[2020] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 50/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

RAMIE MILLER v R

Norman Godfrey instructed by Brown, Godfrey & Morgan, for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mr Dwayne Green for the Crown

15 January and 3 April 2020

SIMMONS JA (AG)

[1] Pursuant to his application for leave to appeal being granted by a single judge of this court, the appellant challenged his conviction and sentence. After hearing submissions in this appeal, we gave judgment on 15 January 2020 in the following terms:

> "1. The appeal against conviction and sentence is dismissed.
>
> 2. The conviction and sentence are affirmed.
>
> 3. The sentence is to be reckoned as having commenced on 8 June 2017."

We also indicated then that we would provide our reasons in writing. This is a fulfilment of that promise.

[2] The appellant, Mr Ramie Miller, appeared before Shelly-Williams J, sitting with a jury, in the Manchester Circuit Court, on an indictment charging him for the murder of Jonathan Dyght (the deceased), to which he pleaded not guilty. On 29 May 2017, he was convicted of manslaughter, by reason of provocation, and on 8 June 2017, he was sentenced to serve a term of 12 years' imprisonment at hard labour.

The Crown's ase

[3] The Crown relied on the evidence of three witnesses, Mr Alfred Dyght, the brother of the deceased, Mr Tony Banton, the sole eye witness, and Detective Sergeant Desmond Taylor, the investigating officer. The post mortem report of Dr Derrick Ledford, which was agreed by the parties, was read into evidence.

[4] Mr Alfred Dyght testified that on 20 December 2011 he attended a post mortem examination at Bent Funeral Home where he identified the body the deceased.

[5] Mr Tony Banton's evidence is that on 17 December 2011 sometime after 10:30 pm in the vicinity of Angie's shop/supermarket in Alligator Pond, in the parish of Manchester, the appellant and his girlfriend, Miss Ruth Dunbar, were engaged in an argument with the deceased. During the argument, the deceased said something to the appellant after which, Miss Dunbar picked up a stone, which was described as a "piece of building block", and flung it at the deceased. The stone hit the deceased in his head and caused him to fall to his knees. The deceased subsequently got up and ran towards Miss Dunbar. The appellant then ran towards him, held him around his neck from behind and placed the knife at his throat. An onlooker pleaded with the appellant not to cut the deceased's

throat, but the appellant proceeded to do so. Subsequently, the deceased turned to face the appellant and began hitting him in his face. The appellant swung the knife "all over" the deceased's body, delivering injuries to his armpit, belly and chest area. Mr Banton ran towards the appellant and kicked him in his side. The appellant fell. He then got up and he and Miss Dunbar ran in the direction of the police station.

[6] Detective Sergeant Desmond Taylor testified that on the day in question he received certain information which caused him to go to Angie's Grocery Shop. When he arrived, he saw the body of a male on the ground bleeding from wounds to his neck and right armpit. The person appeared to be unconscious and he sought the assistance of members of the public to take him to the hospital, where he was pronounced dead. Based on information received that night he commenced investigations into a case of murder.

[7] On 18 December 2011, Detective Sergeant Taylor spoke to the appellant at a residence. He observed that the appellant had wounds to his left thumb and the left side of his chest. The appellant said "a Johnno fus attack mi and mi baby mother and mi defend myself".

[8] The officer, the appellant and the appellant's father went to the appellant's house where the witness observed broken glass and what appeared to be a blood stain on the floor inside the appellant's room. A glass louvre blade was also missing.

[9] In cross examination he indicated that the appellant was taken to the doctor.

[10] The post mortem report which was admitted in evidence with the consent of the parties revealed that the deceased had a "large cut to the right medial arm" a "four inch cut to the left neck" and "a superficial cut to the left chest".

The appellant's case

[11] At the close of the Crown's case, counsel for the appellant made a no case submission, which was overruled by the trial judge. The appellant then gave an unsworn statement and called Miss Dunbar as his only witness.

[12] In his unsworn statement, the appellant stated that he and Miss Dunbar were on their way home when he saw the deceased heading in their direction with an open knife in his pocket. The deceased said "yuh lucky yuh never deh a yard". When they got home the appellant observed pieces of broken glass, a damaged window and a broken bottle on the bed beside their baby. The appellant and Miss Dunbar decided to go to the police station. On their way to the police station, they saw the deceased, and Miss Dunbar asked him "why him fling inna di house pon di pickney dem". The deceased immediately attacked Miss Dunbar with a knife, and the appellant ran to her defence. The appellant stated that both he and Miss Dunbar sustained injuries from the knife the deceased wielded. After being stabbed twice by the deceased, the appellant "…applied [his] knife, [and] start swinging".

[13] Miss Dunbar's evidence was that on the day in question, after receiving a phone call from her daughter, she and the appellant decided to go home. On their way they saw the deceased and an argument ensued between the appellant and the deceased. When

they arrived home, Miss Dunbar's older daughter complained that she had splinters in her eye as a result of the window being broken and described the attacker to them.

[14] On their way to the police station Miss Dunbar confronted the deceased who removed a knife from his pocket and used it to cut her on her left hand. During the altercation the appellant came to her rescue and they started to fight. She indicated that she did not see the appellant hold onto the deceased's throat and cut him. She also stated that she did not hear anyone telling the appellant not to cut the deceased's throat.

The appeal

[15] On 12 June 2017, the appellant filed a notice of appeal based on the following grounds:

> "(1) The verdict is unreasonable and cannot be supported by the evidence.
>
> (2) The Learned Trial Judge erred in law when she rejected the Appellant's No Case Submission and thereby depriving [sic] him of a fair trial.
>
> (3) The Learned Trial Judge erred in law when she left Provocation to the Jury when it did not arise on the Prosecution's case or on the Defence's case thereby denying the Appellant a fair trial."

[16] The appellant also sought and was granted leave to file and argue additional and/or supplemental grounds of appeal. There was no objection from the Crown. The additional grounds were as follows:

> "(4) The Learned Trial Judge failed to adequately direct the jury as to the application of the law on self-defence to the

evidence in the case and thereby deprived the Appellant of a fair trial.

(5) The Learned Trial Judge failed to direct the jury that where there are proven or admitted material inconsistencies, in the testimony of a witness, those inconsistencies may only be resolved through the mouth of the witness, and left unresolved no positive findings of fact against the appellant may be made upon them."

Ground 1: The verdict is unreasonable and cannot be supported by the evidence.

Ground 2: The learned trial judge erred in law when she rejected the appellant's no case submission and thereby deprived him of a fair trial.

Appellant's submissions

[17] Counsel for the appellant, Mr Godfrey submitted that since the Crown's case rested wholly on the evidence of the sole eyewitness, Mr Tony Banton, his credibility was a critical consideration. Mr Godfrey noted that the witness' account of the events at trial differed substantially from his statement to the police.

[18] Counsel also submitted that when giving evidence of what occurred during the altercation, Mr Banton stated that the appellant "held" the deceased around his neck prior to cutting. He pointed out that in his statement to the police and his evidence at the preliminary enquiry, Mr Banton had stated that the appellant "rushed" towards the deceased, put the knife at his neck and slashed his throat.

[19] Mr Godfrey contended that both accounts are completely different as regards to how the injury was inflicted. He argued that if the appellant had held the deceased by the throat, as asserted by Mr Banton, the defence of self-defence would not arise. Self-

defence arose he said, because the deceased "rushed" at Miss Dunbar after she threw the stone at him. It was submitted that the sequence of events as described in Mr Banton's evidence must be scrupulously scrutinized against the inconsistent accounts he had previously given.

[20] Mr Godfrey also referred to Mr Banton's evidence that while the appellant was "cutting up" the deceased, Miss Dunbar ran towards the deceased and swung a broken bottle at him. Under cross-examination Mr Banton admitted that, in the Resident Magistrate's Court, he stated that he did not see Miss Dunbar with a broken bottle. When Mr Godfrey queried those inconsistent statements, Mr Banton's response was that he did not remember. Mr Godfrey therefore submitted that Mr Banton, being the sole eyewitness, ought to have presented a consistent account of the sequence of events.

[21] Mr Godfrey pointed out that the Crown conceded that in that particular instance there was no explanation provided for the inconsistency. He submitted that coupled with Mr Banton's refuge into "lapse of memory" when confronted with his statement, which Detective Sergeant Taylor testified had been recorded by him, there was sufficient basis for the learned trial judge to have upheld the no case submission. He stated that the trial judge ought to have treated with the inconsistencies in a more detailed fashion, as any explanation from the witness as to his lapse of memory would have been negatived by the evidence of Detective Sergeant Taylor. In support of that point, counsel relied on the case of **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987.

The prosecution's submissions

[22] The learned Director of Public Prosecutions, Miss Paula Llewellyn QC, submitted that the main issue in this matter was credibility. The Crown's case was indeed based on the evidence of a sole eyewitness, Mr Banton, who was a friend of both the appellant and the deceased. Miss Llewellyn contended that under robust cross-examination, Mr Banton admitted that he omitted "things". She called on the court to bear in mind, however, that the incident occurred in 2011 and the trial took place in 2017. She further contended that the trial judge was at pains to highlight the issues of credibility and reliability of the sole eyewitness.

[23] It was also submitted that it is not sufficient for the appellant to simply state that his appeal should be allowed because the verdict is not supported by the evidence. Miss Llewellyn relied on the case of **R v Joseph Lao** (1973) 12 JLR 1238 and submitted that the standard for an appeal to be allowed on this basis, as stated by Henriques P, was:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the [respondent] and the [appellant], or the matters which fell for and against him are carefully and minutely examined and set out against each other, it may be said that there is some balance in his favour. He must show that the verdict is so against the evidence as to be unreasonable and insupportable."

[24] Additionally, Miss Llewelyn referred to page 1241 of **R v Joseph Lao**, which stated:

> "The court will set aside a verdict on [the ground that the verdict is unreasonable and cannot be supported by the

> evidence], where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[25] The Director further submitted that that was not the case, as when the evidence is taken as a whole, the verdict cannot be said to be obviously and palpably wrong. The jury saw and heard the witnesses for both the appellant and the Crown, as well as the unsworn statement of the appellant, and had the benefit of observing their demeanour. The jurors were the arbiters of the facts.

[26] It was also submitted that the learned trial judge identified the issues in the case to be self-defence, provocation and credibility; and she took great pains to give an overview of all the evidence, including references to the inconsistencies and omissions in Mr Banton's evidence. The learned trial judge made it clear to the jury that the success of the Crown's case depended on their view of the Mr Banton's evidence, on which the Crown rested.

[27] The Director argued that once the jury found Mr Banton to be credible, and the learned trial judge gave the requisite guidance in relation to credibility, the Crown's evidence was sufficient to establish the offence of manslaughter. The jury clearly rejected the appellant's claim of self-defence and accepted the Crown's witness as to fact. In the circumstances, it was submitted that the appellant received a fair trial and no grave injustice was caused.

[28] With respect to the no case submission, it was submitted that the learned trial judge rightly rejected the no case submission made on behalf of the appellant. The learned Director argued that once the minimum elements of the offence were made out,

the trial judge did not have a duty to decide who was telling the truth. She relied on the case of **R v Joseph Lao**, and submitted that the appeal had no merit, as the trial judge was mindful of the authorities regarding the no case submission.

[29] The Crown also relied on the case of **Steven Grant v R** [2010] JMCA Crim 77, in which Harris JA, at paragraphs [67] and [68], outlined the principles which are to guide the court in its consideration of a no case submission.

[30] Reference was also made to the case of **Kissooa and Singh v The State** (1994) 50 WIR 266 which addressed how a judge should treat with a no case submission, even if he believed the witness is lying. It stated:

> "Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nevertheless have left the case to the jury. It cannot be too clearly stated that the judge's obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the Jury."

[31] Miss Llewelyn reiterated that the learned trial judge carefully highlighted the inconsistencies and discrepancies in Mr Banton's evidence, as well as his responses to the "vigorous cross-examination of Mr. Godfrey". She contended that notwithstanding the inconsistencies, discrepancies or omissions, there was sufficient evidence before the jury to ground a guilty verdict, considering that the trial judge's directions were adequate.

Discussion and analysis

[32] The essence of Mr Godfrey's complaint is that the failure of the learned trial judge to uphold the no case submission, given the state of the evidence, resulted in a miscarriage of justice.

[33] In this case, the evidence of Mr Banton was critical in the determination of guilt or innocence. The issue is whether the evidence presented to the court was so tenuous that the case ought not to have been sent to a jury. The court in its determination of this issue is guided by the principles in **R v Galbraith** [1981] 1 WLR 1039. In that case Lord Lane CJ in outlining the approach which is to be adopted by the court stated:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."[1]

[1] Page 1042

[34] Where there are inconsistencies and/or discrepancies in the testimony of a witness the issue of credibility naturally arises. Such occurrences are not uncommon and a trial judge is required to treat with them and ultimately decide whether as a matter of law the case should be removed from the jury. In conducting this exercise, the trial judge is guided by the principle that questions of fact are exclusively within the jury's domain and it is for them to determine whether a witness is credible or not. This involves the consideration of the strengths and weaknesses of the testimony of the particular witness. Inherent in the directions that are to be given to the jury in this area, is an acknowledgement that not all inconsistencies and discrepancies go to the root of the case. Consequently, it is for the jury to determine whether or not the credibility of a witness has been undermined in those circumstances or remains intact.

[35] In **Steven Grant v R**, which was cited by the Crown, Harris JA cited with approval the principle in **R v Galbraith.** The learned judge of appeal also stated:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited. In R v Baker and Others (1972) 12 JLR 902, Smith JA (as he then was) said:
>
> > 'The purpose of proving that a witness has made a previous inconsistent statement is to discredit

> his evidence in the eyes of the jury and they alone, as the judges of fact who must decide whether the witness has been discredited and to what extent. No case has yet altered this position.'

In **Mills v Gomes** (1964) 7 WIR 418 at 440 Wooding C.J. said:

> 'In our view then the direction to be given must have due regard to the facts of each case. No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The Judge may, and in cases such as we are now considering we think it is his duty to give such directions as will assist the jury in assessing the credit worthiness of the evidence given by the witness whose credibility has been attacked but it can be but seldom that the circumstances will warrant his going beyond that. More especially, where a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement due regard being had to the explanation proffered.'

[69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony.

[70] Even in circumstances where a judge is of the view that, by reason of discrepancies and inconsistencies, a conviction could not be supported by the evidence, it is not the judge's duty to stop the case and this is so, even if he believes the witness to be lying. In **Kissooa and Singh v The** State (1994) 50 WIR 266 Kennard JA at page 289, said:

> 'Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nevertheless have left the case to the jury. It cannot be too clearly stated that the judge's obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury.'"

[36] Mr Godfrey has argued that the case should have been withdrawn from the jury based on the following:

(1) The sequence of events as described by Mr Banton is inconsistent. In examination in chief, Mr Banton gave evidence that the appellant's spouse Ruth, threw a stone which hit the deceased in his forehead causing him to fall on his hands and knees. He then got up and was rushing towards her when the appellant held him around his neck from behind with a knife at his throat. Someone called out to the appellant "Don't cut the man throat Ramie". The deceased turned and faced the appellant and was using his hands to hit the appellant in his face. The appellant it was said used a knife and slashed the deceased all over his belly and stomach. Whilst the appellant was cutting the deceased Ruth ran towards the deceased swinging a broken bottle at him.

However, in cross examination, the witness admitted that in the Resident Magistrates Court he had stated under oath that he never saw her with a broken bottle.

(2) On the same subject, Mr Banton was asked if he recalled saying in the Resident Magistrates Court when asked if he saw Ruth do anything else saying "no she stood up and watch ramie cutting Johnno". His response was that he didn't remember all of it. That portion of his deposition was admitted in evidence as exhibit 1.

(3) The witness also stated that he did not say in his statement to the police that while the appellant was swinging the knife at the deceased Ruth was also swinging a bottle at the deceased. The relevant portion of his statement was admitted in evidence as exhibit 2. The witness maintained that both accounts were true.

[37] In his submissions, counsel for the appellant had urged us to find, in accordance with **R v Curtis Irving** (1975) 13 JLR 139 and **Negarth Williams v R** [2012] JMCA Crim 22, that the witness was so discredited that the learned trial judge ought to have upheld the no case submission.

[38] In **R v Curtis Irving**, the applicant was convicted of murder based on the evidence of a sole eyewitness. At the trial the witness stated that on the night in question he heard a "swishing" sound. He then looked through a crevice in the wood on the side of his house which faced a shed. He saw the deceased lying down at the door of the shed

and the applicant standing at the door with a cutlass. The applicant then chopped the deceased and left. In cross examination, he said that the deceased was inside the shed and the applicant was at the door. He later stated that at that time he did not see the applicant. He confirmed that he had stated at the preliminary enquiry that he had said that he did not see the applicant when he saw the deceased inside the shed. He also stated that he had not spoken the truth at the preliminary enquiry. His account also changed, in that he now asserted that he did not see the applicant chop the deceased. His evidence was also questionable in that although the deceased was his friend, he told no one about the incident (he went to his sister's house and went to sleep), nor did he go back to the scene to check on what had happened to the deceased. Later in his cross examination he stated that he saw the deceased lying in the yard in front of his house (not inside the shed or at the door of the shed as stated previously). This was followed by testimony that he had seen the deceased in the shed and the applicant in the yard. There were several other areas of conflict between his evidence at the preliminary enquiry and that given at the trial.

[39] His appeal was allowed. Graham-Perkins JA stated:

> "By virtue of the incomprehensible maze of admitted untruths and blatant and unexplained contradictions and inconsistencies in the evidence of Simpson we find it quite impossible to understand how any reasonable jury could have returned a verdict adverse to the applicant. If the learned trial judge had taken the view that the evidence of Simpson had been discredited by the cross examination and thus rendered so manifestly unreliable that no reasonable tribunal could safely act on it we apprehend he would have been perfectly well justified. Perhaps he thought he should be guided by the

following dicta of Wooding, CJ, in **R. v Daken** (1964) 7 W.I.R. at p 444 approved by this court in **R. v. Bernard** (1973) SCCA No. 26 of 1973.

> 'No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The judge may and in cases such as we are now considering we think it is his duty to, give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that.'

We think, however, that the circumstances of this case fairly warranted Henry, J., going beyond giving directions with a view to assisting the jury in assessing the credit-worthiness of Simpson whose credibility had been so successfully attacked. This was no mere matter of an apparent contradiction as in **R v Bernard**. This was a case of a self-confessed liar who claimed to have seen the applicant commit an act of murder and at the same time, admitted that he had not seen any such thing."

[40] In **Negarth Williams v R** the sole eyewitness was totally discredited in respect of the evidence he gave about the same incident at a previous trial about the incident. The first matter on which he was discredited was whether he had a firearm on the evening before the incident. The second was whether he had a gun on the day of the incident. At the trial he denied that he had had a firearm. This differed from his admission at the earlier trial that he had had a firearm.

[41] When he was cross examined he said that he didn't recall saying that he had had a firearm. He then said that he did not have a firearm on the day of the incident and had never held a firearm in his life. No explanation was given for these inconsistencies even

when some of his previous statements were put to him. The forensic evidence which was admitted into evidence during the case for the defence, revealed that he had elevated levels of gun powder residue on his hands.

[42] The appeal was allowed. Brooks JA found that the learned trial judge's approach in dealing with the inconsistencies was "less than effective in demonstrating the complaint by the defence of [the witness'] unreliability". In this regard, he stated that the contradictory documentation ought to have been read to the jury once admitted into evidence. This approach, he opined, would have assisted the judge and the jury in their appreciation of the gravity and extent of those inconsistencies. At that stage, the learned trial judge would "have been more alert to the next step, which…he ought to have taken, which was to have stopped the case at the end of the case for the defence and directed the jury to return a formal verdict of not guilty".

[43] In this matter, there is no dispute that the appellant killed the deceased. The issue is the circumstances in which the act was committed. The inconsistencies and discrepancies in this matter, largely centre around whether Ruth attacked the deceased with a concrete block and a broken bottle. Another area in dispute is whether the appellant swung the knife at the deceased or if he held him from behind. There is no dispute that the appellant used a knife to cut the deceased. Mr Banton said that after Miss Dunbar hit the deceased with a stone he chased her. It was whilst he was chasing her that the appellant ran towards him, held him and inflicted the fatal injury.

[44] The medical evidence does not support Mr Banton's assertion that Miss Dunbar inflicted a wound to the deceased's head. The fact that he never told the police that the appellant held the deceased from behind is a matter which goes to his credibility.

[45] Mr Godfrey had submitted to the learned trial judge that the Crown could not negative self-defence in light of the fact that the appellant and Miss Dunbar sustained injuries. Whether the appellant was acting in self-defence is, however, dependent on whether the jury believed that the appellant honestly believed that he or Miss Dunbar were under attack and, if so, whether the amount of force used to repel the attack was reasonable. This was a matter entirely for their determination.

[46] Having assessed the nature of the inconsistencies, we are of the view that they do not seriously undermine the evidence presented by the Crown so as to render the case so weak or tenuous that a reasonable jury properly directed could not convict on it. In the circumstances, we find that there is no merit in grounds 1 and 2.

Ground 3: The learned trial judge erred in law when she left provocation to the jury when it did not arise on the prosecution's case or on the defence's case thereby denying the appellant a fair trial.

[47] Mr Godfrey submitted that by directing the jury to consider the defence of provocation, the learned trial judge deprived the appellant of a proper consideration of the complete and total defence of self-defence. This amounted to a serious misdirection by the "non-direction" of the learned trial judge as to how the inconsistencies of the sole eyewitness should have been treated with and the lack of evidence explaining how the appellant and Miss Dunbar came by their injuries.

[48] It was submitted that it was always the appellant's defence that the deceased was armed. The learned trial judge, therefore, failed to properly direct the jury on the law of self-defence and its application to the evidence. The issue of provocation did not arise on the appellant's or the respondent's case. The learned trial judge's direction amounted to a misdirection as there was no evidence of anything said or done to the appellant by the deceased that could have amounted to provocation.

[49] The learned Director, in response, submitted that the learned trial judge did not err in law when she left the defence of provocation to the jury. It is trite law that a trial judge can examine evidence and give directions in relation to a relevant defence, even if that defence was not relied on by the accused. Miss Llewellyn contended that, in the instant case, the issue of provocation was indeed live and the learned trial judge was astute in her treatment of the defence of provocation. She further submitted that the learned trial judge also dealt with all aspects of self-defence, of oneself and another, before addressing the defence of provocation.

[50] It was also submitted that both defences can co-exist and, in the circumstances, if the learned trial judge did not direct the jury on provocation, the Crown would view that to be a misdirection. In support of the issue of provocation being addressed by the learned trial judge, counsel referred to Miss Dunbar's evidence of being attacked including injuries she and the appellant received. She also referred to the incident at Miss Dunbar's home, as well as the fact that the altercation occurred on their (the appellant and Miss

Dunbar) way to police station. The learned Director noted that Miss Dunbar did not take her child to the doctor.

[51] Miss Llewelyn referred to the case of **R v Stewart** [1995] 4 All ER 999 which stated:

> "It is now well established that even if the defence do not raise the issue of provocation, and even if they would prefer not to because it is inconsistent with and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked; and this is so even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight."

[52] The learned Director asserted that the instant case was one in which the defence of provocation arose on the evidence, notwithstanding that it was not relied on by the appellant at trial.

[53] It was submitted that **R v Stewart** also treats with how a judge must direct jurors in a case such as this, it stated:

> "…where the judge must, as a matter of law, leave the issue of provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that the appellant lost his self-control. This is particularly important where counsel has not raised the issue at all. In many cases it may be obvious, for example if there has been a fight and a defence of self-defence is rejected by the jury, or if there is evidence of a row or violence and the defence is nevertheless one of accident, however improbable that may be. If this guidance is not given, the jury will find it difficult to answer the two questions posed, namely did the accused lose his self-control as a result of things done or said and, more particularly, whether a reasonable man would have been so provoked by such things... "

[54] The learned trial judge pointed out the areas of the evidence that could be deemed provocation. Namely, the evidence of an argument between the deceased, the appellant and Miss Dunbar. Additionally, the evidence from Miss Dunbar that the deceased accosted the appellant and thereafter they went home to learn that the deceased had attacked their home and endangered their children. The issue of provocation was also supported by the evidence that the deceased assaulted Miss Dunbar with a knife prior to the appellant pushing him off her. The learned Director submitted, therefore, that the learned trial judge was well grounded in law by leaving the defence of provocation to the jury and that she did so in "simple and straightforward terms".

Discussion and analysis

[55] Provocation is defined as "…some act, or series of acts, done by the dead man to the accused which could cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."[2] Mr Godfrey has complained that the learned trial judge committed an error when she left the issue of whether the appellant was provoked to the jury. The Crown has argued that the issue arose on the evidence and as such the learned trial judge was quite correct.

[56] In **Bullard v the Queen** [1957] AC 635 this issue was dealt with by Lord Tucker, who said:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of

[2] R v Duffy [1949] 1 All ER 932n

> provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

The above principle applies whatever the main defence may be and even where counsel for the accused indicates that provocation should not be put to the jury.[3] Where as a matter of law this issue is left to the jury it is incumbent on the trial judge to indicate what was said or done which may amount to provocation as well as those aspects of the evidence which may support the conclusion that the accused lost his or her self-control.[4]

[57] We agreed with the learned Director that the issue of provocation did indeed arise on the evidence. The learned trial judge was therefore correct to have left it for the jury's consideration. We are also of the view that the learned trial judge's directions were quite comprehensive and cannot be faulted.

Ground 4: The learned trial judge failed to adequately direct the jury as to the application of the law on self-defence to the evidence in the case and thereby deprived the appellant of a fair trial.

[58] Mr Godfrey submitted that, although on the Crown's case the deceased was unarmed, that would not on its own deprive the appellant of self-defence, especially in circumstances where the appellant perceived danger to his girlfriend and did not have an opportunity to reflect on the appropriate response. Counsel referred to the damage to the appellant's and Miss Dunbar's home and the harm to their children. Moreover, he

[3] R v Dhillon [1997] 2 Cr App R 104
[4] R v Stewart [1995] 4 All ER 999 at 1007

submitted that it is the appellant's intervention that prevented the deceased from "reaching" Miss Dunbar.

[59] Counsel contended that it should be noted that, on the Crown's case, injuries were observed on the appellant by Detective Sergeant Taylor on the night of the incident, and those injuries were so serious that they required medical attention. He also noted that injuries were also observed on Miss Dunbar. Mr Godfrey submitted that it was the Crown's duty, since they did not challenge the evidence of the injuries, to explain the existence of those injuries, as their presence was more consistent with the appellant's case, which was that he acted in self-defence. Detective Sergeant Taylor also accompanied the appellant to his house and observed the damage to the glass windows, which was consistent with the appellant's case. In support of this submission, counsel relied on the case of **R v Washington Sweeny** (1972) 12 JLR 980.

[60] On the question of whether excessive force was applied, counsel submitted that based on the totality of the circumstances which led to the deceased's fatal injuries, it would be placing too much of an onerous burden on the appellant, who in the moment acted under the honest belief that Miss Dunbar was under serious attack from the deceased. In the circumstances, his honest belief, upon which he acted was reasonable.

[61] Mr Godfrey submitted that this was a classic case of self-defence of another, however the learned trial judge took the jury's mind to provocation, and therefore deprived the appellant of the complete defence of self-defence.

[62] The Crown contended that the learned trial judge adequately directed the jury on self-defence and highlighted the evidence in relation to it. The learned trial judge also addressed how self-defence would affect their assessment of whether or not the appellant was guilty of murder. Reference was made to the various points in the learned trial judge's summation where she discussed the issue of self-defence. It was submitted that if the trial judge sought to separate self-defence and provocation then this could have confused the jury based on "the evidence of either narrative". The trial judge's approach, did not in any way amount to a miscarriage of justice nor did it undermine the fairness of the trial.

Discussion and analysis

[63] The learned trial judge in our view gave ample directions on the issue of self-defence. She also directed the jury's attention to the evidence of Detective Sergeant Taylor that he observed that the appellant had injuries. She also reminded them that when the officer asked him about those injuries he said that it was the deceased who first attacked him and Miss Dunbar and that he was defending himself. The learned trial judge referred to Mr Godfrey's submission that those injuries supported the appellant's case that he was defending himself and referred them to her earlier directions on the law of self-defence.

[64] We find no fault with the learned trial judge's approach and are of the view that this ground has no merit.

Ground 5: The learned trial judge failed to direct the jury that where there are proven or admitted material inconsistencies, in the testimony of a witness,

those inconsistencies may only be resolved through the mouth of the witness, and left unresolved no positive findings of fact against the appellant may be made upon them.

[65] Mr Godfrey submitted that the Crown at the time found it necessary to deal with the inconsistencies regarding the sole eyewitness, Mr Banton, because those inconsistencies were glaring. He submitted that the inconsistencies spoke to the reliability of the witness.

[66] It was submitted that the learned trial judge failed to mention the material inconsistency between the evidence of the pathologist as to the absence of injuries to the forehead and belly of the deceased, as was described by Mr Banton. In support of this point, he relied on the case of **Andre Manning v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2006, judgment delivered 16 October 2009.

[67] He contended that the issue of the "sequence of events" was material because there is a marked difference between "rushing at someone" and "holding them by the throat". The learned trial judge, therefore, failed to direct the jury on the totality of the circumstances, such as, the damage the appellant observed at his home and the attack on his girlfriend by the deceased. In those circumstances, the appellant's intervention ought to have been measured by the totality of those circumstances; otherwise it would amount to a misdirection.

[68] Mr Godfrey argued therefore that, considering that Mr Banton was completely discredited under cross-examination, the verdict was against the weight of the evidence,

and should not be allowed to stand. Furthermore, the appellant was denied a fair trial. The appellant therefore prayed that the appeal be allowed, the conviction be quashed, the sentence be set aside and the verdict of an acquittal be entered.

[69] The Crown placed reliance on its submissions in relation to grounds 1 and 2. It was contended that they were equally applicable to ground 5 as the issues are intertwined.

[70] Miss Llewelyn reiterated, however, that the learned trial judge, having directed the jury on how to deal with the discrepancies, inconsistencies and omissions of the main witness, Mr Banton, it was then left to the jury to decide what to accept and what to reject.

[71] In the circumstances, the Crown submitted that this ground had no merit, and the conviction and sentence should be affirmed.

Discussion and analysis

[72] The learned trial judge's directions in relation to the inconsistencies in the Crown's evidence cannot be faulted. She highlighted those inconsistencies and reminded the jury that they are to examine them in order to determine whether the witness was being truthful. She also reminded the jury of the submissions made by the Crown and Mr Godfrey and conducted a detailed review of Mr Banton's evidence, pointing out the areas where inconsistencies may have arisen. This included the medical evidence that no injury was seen on the deceased's forehead despite Mr Banton's evidence that Miss Dunbar hit him with a building block and that he saw blood.

[73] Mr Godfrey relied on **Andrea Manning v R** in support of his submissions that the inconsistency in the witness's account of how the injury was inflicted was a material one; did the appellant run up to the deceased and slash his throat or did he hold him from behind? The case was one in which the evidence of the witness was inconsistent as to whether he saw the appellant shoot the deceased as he never said so in his statement to the police or at the preliminary enquiry. The witness also gave evidence that the appellant had put the gun at the deceased's head. However, the evidence of the pathologist did not support that assertion as no gun powder markings were found at the location of the fatal wounds. The location of the wound on the left side of the deceased's face was also not in keeping with the witness' evidence that he was shot on the right side. In those circumstances, the court found that "…the evidential base fashioned by the prosecution would appear to be less than 'slender'" and the no case submission ought to have been upheld.

[74] There is no dispute that it was the appellant who inflicted the fatal injury to the deceased. Mr Banton's credibility was called into question in relation to the circumstances in which the deceased was killed. The jury had to determine whether they accepted his evidence in light of the inconsistencies. Those inconsistencies, in our view, did not destroy the evidential base of the Crown's case. The jury, having been directed in terms of the law and reminded of the evidence, were properly left to determine whether Mr Banton's evidence was credible.

[75] Having examined the transcript, we agreed with the learned Director that the directions of the learned trial judge were adequate and no injustice was caused to the appellant. This ground is without merit.

Conclusion

[76] It is for the above reasons that we made the orders set out in paragraph [1] of this judgment.