miss Fearon pales in significance when the evidence of all the other witnesses are considered. It is clear from all the witnesses that room 212 was a room set apart from the rest. There were no rooms close to it, and it certainly was not close to room 202. There was a passageway from the main building which could take you across a landing to room 212, but based on the evidence, including that of Miss Younger and Miss Green, it is clear that the entry door to room 212 could not be seen from inside the main building, contrary to what was claimed by the appellant. The evidence of Miss Younger, which was read into the record, showed on the defence's case, that room 212 was located over the laundry which was at the back of the hotel and was the only room in that vicinity. She was able to sit outside the laundry and, facing room 212, see the "white man and black lady" entering that room.

[134] The trial judge, in summing up on this issue, at page 786 of the transcript, said of the evidence of Miss Green:

> "This was an important thing from her evidence because, you find that this would be important in making up your mind as to how to deal with the statement, the unsworn statement of the accused; as to how he became aware of what was going on in Room 2-1-2".

This statement by the judge cannot be said to be faulty in so far as it was a direction to the jury to assess the appellant's unsworn statement and the witness' evidence.

[135] At pages 798 to 799, in reference to Miss Fearon's evidence regarding the position of the rooms, the trial judge told the jury that they may consider it an important part in the case. He then recounted her evidence.

[136] Therefore, although the trial judge did not give specific directions on inconsistencies and discrepancies, which he ought to have done, he did point out the evidence of the different witnesses and what each said about the room. Although he did not specifically draw attention to any difference between the evidence of Miss Green and Miss Fearon, based on the supporting evidence given by several of the other witnesses as to the location of the room, the jury had ample evidence from which they could have drawn their own conclusion. The difference in the description of the location of the rooms given by Miss Green and Miss Fearon (in the case of Miss Green that room 212 was outside the main building) would have taken on a different complexion if they had been the only two witnesses to have given evidence of this. The trial judge would have been duty bound to point out to the jury the difference, if any, and leave it to them to determine

if it was material. He was also bound to point out the possibility of a "weakening effect", if any, of the discrepant evidence between those two witnesses (see **The State v George Mootoosammy and Henry Budhoo** (1974) 22 WIR 83).

[137] However, in this case, there was no "weakening effect". The appellant's evidence supports the prosecution witnesses' account that there was a passageway leading to 212 which he said, "sat out by itself". However, he claimed that he had to pass that room to get to room 202. Both Miss Green and Miss Fearon gave evidence that you would not go down pass room 212 to get to room 202. He also said that as he passed along the passage to get to his room he saw the door to 212 wide open. However, Miss Fearon's evidence is that there is no reason to pass or go to room 212 because neither the stairs or the passage passed room 212 and that the only view from that room is anyone outside the laundry. Miss Younger stayed outside the laundry at the back of the hotel and saw the white man entering the room. It is clear from the evidence, that all the entry doors could be seen from inside the building, except that of room 212. Room 202 was at the front of the hotel and had an ocean view. It was, therefore, open to the jury to accept the supporting evidence of the other witnesses as to the location of the room, along the landing or passageway leading outside the main building, over the laundry and with its entry door not visible from the main building. It was also open to them to reject the unsworn statement of the appellant, in that regard.

[138] Early in the summation, at pages 768 to 769 of the transcript, the trial judge told the jury that they were entitled, as judges of the facts, to say what evidence they believed

or disbelieved, and that it was open to them to disbelieve all a witness had said, or to disbelieve a part and believe only a part, or accept a part and reject a part. None of the prosecution's witnesses were discredited, or had their evidence impeached with regard to the location of the rooms. The absence of a direction on the treatment of inconsistencies and discrepancies, therefore, was not fatal. Thus, we find that no miscarriage of justice was occasioned by the trial judge's failure in this instance.

Whether the trial judge failed to treat adequately with the DNA evidence (ground 4)

Appellant's Submission

[139] Counsel for the appellant complained that the trial judge heard evidence that the DNA sample was taken from the appellant by telling him a false story about its purpose, and therefore, the jury should have been warned about its use. The taking of a DNA sample, it was argued, should only be done with the consent of the accused and the appropriate warnings should have been given about its use at trial in a similar fashion as a cautioned statement. The sample, counsel contended, would have been taken in breach of the appellant's right not to give evidence against himself, his right to silence, and his right to a fair trial. At the very least, counsel submitted, the question about the voluntariness of the sample should have been considered in a *voir dire*.

[140] Counsel for the appellant also submitted that the trial judge's directions on the use of the DNA sample were incomplete and not in line with the directions given by the court in **R v Doheny and Adams** [1997] 1 Cr App R 369.

Respondent's submissions

[141] The DPP submitted that how the sample came to be taken from the appellant formed part of the evidence of Inspector Hamilton, and that it was never directly put to him in cross-examination that the appellant only gave his DNA because of a false story. Counsel pointed out that at no point did defence counsel indicate to the court that he was challenging the voluntariness of the giving of the blood sample.

[142] The DPP argued that the DNA sample was given voluntarily, and its probative value was far outweighed by any prejudicial effect. The learned judge, therefore, did not err in admitting this evidence. In support of this submission the DPP cited the dictum of Lord Diplock in **R v Sang** [1979] 2 All ER 1222, where he said, inter alia, that a court, except in the case of admissions and confessions, "has no discretion to refuse to admit relevant and admissible evidence on the ground that it was obtained by improper or unfair means".

Analysis

(a) Should the trial judge have held a voir dire into the circumstances surrounding the taking of the appellant's blood sample and should he have given the jury an appropriate warning as to its use at trial?

[143] The first aspect of the complaint in this ground is that the appellant's DNA sample was taken without his consent, and therefore, the trial judge erred in failing to hold a *voir dire* to determine the circumstances under which it was taken or obtained. It was also the appellant's contention that the judge failed to warn the jury as to how they were to treat with these issues.

[144] The issues to be resolved by this court with regard to this complaint, are therefore, three-fold. The first is whether the trial judge ought to have held a *voir dire* to determine

the question of voluntariness, and, therefore, the admissibility of the evidence. The second is whether the evidence from the blood sample ought to have been excluded even though it was admissible; and the third is whether the jury ought to have been given a special warning regarding the use of the evidence, having regard to the circumstances in which the sample was taken.

[145] It is well accepted that for confessions and admissions of any kind to be admissible and reliable, it must be shown that they were voluntarily made. However, evidence amounting to a confession or admission will, in very limited circumstances, be excluded on the sole basis that it was improperly or illegally obtained.

[146] The applicable principles are those laid down in **R v Sang**. In that case, the House of Lords was dealing with the following issue stated at page 1225:

> "Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"

[147] Lord Diplock, in his judgment, on the same page, stated:

> "I understand this question as enquiring what are the circumstances, if there be any, in which such a discretion arises; and as not being confined to trials by jury ..."

[148] He later went on to say, at page 1227:

> "... What the question is concerned with is the discretion of the trial judge to exclude all other kinds of evidence that are of more than minimal probative value."

[149] He reviewed a number of cases on the issue, and concluded, at page 1229 to 1230, that the scope of a trial judge's discretion to exclude admissible evidence is limited to:

> "... (1) admissible evidence which would probably have a prejudicial influence on the minds of the jury that would be out of proportion to its true evidential value and (2) **evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect**." (Emphasis added)

[150] Lord Diplock, at page 1230, also said:

> "...there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.
>
> Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial court is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial.
>
> A fair trial according to law involves, in the case of a trial on indictment, that it should take place before a judge and a jury;

> that the case against the accused should be proved to the satisfaction of the jury beyond all reasonable doubt on evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied; for the fairness of a trial according to law is not all one-sided: it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. **However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason**." (Emphasis added)

[151] It is, therefore, not part of the common law that all evidence obtained illegally or improperly is inadmissible. In **Kuruma, Son of Kaniu v R** [1955] AC 197, the appellant appealed against his conviction and sentence for unlawful possession of ammunition. His main ground of appeal was that the evidence against him had been obtained unlawfully and, therefore, ought not to have been admitted. Lord Goddard, in giving the decision of the Board, held that the test of admissibility of such evidence was whether it was relevant to the matters in issue. If the evidence was relevant to a matter in issue, it was admissible and the court was not concerned with how the evidence was obtained. Nevertheless, the court retains a wide discretion to exclude evidence if to include it would operate unfairly against an accused.

[152] Therefore, the general rule is that relevant evidence obtained illegally, unlawfully or improperly is admissible, and the court need not concern itself with how it was obtained (see Lord Goddard in **Kuruma**, at page 203). However, since the duty of the trial judge is to ensure that the appellant's trial is conducted fairly, there is a residual discretion in the trial judge to exclude such evidence where it would operate unfairly against the accused, including (1) where its prejudicial effect outweighs its probative value, and (2) where the evidence was obtained by means which would normally result in the exclusion of an actual confession, including unfair, oppressive or morally reprehensible means. This discretion extends to evidence given by an accused person voluntarily if it was induced by trickery, or if the method of inducement was unfair in that the rule against self-incrimination has been infringed (see Lord Scarman at page 1247 of **R v Sang**).

[153] In this case, no issue was raised before the trial judge that the blood sample given was not given voluntarily. There is no record of a challenge or objection to the evidence in the transcript. There was also no request made for a *voir dire* to be held. Neither was it directly put to Inspector Hamilton, who was the one who requested the sample that it was obtained by trickery. What was put to the officer was that he had told the appellant that he was requesting a sample in relation to an investigation he was conducting into an allegation of rape at the hotel. This the officer denied. The undisputed fact is that the appellant consented to the blood being taken from him, and no submission was made to the court on the necessity to hold a *voir dire* to determine whether that consent was vitiated by trickery. There was nothing in the evidence that would have alerted the trial

judge that a *voir dire* was necessary to determine whether the sample was voluntarily given.

[154] The defence had the right to request a ruling on the question of voluntariness, or some other challenge to the admissibility of the evidence even without utilizing the *voir dire* procedure (see **Ajodha v The State** [1982] AC 204, 208). The defence did not raise any objection to the evidence which called for a ruling by the trial judge, and no issue arose on the evidence such as would alert the trial judge that any question of admissibility had arisen.

[155] In principle, therefore, the trial judge had no basis on which to exclude the evidence which was otherwise admissible. The DNA evidence was, therefore, admissible, and its probative value far outweighed any prejudicial effect it may have had.

[156] In the circumstances of this case, there was no requirement for any special warning regarding the taking of the appellant's blood sample.

(b) Were the trial judge's directions on the DNA evidence inadequate and incomplete

[157] The complaint that the trial judge's summation was inadequate and incomplete because it failed to direct the jury in the terms laid out in **Doheny and Adams**, is also without merit. The appellate court's decision in **Doheny and Adams** concerned the procedure which should be adopted where DNA evidence is relied on by the prosecution to prove its case. The issue that the court was dealing with was the manner in which the DNA evidence had been presented to the jury. The court, at page 371, after identifying

that issue, went on to make "some general comments about DNA testing, the conclusions that can properly be drawn from such testing and the manner in which those conclusions should be presented to the jury".

[158] Phillips LJ, who wrote the judgment of the court, explained DNA testing and profiling, and quoted from the judgment of Lord Taylor in the case of **Deen** (Transcript 21 December 1993), where the process of DNA profiling was explained. Phillips LJ then went on to explain the relevance and efficacy of DNA profiling in proving identity. He explained that the first stage in seeking to prove identity by DNA profiling is to achieve a match. Importantly, he went on to explain the random occurrence ratio and its significance in DNA profiling.

[159] He explained it thus, at page 372:

> "The characteristics of an individual band of DNA will not be unique. The fact that the identical characteristic of a single band are to be found in the crime stain and the sample from the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups 'the random occurrence ratio' ."

He then went on to state that:

> "If the DNA obtained from the crime stain permits, it may be possible to demonstrate that there is a combination of bands common to the crime stain and the suspect which is very rare.

[160] He then stated, at page 373:

> "The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes very significant...
>
> **The reality is that, provided there is no reason to doubt either the matching data or the statistical conclusion based upon it, the random occurrence ratio deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is highly probative. As the art of analysis progresses, it is likely to become more so, and the stage may be reached when a match will be so comprehensive that it will be possible to construct a DNA profile that is unique and which proves the guilt of the defendant without any other evidence. So far as we are aware that stage has not yet been reached.**
>
> The cogency of DNA evidence makes it particularly important that DNA testing is rigorously conducted so as to obviate the risk of error in the laboratory, that the method of DNA analysis and the basis of subsequent statistical calculation should – so far as possible – be transparent to the defence and that the true import of the resultant conclusion is accurately and fairly explained to the jury."

[161] His Lordship then went on to explain the proper role of the DNA expert and what his evidence should contain in order to assist the jury and the limits of his evidence and role. He then pointed out that it would then be for the jury, having heard all the evidence, including that of the expert, to decide "whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics".

[162] In relation to the summing-up Phillips LJ noted, at page 375, that:

> "... [T]he jury are likely to need careful directions in respect of any issues of expert evidence and guidance to dispel any obfuscation that may have been engendered in relation to areas of expert evidence where no real issues exists. **The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain.** In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case:
>
> > 'Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.'"

[163] In the instant case, the trial judge dealt with the DNA evidence at pages 841 to 844 of the transcript. After reciting the evidence which established the competence of the expert, Miss Sherron Brydson, he reminded the jury of her explanation as to what DNA was. He also reminded them, after quoting her evidence, as to how she obtained the partial DNA profile from the blood received, and that she compared it with the rest of her findings. He explained and outlined the expert's evidence and the system that she used. He discussed the aspects of her evidence dealing with her explanation of a partial profile, the statistical frequency and the random occurrence ratio. He told them, in respect

of the appellant's match and the frequency in the Jamaican population, that it would occur once in every 2,870,000 persons. He told the jury, at page 843, that:

> "She concluded that source [sic] of the blood on the shower curtain cannot be excluded as being the same source as the blood from Adrian Forrester..."

[164] The jury not only heard from the forensic expert that the appellant's DNA was most likely that found in the room, but they also had confirmation from the appellant that he was there and had left his blood there. The evidence of the random occurrence ratio was not challenged. This random occurrence ratio would have been evidence of extreme importance if the evidence necessary to identify the appellant as the perpetrator was based solely or primarily on the DNA evidence. However, this random occurrence ratio paled into significance based on the fact that the appellant admitted to being in the room, where he bled, and in the bathroom where his DNA was found.

[165] The appellant gave an explanation as to how his blood came to be in the deceased's room. It was a matter for the jury whether they accepted his explanation, in light of all the other circumstantial evidence in the case brought by the prosecution. The DNA from his blood found in the bathroom was only one aspect of this circumstantial evidence, and the fact that the appellant admitted to leaving blood in the room made it unnecessary for the jury to be warned about relying solely on the DNA evidence from the prosecution to prove the identity of the appellant as a person who had been in the deceased's room and had left the stain there.

[166] There was no need for a direction in line with **Doheny and Adams** as the identification of the person who left the stains was not in issue. There was no need for the jury to be told that they had to be sure that it was the appellant who left the stain, because the appellant in his unsworn statement told them that he had left the stain, exactly where the expert said she found it. They needed only to be sure that the stain was left in the circumstances the prosecution alleged and not as the appellant had claimed.

[167] In the instant case, there was no need for the jury to be told that the prosecution was relying on the DNA results to identify the appellant. Since there was no complaint with regard to any shortcomings in the manner in which the DNA evidence was presented, the issue is whether the judge was required to give the directions suggested in **Doheny and Adams**. In our view, in the circumstances of this case, the issues which arose in **Doheny and Adams** did not arise, and the directions found to be necessary in that case were not necessary in the instant case.

[168] This ground, therefore, fails.

Whether the appellant was denied a fair trial because the trial judge failed to direct the jury that DNA evidence on its own could not conclusively prove the guilt of the appellant (ground 4.1)

Appellant's submissions

[169] Counsel for the appellant submitted that the trial judge deprived the appellant of a fair trial by failing to direct the jury that the DNA evidence on its own could not conclusively prove the guilt of the appellant. At its highest, it was argued, the DNA could

only prove that the appellant had been in room 212. Counsel maintained that the judge's direction fell way below the required standard because it was the only thing connecting the accused to the crime. Counsel argued that the failure by the trial judge to assist the jury may have left them with the impression that they had to convict because of the DNA.

[170] The appellant relied on **R v Robert Ogden** [2013] EWCA Crim 1294, **R v Reed and R v Garmson** [2009] EWCA Crim 2698, and **R v FNC** [2015] EWCA Crim 1732 in support of these submissions.

[171] Counsel further submitted that there was a distinction in law between DNA evidence left during the commission of a crime and DNA evidence found on an article left at the scene. Counsel pointed out that, in **Reed and Garmson,** the court was dealing with a case of DNA evidence left during the commission of the crime, whilst in **Ogden,** the evidence was in relation to articles left at the scene. Different considerations, it was argued, applied in each case.

Respondent's submissions

[172] The DPP submitted that the appellant was not deprived of a fair trial, as the DNA evidence was not the only proof of guilt, and there was other evidence placing the appellant in the deceased's room. In that regard, the DPP noted that, in evidence, was an armband and a room key assigned to the appellant at the hotel, which were found in the deceased's room, and which were what had led the police to the appellant. Additionally, it was submitted, the appellant placed himself in the deceased's room, when he gave an explanation as to his presence there.

[173] The DPP conceded that the trial judge was not as "fulsome" in his directions on DNA as he could have been. However, she pointed out that nowhere did the trial judge tell the jury that the DNA evidence was conclusive of guilt. It was also submitted that the trial judge had directed the jurors that they should reach their verdict having considered all the evidence, not just the DNA evidence. The DPP maintained that there was no miscarriage of justice occasioned by the defect in the trial judge's summation on DNA.

Analysis

[174] The extent to which the DNA evidence will assist in proving a case will be based on the particular facts and circumstances of each case. On the one hand, DNA evidence can be used to identify the perpetrator when it is being alleged that the perpetrator's DNA was "deposited" or left at the scene during the commission of the offence. This will, more often than not, be the case if the match probability is very high (see **R v Adams (no 2)** [1998] 1 Cr App R 377). On the other hand, it can be used to identify persons whose DNA was found on items left at the scene or who had been at the scene up to a certain point. DNA evidence alone, however, may be inconclusive of guilt unless there is a close connection between the DNA evidence and the commission of the offence, that is, there is other evidence which suggests it was deposited during the commission of the offence. DNA evidence, whether deposited during the commission of the offence or left on an object found on the scene of the crime, in conjunction with other evidence pointing to a defendant, can be compelling.

[175] The main authorities in relation to the content of the summing-up regarding DNA evidence are cases where the DNA evidence was the main or sole evidence being relied on.

[176] The applicable principles concerning DNA evidence can be found in **R v FNC**, **Doheny and Adams,** and **R v Ogden.** The former embarked on an assessment of the leading cases involving DNA evidence, and sought to distinguish and explain those decisions, including the latter two.

[177] **R v Ogden** was a case involving DNA found on a scarf left near a smashed window used by a burglar to gain entry to a house. There was no other evidence against the defendant. Two spots of blood were on the scarf, only one of which had been tested matching the profile of the defendant. Although the random ratio was one in a billion, there was no evidence that the burglar had cut himself on the window, it was not possible to date the blood on the object, and it was accepted that someone else could have taken the scarf to the scene with the defendant's blood already on it. It was also not possible to say how the blood came to be on the scarf, whether by airborne droplets or contact transfer. The Court of Appeal found, and the prosecution conceded, that a no case submission ought to have succeeded in that case.

[178] In **R v FNC**, DNA evidence deposited during the commission of the offence provided the only link between the defendant and the crime. The chance of obtaining the same DNA profile from another male unrelated to the defendant was expressed as one in a billion. The trial judge dismissed the case following a submission of no case to answer,

on the basis that there was no other evidence linking the defendant to the offence. On appeal, the Court of Appeal held that the case should not have been dismissed. The court looked at the authorities relating to DNA and distinguished the cases where DNA was deposited at the crime scene during the commission of the offence from those cases where DNA was found on an object left at or near the crime scene. Having discussed the development of the case law and the authorities on the subject, the court concluded that where DNA is directly deposited during the course of the commission of the offence by the offender, a very high DNA match with the defendant was sufficient to raise a case for the defendant to answer, even if it is the only evidence against the accused. The jury will have to consider all the evidence, including any challenges to it tending to weaken it, such as an airtight alibi (see **R v Adams (no 2)**). The court also stated, obiter, that even where the DNA is deposited on an article left at the scene, there may be a case to answer where the match is in the "order of one in a billion" (paragraph [30]).

[179] In **Garland Marriot v R** [2012] JMCA Crim 9, this court upheld a conviction for double murder where the evidence against the applicant rested almost exclusively on scientific evidence.

[180] The issues raised in the cases above, which were relied on by the appellant, in our respectful view, are not applicable to this case. In those cases, the prosecution placed substantial or sole reliance on the results from the DNA comparisons obtained from the stain left at the crime scene with the profiles obtained from the blood samples given by the defendant. In the case of **Doheny**, there were shortcomings in the manner in which

the DNA evidence was presented to the jury. In the case of **Adams**, which was heard along with **Doheny**, the appeal was dismissed on the basis that, with regard to the complaint against the DNA evidence, they were not of any significance as the complainant had identified the appellant Adams. Therefore, the prosecution was not only relying on DNA evidence, and in any event, the DNA profile having matched the crime stain, the jury could have been left in no doubt as to who had left the stain. The case of **R v Ogden**, where the DNA evidence was the sole evidence against the appellant, is also not applicable to this case. The same is true of the case of **Reed and Garmson**.

[181] In the instant case, the appellant's DNA was directly deposited at the crime scene on the shower curtain in the bathroom of the deceased's hotel room. On the prosecution's case, this pointed to the fact that he had been present in the deceased's room. This fact, along with the evidence of the key to room 202, the appellant's arm band, and the electrical cord from room 202 being found in the deceased's room, as well as the fact that the appellant had checked in on the breakfast plan but left the hotel earlier than planned, according to the prosecution, pointed to his involvement in the "struggle" in room 212 resulting in the stabbing death of the deceased. On the defence's case, the appellant admitted his presence in the room and gave an explanation for how his blood, armband and key came to be there. He gave no explanation for the electrical cord assigned to his room, or why he left earlier than planned.

[182] His explanation was that he was passing and saw a fight going on in room 212 and he went in to quell the dispute, somehow ended up bleeding, went to the bathroom

to wash off the blood and dried his hand in a towel in the bath. He also lost his key in the room at that time. He left the deceased alive and well in the room, and left the hotel sometime thereafter. The deceased was seen alive after the time the appellant claimed to have left the hotel. The jury would have had to decide, not whether the prosecution had properly identified the accused as the person who had been in the room, that fact not being in contention, but, rather, whether the prosecution had satisfied them to the extent that they felt sure, that the presence of the appellant in the deceased's room had not been to part a fight, as he claimed, but to kill the deceased.

[183] It is true that the trial judge did not tell the jury that the DNA evidence was not conclusive of guilt. However, the DNA evidence did not stand by itself and the appellant's presence on the scene was not in issue. The jury was told that the case was one based on circumstantial evidence and were directed on circumstantial evidence. They were told that the appellant's presence in the deceased's room was only one aspect of the circumstances the prosecution said existed which pointed to the guilt of the appellant. On several occasions, the judge reminded the jury of the appellant's case, that, as the judge put it, he was acting as a "good Samaritan" and that he suffered the injury as a result. He also reminded them, at page 775 of the transcript, that not only had the appellant said he left the deceased alive and his room undisturbed, but that there was evidence on the prosecution's side that the deceased had been seen alive long after the appellant said he left the hotel. Again, at page 805, the judge reminded the jury of what the appellant had said about the circumstances under which his key was found in room 212. Having reminded the jury of the appellant's unsworn statement, he also reminded

them, at pages 861 to 862, that the burden of proof rested on the prosecution and that the appellant had nothing to prove. Additionally, he told them that they had to be satisfied that the appellant was in the room at the time of the struggle which resulted in the death of the deceased. At page 865, he again reminded the jury of the appellant's account of how his blood came to be in the room.

[184] The trial judge's directions on DNA evidence, although not ideal, when taken as a whole were adequate in these circumstances. The appellant's explanation of how he came to be in the room and how his blood was left there was fairly put to the jury on more than one occasion.

[185] As a result, this ground must fail.

Whether the evidence of the accused's bad character was: (a) inadmissible in the circumstances in which it was led and amounted to a miscarriage of justice; (b) a material irregularity which renders the convictions unsafe; (c) of no probative value and could only be used to paint the appellant in a bad light; (d) of no assistance to the jury in resolving the issues in the case save to say the person was of bad character and; (e) was compounded by the appellant's reference to his deportation (ground 6)

Whether the summation of the trial judge was inadequate to deal with the inadmissible evidence of bad character and whether he ought to have discharged the jury (ground 7)

Appellant's submissions

[186] Counsel for the appellant argued that the trial judge allowed the prosecution to lead evidence which tended to show that the appellant was of bad character. The evidence, counsel submitted, was about a matter which took place well in advance of the case before the court, and had no connection with the case. This evidence, counsel

argued, was not merely blurted out by an unsophisticated witness giving evidence of the general circumstances of the case, but was deliberately led by the prosecution. It was submitted that, in allowing the evidence to be led, the judge relied on precedents which were used by the prosecution to deliberately circumvent the usual rule that the defendant has a shield. Counsel argued further that this was an inappropriate and dangerous use of precedent and should not be permitted to stand.

[187] Counsel submitted that evidence of an accused's bad character is more than evidence of his previous conviction, and includes evidence that showed a tendency towards misbehaviour. Counsel maintained that the evidence elicited from Sergeant Wright regarding the taking of the appellant's fingerprints could only have had one effect, that is, to prejudice the minds of the jury, and furthermore, the evidence did not advance the prosecution's case beyond the existing parameters.

[188] Counsel further submitted that cases in which the prosecution is allowed to lead evidence of previous bad character are very limited. In this case, the evidence was led by the prosecution through a police officer whose job description, as he described it, included the taking of the fingerprints of prisoners. The appellant complained that the officer used the word "prisoner" no less than four times in relation to the taking of fingerprints, and that he did not indicate that he took fingerprints in circumstances other than in relation to prisoners; so that a direction not to speculate about why the fingerprints were taken is a non-direction.

[189] It was argued that the appellant's previous conflict with the law was integral to the circumstance of the fingerprint being taken. The decision to admit into evidence the document counsel referred to as the "fingerprint form" gave the jury a tangible piece of evidence showing that the appellant's fingerprints had been taken by the police. The appellant argued that, at the first trial, the prosecution had referred to the same form as a "CIB Form", and the end result of that trial was a hung jury.

[190] Counsel cited **R v John Taylor** (1934) 25 Cr App R 46, **R v William Charles Richard Peckham** (1935) 25 Cr App R 125, and **R v Weaver** [1968] 1 QB 353, which are cases that dealt with evidence of the appellant's bad character being inadvertently introduced into evidence. Counsel also relied on **R v Peter McCLymouth** (1995) 51 WIR 178, and asked this court to distinguish it from **R v Weaver**. She submitted that in **R v Weaver** the conviction was permitted to stand because of the way in which the trial judge dealt with the inadvertent admission of the bad character evidence. Further, it was argued, in that case the trial judge was able to offer an innocent explanation, and thereby minimized the impact that the evidence could have had on the minds of the jury. However, in this case, counsel contended, there was no innocent explanation for the fingerprinting of the accused, and the directions on the evidence of Sergeant Wright simply said that he was a man before whom a document was signed.

[191] Counsel contended that the question with which this court must grapple is whether the trial of the matter was fair. Counsel maintained that the conviction should not be allowed to stand as the trial judge ought to have discharged the jury, and that the proviso

cannot be applied, since it was not a case in which it could be said that the appellant would have inevitably been convicted.

Respondent's submissions

[192] The DPP conceded that, at common law, evidence which shows that a defendant has a propensity to misbehave is generally to be excluded on grounds of fairness, unless there is some reason to admit it beyond mere propensity. She, however, argued that the evidence in this case did not meet the threshold of bad character evidence or prejudicial evidence. She maintained that there was no material irregularity.

[193] The DPP argued that the evidence complained of was relevant as it was intended to show that the signature on the form was that of the appellant, and that this signature was used for handwriting comparisons with the hotel log book and the appellant's driver's licence. This, it was argued, was of significant probative value to the prosecution's case, as it was the prosecution's case that the appellant had denied being at the hotel at the relevant time. It was also pointed out that no evidence was led as to why the appellant's prints were taken or as to whether he was convicted of any offence. The DPP cited **Makin v Attorney General for New South Wales** [1891-94] All ER Rep 24, where the court held that "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury ..."

[194] The DPP further submitted that the trial judge's direction to the jury in relation to the bad character evidence was sufficient. She argued that the evidence elicited did not

require the trial judge to discharge the jury, and that any prejudicial effect the evidence might have caused, was safely cured by the judicial warning. She pointed out further that the trial lasted two weeks, and the summation was several days after the evidence was led. Counsel also contended that, in any event, because this was such a powerful case involving circumstantial evidence, it was a suitable case for the proviso.

Analysis

[195] As a general rule, the prosecution is not permitted to lead evidence of a defendant's bad character. This not only includes previous convictions or previous misconduct, but also any tendency towards wrongdoing or immorality. Evidence of a bad reputation in the community is generally not permissible either (see Blackstone's Criminal Practice 2000, paragraph f12.1, at page 2111). At common law, evidence of a propensity towards bad conduct is generally excluded on the grounds of fairness, unless there is a reason for admitting such evidence beyond showing a mere propensity (see **Regina v Neale** (1977) 65 Cr App R 304). Such evidence is only permissible if it falls in one of the few exceptions to this general rule. For example, section 9(f) of the Evidence Act provides a statutory exception whereby an accused may be questioned as to his bad character if (i) that evidence tends to show he is guilty of the offence charged; (ii) he or his attorney has asked questions to establish his good character or cast aspersions on the prosecutor or prosecution's witnesses; and (iii) he has given evidence against his co-accused.

[196] Similar to section 9(f)(i), an exception at common law is where such evidence forms part of the general background, or where it is germane to the enquiry as to guilt. The mere fact that the evidence adduced by the prosecution in evidence in chief tends

to show a propensity to misbehave, does not by itself make it inadmissible if it is relevant to an issue the jury has to decide.

[197] In **Murphy on Evidence,** the 11th edition, at page 34, paragraph 2.10.1, the learned author pointed out that:

> "Evidence is said to be admissible or receivable if it is relevant and if it is not (excluded) by the rules of evidence. The rules of evidence are rules of law, and it follows that, unlike relevance, which is determined solely by reference to the logical relationship between the evidence and a fact in issue, admissibility is a matter of law. To be admissible, evidence must be relevant, but relevance is not enough to result in admissibility. While evidence must be relevant to be admissible, the converse proposition is not true. Not all relevant evidence is admissible."

[198] One of the ways in which possibly prejudicial evidence may be relevant and therefore admissible is if it were led to rebut a defence which would otherwise be open to the accused (see Lord Herschell LC in **Makin v Attorney General**). The issue would then involve the question of whether the probative value of the evidence outweighs its prejudicial effect. In which case, the trial judge has a discretion, as part of his inherent power to ensure a fair trial, to exclude such evidence, even though it is admissible. The more probative the purpose for adducing such evidence, the less likely it is that it will be excluded (see Lord du Parcq giving the judgment of the Board in **Noor Mohamed v The King** [1949] AC 182).

[199] Evidence of bad character may also involve evidence deliberately or inadvertently led or blurted out by a witness, of which the trial judge usually would not have had an opportunity to rule on its admissibility or its prejudicial effect. The issue then becomes

what steps should be taken to address or rectify the situation, if it is agreed that it may prejudice the accused by inferring that he is of a bad character or ill repute, and was therefore, inadmissible. Two possible steps would be to either discharge the jury or to warn the jury to disregard the evidence.

[200] Where evidence prejudicial to an accused is revealed in the hearing of the jury, whether to discharge the jury is within the judge's discretion. In **R v Weaver**, it was held that the inadvertent admission of prejudicial evidence did not necessarily have to result in the discharge of the jury. The decision is for the trial judge after taking into account all the circumstances of the case. The Court of Appeal will not lightly interfere with the exercise of that discretion.

[201] In this case, the evidence was led by the prosecution in their attempt to put before the jury relevant and probative evidence regarding the appellant's handwriting and the fact that it proved that he was the same person who had checked into the hotel at the relevant time. The issues which arise, are therefore, whether evidence of bad character was led, and if so, whether it fell within one of the exceptions; and, whether the prejudicial effect outweighed the probative value, and thus, whether the trial judge properly exercised his discretion and gave adequate directions.

[202] There were three complaints in relation to the impugned evidence. One was in relation to the evidence led by the prosecution that the appellant had signed a fingerprint form whilst he was a prisoner at the Resident Magistrates Court (now Parish Court) some years before this incident. The second, is that the judge's directions were inadequate to

cure this prejudice. The third complaint was that this was compounded by the fact that the appellant had told the court in his unsworn evidence that he had been deported from the United States of America.

[203] The prosecution was required to prove that the appellant had murdered the deceased. To do that they had to prove that he had been at the hotel at the material time. Faced with a denial, on the prosecution's case, that the appellant had never been to that hotel, and in the absence of any other form of identification evidence, the only way to prove that the person who had checked into room 202 was the appellant, was through the comparison of the signature on the hotel's registration card with the appellant's signature on the fingerprint form and his driver's licence. This would place the appellant at the hotel at the relevant time. It is arguable, therefore, that the evidence was relevant to an issue the jury had to decide.

[204] The evidence of the appellant's signature was admissible to rebut any possible defence the appellant may have raised that he had never been to the hotel, or certainly, that he was not there during the material period. However, the larger question, is whether the evidence regarding how the signature was acquired was relevant, and, whether its prejudicial effect far outweighed its probative value.

[205] Since each case has to be decided on its own facts, it is necessary to examine what took place in this particular instance. The prosecution led evidence from Sergeant Wright that he was a police officer whose duties entailed the fingerprinting of prisoners who are charged, preparing criminal records and conducting criminal investigations. He

also told the court that, on 7 April 2005, he was at the Resident Magistrate's Court where he fingerprinted a number of prisoners, including the appellant. At that stage, there was an objection from the appellant's counsel, the jury was excused, and arguments and submissions ensued before the trial judge. The issue was whether the prejudicial effect of the jury hearing that the appellant had been fingerprinted whilst in the custody of the police in 2005, far outweighed its probative value.

[206] Counsel for the prosecution, in submissions to the trial judge, relied on cases including **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28 and **R v Weaver**, to convince the trial judge that a warning was sufficient in the circumstances. In the end, the trial judge agreed that a warning was sufficient, and upon the return of the jury, gave the following directions, at page 327 of the transcript:

> "Madam Foreman and your [m]embers you heard the witness said [sic]:
>
> 'The year 2-0-0-5, I caused the fingerprint of the accused to be taken.'
>
> You cannot speculate as to why that was done. You cannot, based on what you have heard ascribe as wrongful or criminal conduct to him, because of what the witness said. I must warn you as a matter of law, that you cannot use that; what you have heard to resolve any of the issues that you will have to try in this case. You cannot use that to resolve; try to put as matter before you in this case. Take that from your mind completely."

[207] Counsel for the appellant contends that this warning was inadequate to cure the damage done by the introduction of this evidence, and the jury ought to have been discharged. In our view, whilst the evidence that the signature on the registration form

was the appellant's was relevant and probative and the manner in which it was proven to be so was equally relevant and probative it was not, in our view, necessary to lead the evidence of the signature on the fingerprint form in the manner in which it was led. The fact that the appellant was in custody when his fingerprint was taken was not relevant, neither were the duties of Sergeant Wright. These irrelevant statements led to the jury hearing information which was potentially prejudicial to the accused, as it may have suggested to the jury that he had been in trouble before. It is unfortunate that the prosecution, the defence and the trial judge failed to agree on an acceptable means of leading the evidence of the appellant's handwriting beforehand. It was quite permissible for the prosecution, the defence and the trial judge to determine, in the absence of the jury, beforehand what was required, and to agree on how it would be led. We would recommend, that this course be adopted should a similar situation arise again.

[208] We, however, do not agree that in this case, the trial judge was wrong not to discharge the jury. Whilst we would agree that the directions given were not necessarily the most comprehensive directions, as perhaps along with what was told to the jury by the trial judge, the jury could also have been told why the evidence of the appellant's handwriting was led, and the sole use which they were allowed to make of it. In the end, however, because the appellant admitted to being at the hotel, the jury was not required to consider the issue of the matching signature at all, and, therefore, they having been warned by the trial judge, would have had no reason to consider the fingerprint form or the evidence surrounding it in their deliberations for any purpose at all. So, having had no reason to consider the evidence for any legitimate purpose, it is not likely that they

would have deliberated on it at all. This is especially so, since the issue was dealt with immediately by the judge and never came up again in the trial, which continued for several days after. It is also not surprising that the trial judge did not repeat the warning later in his summation, as, by then, the usefulness of it had faded in significance.

[209] We have no difficulty in distinguishing the cases relied on by the appellant. In **R v McClymouth** the witness for the prosecution had blurted out that the appellant, who was on trial for murder, had been involved in another murder, and that his then lawyer had also represented him in that case. The trial judge refused to discharge the jury, and the appellant was convicted. On appeal, this court found that the insinuation by the sole eyewitness, who the jury were being asked to find as credible, that the appellant was of bad character and that his lawyer was just as bad, was so damaging that it could not be cured by a warning, and the jury ought to have been discharged.

[210] In **R v John Taylor**, the jury learnt they were trying a man who had previous convictions by virtue of totally irrelevant questions asked by the trial judge. The Court of Appeal in that case concluded that, in those circumstances, the trial was unsatisfactory and the conviction was quashed.

[211] In **Peckham**, the appellant was charged on two separate indictments and arraigned in relation to both, but was put in the charge of the jury in relation to one only. The trial proceeded on one indictment, for which evidence was led relevant only to the other indictment. The jury learnt from a witness for the prosecution that the appellant had been to prison. An application was made for a retrial, but was refused, and no

warning was given to the jury regarding that inadvertent statement from the witness. The court found that the reception of evidence on the trial of one indictment, relevant only to another, was fatal. It also found that, where prejudicial evidence of a previous record was heard by a jury, and a new trial was applied for, it should be granted.

[212] As was recognised in **Weaver**, the modern approach is that the discretion of the trial judge will not lightly be interfered with. It depends on the circumstances of the case and the nature of what has been admitted in evidence. In **Calvin Powell and Lennox Swaby**, the witness, entirely unsolicited, gave evidence that a person who was present when she was identifying the property of the deceased persons was "the one that kill his baby mother". She did not know any of the appellants before and did not attribute the statement to any particular person. This court found that the situation called for the trial judge to determine whether, in the circumstances, he should terminate the trial or continue with a warning to the jury. The trial judge chose the latter and gave a warning shortly after the statement was made. This court refused to interfere with the discretion exercised by the trial judge not to discharge the jury and order a new trial, as what occurred, was 'not devastating' to the fair trial of the accused, thereby distinguishing **R v McClymouth**.

[213] In the instant case, we find that the evidence that the appellant's fingerprints were taken whilst in the custody of the police, did not provide general evidence of bad character. The evidence, though it had the potential to be prejudicial, in that it could give the impression that the appellant may have been in trouble before, in the circumstances,

was not so prejudicial that it could not be cured by the trial judge's warning which he immediately gave. No evidence was led as to why the appellant was in custody, that any charge was levelled against him, or that he was convicted of any offence. The jury having been warned very early to ignore the evidence and not use it, and having later on been given a partial good character direction in favour of the appellant, we find that there was no miscarriage of justice occasioned by it, and the conviction, in our view, was not, thereby, rendered unsafe.

[214] With regard to the appellant's voluntary disclosure that he was deported, we would only point out that the shield against the admission of bad character evidence is for the benefit of the accused. It is a matter for him what use he makes of it. The shield does not prevent the appellant from volunteering information if he so desires - see Lord Reid in **Jones v DPP** [1962] AC 635 on revelations of bad character voluntarily disclosed by the defence, at page 663, where he said this of the shield:

> "It does not prevent him from volunteering evidence, and does not in my view prevent his counsel from asking questions leading to disclosure of a previous conviction or bad character if such disclosure is thought to assist in his defence."

[215] Nonetheless, with regard to the appellant's statement that he was deported, the trial judge told the jury, at page 877 to 878, that:

> "Madam Foreman and your members you will recall that the defendant in his unsworn statement had indicated that he was deported and you cannot—let me just tell you, you don't know what it is really, this deportation was about, persons for various reasons, some quite simple, are sent back, deported,

> and you cannot use that that as a factor in resolving any issue in this case. You ought not to use that against him."

[216] There was no miscarriage of justice based on the learned judge's approach. These grounds must, therefore, fail.

Whether the sentence of 35 years is manifestly excessive in all the circumstances (ground 8)

Appellant's submissions

[217] Counsel for the appellant argued that the range of sentences for murder being 15 years to life imprisonment at hard labour, longer term sentences such as that which was meted out to the appellant, should be reserved for the more gruesome cases. Counsel pointed out that although the deceased received 11 wounds, no firearm was used in the commission of the offence, and that the appropriate sentence should be one similar to those reserved for cases where no firearm was used. Counsel cited the cases of **Troy Jarrett & Jermaine Mitchell v R** [2017] JMCA Crim 38, **Horace Kirby v R** [2012] JMCA Crim 10, **Omar Reid v R** [2011] JMCA Crim 62 and **Janet Douglas v R** [2018] JMCA Crim 7. Counsel also relied on the principles espoused in **Meisha Clement v R** [2016] JMCA Crim 26 and the Sentencing Guidelines for the use of Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines).

[218] Counsel also pointed to the fact that, on the evidence, there had been a massive struggle which, she submitted, was perhaps an indication that there was more than one person involved in the commission of the offence but no evidence as to who had delivered the fatal blow. Counsel submitted that, in those circumstances, a sentence of 20 years was more appropriate.

Respondent's submissions

[219] Counsel for the prosecution submitted that the first thing to be determined is whether the sentence imposed was arrived at by applying the usual accepted principles of sentencing. The second thing to be determined, it was further submitted, was whether the sentence was within the range of sentences which the court was empowered to give for the particular offence and was usually given for like offences.

[220] Counsel conceded that the trial judge had not indicated a starting point in relation to the range of sentences as recommended in this court's decision in **Meisha Clement v R** and in the subsequent Sentencing Guidelines. Counsel submitted, however, that based on the nature of the case, the brutal killing of a tourist in his hotel room and the previous conviction of the accused, this case could be viewed as one of the worst. Counsel cited the decisions in **Carlington Tate v R** [2013] JMCA Crim 16, **Kevin Young v R** [2015] JMCA Crim 12, **Massinissa Adams et al v R** [2013] JMCA Crim 59, and **Paul Brown** [2019] JMCA Crim 3, contending that a sentence of 30 years was appropriate and with a reduction for the time spent in pre-trial custody, the time would be reduced to 25 years.

Analysis

[221] The appellant was sentenced in 2016 and the trial judge did not have the benefit of the guidance provided by this court in **Meisha Clement v R**. The Sentencing Guidelines were also not in force at the time the appellant was sentenced. The trial judge, however, was still required to sentence the accused according to well established principles of sentencing and the guidance provided in the case law emanating from this

court, which were then available. This includes the case of **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, which was cited with approval in **Meisha Clement v R**. Our concern, in considering this ground of appeal, is to determine whether the trial judge applied the proper principles in arriving at the sentence he did. If he did so, then this court will not interfere with the proper exercise of the trial judge's discretion.

[222] In this case, it is clear that the trial judge failed to take the structured approach suggested in **R v Everald Dunkley.** The trial judge was required to determine the appropriate sentence for the particular offence which had been committed by applying the established principles, taking into account the circumstances of the offence and the offender, and aided by previous sentencing decisions in similar cases. Due regard should also have been given to any submissions made by counsel.

[223] In the case of the offence of murder there is no established starting point but the usual range is between 15 years to life imprisonment. The sentencing judge, therefore, has a wide discretion, but it is one which must be judicially exercised. The starting point, therefore, ought to be the trial judge's considered view of what the circumstances of the particular case before him requires, and where it ends up, should be the result of a balancing of the mitigating and aggravating features, whilst avoiding double counting. In a case of murder, as in most other offences, no two cases are alike, and certainly no two offenders will have the same attributes and characteristics. However, the sentence should fall, as near as possible, within the range which the court has the power to impose, and

which is usually given for a similar offence in the same or similar circumstances. From time to time, however, there will be cases, which by sheer dint of circumstances, will fall outside the norm.

[224] In this case, the trial judge was aided by submissions from the appellant's attorney, and the appellant's antecedent report, and a social enquiry report. The court was told in the antecedent report that the appellant was born in Jamaica but had migrated at an early age to live in the United States of America. He was a licensed truck driver and barber. He was deported to Jamaica in 2001.

[225] Whilst living in Jamaica he was self-employed, raising and selling livestock, when he was arrested by the Freeport police for this offence. He is a divorcee and has five children, and at the time of sentencing had "one on the way". He had a previous conviction for shop-breaking and larceny, in 2003, in this jurisdiction.

[226] In his plea in mitigation, the appellant's attorney at trial brought all the relevant factors to the trial judge's attention, including the appellant's educational background, and asked the court not to take into account his previous conviction for shop-breaking and larceny, since this was a murder charge.

[227] It is clear from his sentencing remarks, that the trial judge did take into account the antecedent report and the social enquiry report on the appellant, including what was said about the appellant by his community members. In announcing the sentence, the trial judge said, at page 908 of the transcript, that:

> "The sentence will take into account the four years, four months you have been in custody..."

He then sentenced the appellant to life imprisonment with the stipulation that he serve 35 years before being eligible for parole.

[228] The trial judge indicated that he took into account the brutal nature of the crime. There is no indication of the point at which he started. The appropriate starting point in this case must be determined by the circumstances of the case and its intrinsic seriousness, which included factors such as the manner in which the deceased was killed, the fact that he was a visitor to the island, and the fact that he was targeted in his hotel room. Following from that is also the consideration not only of the loss of life and the irreplaceable loss to family, but the foreseeable consequence of a possible fall out in a vital sector of the economy which is largely dependent on the guarantee of the safety of tourists visiting the island.

[229] As a tourist temporarily residing in one of the island's many hotels, it was expected that the deceased, Mr Johnston, would have been safe there. Instead, inside his very own hotel room, after a "massive" and violent struggle, he received a number of stab wounds one of which went deep into the cavity of his chest. This one, the doctor said, damaged the upper lobe of the right lung, which caused it to collapse and resulted in the collection of blood in the chest cavity. The doctor's evidence is that the deceased had lost 50% of his blood which would have resulted in his immediate death (that is within a few minutes).

[230] This was clearly an unnecessary and gruesome killing and could pose a threat to the viability of an important sector of the economy. It not being the norm or usual for tourists to be murdered in their hotel beds in this country, we believe that this is a factor which justified a higher starting point than is usually the case.

[231] We accept that no indication had been given by the trial judge as to the point at which he begun, but operating on the assumption that the 35 years was imposed after due consideration of time spent in custody of 4 years and four months, then he would logically have considered approximately 40 years to be an appropriate sentence. The issue is whether that was an appropriate sentence for a case of this nature.

[232] The trial judge clearly thought that this was a case which required the imposition of a sentence at the higher end of the scale, and with that, we see no reason to disagree.

[233] The trial judge in sentencing the appellant, not only took account of the brutal nature of the crime and that the deceased was a tourist, but also considered the reports before the court and what the community and church colleagues had to say about the appellant. He also noted the appellant's previous conviction which occurred approximately two years after his return to Jamaica, and that the murder occurred a few years after that. Although the trial judge indicated no starting point, assuming a notional starting point of 40 years, and applying mitigating factors such as the fact that the appellant was said to have been gainfully employed, had a good community report, and the fact that his church brethren spoke highly of him, the sentence ought to be reduced to 38 years.

[234] Counsel, here and in the court below, were of the view that the appellant's previous conviction ought not to be taken into account as an aggravating feature. The trial judge did mention the previous conviction for shop-breaking and larceny but did not specifically state what impact it had on the sentence. In our view, however, it should be considered an aggravating feature, because the circumstances of the murder also involved an element of invasion, and although no motive was led at the trial, it was clear on the evidence, that robbery was likely involved. In those circumstances, bearing in mind the state the deceased's room was in after the murder, we cannot help but feel that the appellant's previous conviction for shop-breaking and larceny must be of relevance to any question of sentencing in the instant case. A sentence of 39 years imprisonment before being eligible for parole would, therefore, have been appropriate before the credit for time spent in custody of 4 years and four months was applied.

[235] Taking into account time spent in custody of four years and four months, the period would be reduced to 34 years and eight months.

[236] In coming to this position, we considered the cases cited by counsel for the appellant. In **Jarrett and Mitchell v R**, murder was committed in the course of a robbery with a firearm. The appellant's pleaded guilty. A sentence of life imprisonment with 30 years to be served before eligibility for parole was imposed. Although, on appeal to this court, the appellants' sentences were subsequently reduced to 19 years, on account of the guilty pleas, this court took the view that 30 years would have been an appropriate sentence had the appellants been convicted after a contested trial. In **Kirby**, the

deceased was stabbed after a disagreement. A sentence of 18 years imprisonment was imposed with no eligibility for parole until after serving 12 years. The conviction and sentence were set aside by this court and a new trial ordered. In **Omar Reid**, the deceased was murdered and dumped in a pit latrine. The sentence imposed for that crime was life imprisonment with a stipulation of a period of 25 years before eligibility for parole. In **Janet Douglas v R**, a period of 40 years before being eligible for parole was considered excessive and 20 years was substituted as being more appropriate for the murder of a woman in the circumstances of a love triangle.

[237] The cases of **Paul Brown v R**, **Kevin Young v R**, and **Carlington Tate v R**, cited by the prosecution, were also considered**.** None of these cases, we believe, bore any similarity to the instant case.

Conclusion

[238] Despite the various contentions raised by the appellant in this appeal, it is our considered view that the appellant did have a fair trial. There was no miscarriage of justice in this case and the conviction is safe.

[239] We are also of the considered view that the appropriate sentence in this case would have been life imprisonment, with a stipulation that the applicant serves 39 years before being eligible for parole and applying the credit for time spent, as the trial judge said he did, the effective period for eligibility for parole would be 34 years and eight months. We, therefore, make the following orders:

(1) The appeal against conviction is dismissed and the conviction is affirmed.

(2) Application for leave to appeal sentence is granted and the hearing of the application is treated as the appeal against sentence.

(3) The appeal against sentence is allowed.

(4) The sentence of life imprisonment is affirmed. The stipulation that the appellant should serve 35 years before becoming eligible for parole is set aside and substituted therefor is a stipulation that the appellant is to serve 34 years and eight months before being eligible for parole.

(5) The sentence is reckoned as having commenced from 22 April 2016.