[2025] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA**

SUPREME COURT CRIMINAL APPEAL NO 5/2018

JERMAINE MINOTT v R

Mrs Melrose Reid for the appellant

Miss Donnette Henriques and Daniel Kitson-Walters for the Crown

26, 27 July 2023 and 24 January 2025

Criminal Law - Appeal against conviction for manslaughter - Whether 'lurking doubt' principle applicable

Criminal Law - Summation - Whether directions on defences of accident, self-defence and provocation were adequate - Whether directions on inconsistencies were sufficient - Whether manslaughter properly left for jury's consideration - Verdict - Challenge to correctness of directions on unanimous verdict

Criminal Law - Sentence - Whether the sentence imposed for manslaughter correct in law

P WILLIAMS JA

Background

[1] On 27 November 2017, Mr Jermaine Minott ('the appellant') was arraigned in the Home Circuit Court before a judge ('the learned judge'), sitting with a jury on an indictment that charged him with murder. After a trial lasting several days in November and December 2017, the jury returned a verdict of not guilty of murder but guilty of manslaughter. On 25 January 2018, the learned judge sentenced the appellant to "life

imprisonment with a recommendation that [he] serve 13 years hard labour before being eligible for parole".

[2] By way of notice of appeal dated 6 February 2018, the appellant sought leave from this court to appeal his conviction and sentence. On 3 January 2022, a single judge of this court considered the application and found that there may have been weaknesses in the summation and the reception of the verdict in the following areas: a) in light of the several defences the jury had to consider, the route to the verdict appears unclear; b) when the jury came back divided, the learned judge did not adequately find out the balance of the division, nor did she inquire whether she could have assisted the jury in any way; and c) it is questionable whether the verdict as to murder was clear before the verdict was taken as to manslaughter. Leave to appeal the conviction was granted. However, the single judge stated that in the event the conviction was upheld, leave to appeal the sentence was refused since the sentence was not manifestly excessive.

[3] The undisputed background on which the murder charge arose is that on 21 September 2012, the appellant attended the home of Ms Aneika Richardson ('Miss Richardson'), with whom he had a child, after receiving a call from her alerting him of the presence of another of her children's father, Mr Omar White ('the deceased') at the home. Upon the appellant's arrival at the home, there was a confrontation between the two men, which ended with the appellant utilising a firearm to shoot the deceased, who died as a result of the gunshot wound that he sustained.

The trial

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

[4] The prosecution relied on the oral evidence of three witnesses at the trial. Those witnesses were Miss Richardson, Detective Inspector Dennis Simpson ('Detective Inspector Simpson') and Dr Perthasarathi Pramanik ('Dr Pramanik'). By agreement, the statements of Miss Keisha Brown, Corporal Annieffe Wilson and Detective Corporal Craig McPherson were admitted into evidence as exhibits and read to the jury.

Aneika Richardson

[5] Miss Richardson's evidence was that on 21 September 2012, at approximately 9:00 am, she was at her home (where she lived with her four children), in Riverton Meadows off Spanish Town Road in Kingston. She was attending to her melon garden when the deceased entered her yard. Whilst they were discussing their daughter, the appellant, with whom she had another child, entered the yard. She admitted that she had called and told him that the deceased was at the home.

[6] When the appellant entered, he enquired of the deceased his reason for being there. The deceased replied that he had come to look for his baby mother. The appellant insisted that the deceased should "come out a di woman yard". The deceased eventually raised his hands and agreed to leave. Miss Richardson said that the appellant was standing in front of the gate through which the deceased had to exit the yard. When the deceased was passing the appellant in order to pass through the gate, Miss Richardson saw the appellant grab him. The deceased, in turn, pushed the appellant. Thereafter, Miss Richardson said the appellant took a gun from under his shirt and fired a single shot at the deceased. The deceased managed to run through the gate and into a neighbour's yard. The appellant ran out behind the deceased. Miss Richardson got her child and exited her gate, whereupon the appellant came from the neighbour's yard and waved the gun at her. He eventually entered his car and drove away. After he drove away, Miss Richardson went to her church sister's home, and whilst there, she heard police sirens.

[7] Miss Richardson explained that she observed what appeared to be blood in the neighbour's yard. She said that the deceased had not attacked the appellant before or after the time the appellant removed the gun from under his shirt. Further, she had not seen the deceased with anything in his hands during the incident. She gave further evidence that at approximately 1:00 am or 2:00 am, either that night after the incident or the following night, the appellant visited her home and spoke with her. Sometime later, he spoke with her again by the telephone and apologised "fi kill Omar" and said he had not gotten over it. She said that nothing was blocking her view when she saw the

appellant reach for the gun on the day of the incident. She could see his entire body when he entered her yard and she saw his face for "10, 15 minutes or so".

[8] In cross-examination, Miss Richardson denied that the appellant was living with her and her children at the time of the incident. However, counsel who appeared for the appellant at trial, Mr Paul Gentles, suggested to her that she was lying based on the statement she gave to the police indicating that the appellant had moved in with her in July 2011 and had been living there since. Nonetheless, she maintained her stance that he was not living with her at the time of the incident. Mr Gentles subsequently confronted Miss Richardson with her statement given to the police where it was also recorded that she said the appellant had moved in with her because she was fearful of the deceased. Initially, Miss Richardson denied saying so but eventually agreed that she had done so. She explained that her initial answer was in response to the question she was asked.

[9] Miss Richardson testified that the appellant had visited her home earlier in the day of the incident and had left taking his daughter with him. She explained that her reason for contacting the appellant that morning was to let him know the deceased was there because she did not know if the appellant would "soon come because if [the appellant] come and see [the deceased], a problem same way". She maintained that she had not called the appellant for him to return and do anything. She insisted that she never knew that the appellant would have returned at all and that he had no need to return to her rescue.

[10] Miss Richardson agreed that the deceased had been imprisoned for stealing but denied knowing whether it was money he had been charged with stealing. She insisted that the deceased had not left stolen money with her which she had spent while he was incarcerated. She denied that the deceased spoke to her about money when he visited the home that morning. She denied calling the appellant and telling him that the deceased was at her home with a gun and was causing her to feel frightened, afraid, and in need of help. She further denied that she knew the appellant would have come to the home to protect her because of what she told him. She maintained that after the appellant

arrived at the yard and spoke to the deceased, the latter held up his hands in the air and walked towards the gate. She denied that the deceased attempted to pull out a gun from his waistband as he was going through the gate and that the appellant tried to "push it back down". She also refuted the suggestion that there was a struggle between the two men for the gun and that was when the deceased was shot. She insisted that she saw when the deceased got shot in the back as he was exiting the yard through the gate and he was not shot to his left side during a struggle.

[11] Under re-examination, Miss Richardson clarified that the appellant had, indeed, lived with her for some time "long before the incident" but had returned to his home.

Detective Inspector Dennis Simpson

[12] At the time of the trial, Detective Inspector Simpson was stationed at the Denham Town Police Station. In January 2013, he was assigned to the Kingston and Saint Andrew Major Investigation Task Force. He testified that on 14 January 2013, he was conducting homicide investigations in the parish of Clarendon. While travelling along the main road to Kellits, he intercepted a motor car and accosted the driver, who was the appellant. Detective Inspector Simpson advised the appellant that he was investigating the murder of the deceased. Detective Inspector Simpson said that the appellant's response was "Officer, a him did have the gun. Me and him wrestle and the gun go off and him get a one shot. Big man ting, a him did have the gun, notice a only one shot him get, mi did a defend miself".

[13] Detective Inspector Simpson escorted the appellant to the Crofts Hill Police Station in Clarendon and thereafter transferred him to the Hunts Bay Police Station. In response to the judge's questions, Detective Inspector Simpson explained that he was part of the team investigating the murder of the deceased. He further clarified that this investigation brought him to Clarendon "directly in pursuit" of the appellant. During cross-examination, Detective Inspector Simpson acknowledged that the appellant did not attempt to escape when he was stopped and confronted.

The statements

[14] Miss Keisha Brown stated that the deceased was her brother and they shared the same mother but had different fathers. She indicated that the deceased was born on 10 September 1984. At the time of his death, he was a truck driver employed by the Cement Company. Miss Brown further stated that on 25 September 2012, she was present for a post-mortem examination at the House of Tranquillity Funeral Home, where she positively identified her brother's body to both the police and Dr Pramanik.

[15] Corporal Annieffe Wilson stated that on 21 September 2012, he was on mobile patrol duty in the St. Andrew South Division, driving a marked service vehicle with Constable Hunter. At around 10:10 am, he received information about the shooting of a man in the Riverton Community. He proceeded to the area and citizens directed him to a premises where he saw a man lying on his back with what appeared to be a gunshot injury. The man was taken to the Kingston Public Hospital in the service vehicle where he was pronounced dead on arrival. Corporal Wilson stated that he then proceeded to the Tranquillity Funeral Home with the body of the deceased. There he searched a bag which was on the deceased, and a passport was found with a picture resembling the deceased bearing the name Omar Anthony White.

[16] Detective Corporal Craig McPherson stated that on the date of the incident at approximately 9:00 am, he was directed to the scene of a homicide in Riverton Meadows. He along with other police personnel from the Forensic Crime Scene section of the Kingston and Saint Andrew Major Investigations Task Force visited the scene, which was cordoned off. Detective Corporal Dwayne Grant briefed him at the scene. He noticed a trail of blood leading through a house and a pool of blood at the back of the house. He processed the scene and took notes. Afterwards, he went to the Tranquillity Funeral Home, where Corporal Wilson showed him a body that appeared to have a gunshot injury to the left thigh. On 25 September, he attended the post-mortem examination on the body, which was identified by Miss Keisha Brown as her brother, Omar White.

[17] Detective Corporal McPherson further stated that having commenced investigations into the murder of the deceased, he formed the opinion that the appellant could assist in the investigations. He was unable to locate the appellant within the community and messages were left for him with nearby residents.

[18] Detective Corporal McPherson also stated that on 16 January 2013, he visited the Hunts Bay lockup where he asked for and was introduced to the appellant. He advised the appellant that he was a suspect in the murder investigation of the deceased. He subsequently charged the appellant with the offence of murder, and when cautioned, the appellant responded that he "never know seh him dead".

Dr Perthasarathi Pramanik

[19] Dr Pramanik testified that he was a consultant forensic pathologist attached to the Ministry of National Security since 31 January 2011. On 25 September 2012, he conducted a post-mortem examination on the body of the deceased at the Tranquillity Funeral Home. The body was identified by Keisha Brown, the sister of the deceased.

[20] Dr Pramanik's evidence was that his examination of the body revealed a gunshot entry wound on the left outer waist of the body measuring 1cm x 0.8cm in size. He demonstrated where the wound was located which was at the waist on the left side. The bullet wound track passed forward, downward, and inward through the body. He explained that this meant that the path that the bullet took on entering the body was from back to front, moving slightly downward and inward. Additionally, there was a laceration to the left thigh muscle with damage to the femoral artery (a major blood vessel), which caused haemorrhaging (bleeding). There was an exit wound on the front of the inner aspect of the left thigh measuring 1.7cm x 0.8cm and it was 107cm from the top of the head and 5cm from the midline. There was also a 5cm x 5cm abrasion to the right forehead.

[21] Dr Pramanik testified that the cause of death was shock and haemorrhage due to a laceration of the femoral artery caused by a gunshot wound to the left thigh. Further,

he opined that the deceased's assailant was likely to have been to the left side of his body or a little behind him. He demonstrated what the position could have been. He was insistent that he could not be certain but it was a possibility that he was unable to confirm. He opined that it was possible for a victim who received such an injury to run after being shot especially since the major blood vessel was supplying the lower limb and not a vital organ. However, continuous bleeding from the damaged blood vessel without medical intervention would affect blood circulation and hamper the blood supply to vital organs. Thus, he opined that death would follow such an injury within a "few to several minutes".

[22] In cross-examination, the following exchange took place between Mr Gentles and Dr Pramanik:

> "Q. ….If an individual has a firearm on the left side of his waist and there was a struggle in respect to the removing of the firearm on the left side of the waist; if the firearm goes off, could that have caused an entry wound to the left outer waist as indicated?
>
> A. No, my answer -- in giving answer, the description of the wound…
>
> Q. I was trying to hear what you are saying?
>
> A. No. I am saying in giving answer, no. Why? In that case it will be a close range shot but from the description, there was no burning, flame burn, gun powder tattooing or shoot [sic] particular depositions around the entry wound; so the wound was inflicted from a distance beyond a distance of two to three feet or more."

The doctor was invited to demonstrate the measurement of two feet with the aid of a tape measure. After doing so, this exchange took place:

> "Q. …So I am saying doctor, if it were, that a firearm is being held, say I am the deceased and I have a firearm struggling with and it is being pulled out of my hand at this distance and it goes off, it would not leave the residue or marks that you are referring to, do you agree?

A. Well, yes. Two feet or more."

When further pressed as to whether such a scenario could have caused the entry wound he saw, Dr Pramanik stated that he could not be certain but it could be possible.

[23] In re-examination, Dr Pramanik said that he could not speak to whether there was any struggle.

The appellant's case

[24] The appellant gave evidence. He testified that at the time of the incident, he was 30 years old, working with David Scrap Metal in Riverton City and operating a taxi. He was living in the Riverton community with Miss Richardson, his baby mother, and four children, one of whom was his. He has been living there since 2011.

[25] He said that on the morning of 21 September 2011, he received a call and as a result, he left home with his daughter. On his way to Cross Roads, he received a call from Miss Richardson, who told him that the deceased was at her home threatening to kill her and she believed he had a gun in his possession. The appellant said he quickly went home, believing her life was in danger. Upon his arrival, he got out of his car and handed his child to the neighbour. He then heard what sounded like inaudible quarreling within his yard behind the gate. Upon opening the gate, he saw the deceased at the front of the yard and Miss Richardson at the back.

[26] The appellant stated that he asked the deceased why he was there, and the deceased responded by cursing and "bend up him face". The deceased walk towards him. He saw the deceased place his right hand on his left side as if to remove something from his waist. The appellant testified that he held on to the deceased and shoved him. Whilst they were tussling, the appellant realised that the deceased had a gun in his right hand. He attempted to twist the wrist of the deceased in an effort to prevent getting shot. The appellant demonstrated how using his right hand he twisted the deceased's left wrist. He explained that he did this "trying to defend" himself. The tussling continued until the appellant said the deceased "shub him off" causing him to go backwards. When the

deceased was approximately two to three arm's length away from the appellant, the appellant heard an explosion. He said the gun was at that time still in the hand of the deceased, and he was still going backwards.

[27] The appellant said that he became frightened and ran to his car and drove away. The deceased ran out before him. He explained that he struggled with the deceased for the gun in a bid to save his life. He denied having waved the gun at Miss Richardson before leaving. However, he called her later that night and told her it was the deceased who had the gun, and that it was an accident because of the "tasseling up". The appellant said when he was arrested, he told Detective Sergeant Simpson " Two a wi wrassle fi the gun and it go off... Big man thing, a fi him gun…It's a tasseling up".

[28] In cross-examination, the appellant maintained that he did not know much about the deceased until the day of the incident. He agreed that he knew that the deceased had "come back from prison". He also agreed that the deceased visited Miss Richardson's home after he came from prison. However, he insisted that it was only on the day of the incident that the deceased had come to the house. He denied that prior to that day the deceased visited the home to see his daughter and that there had been an argument between the deceased and himself. He denied that Miss Richardson had ever called him before that day and told him not to come to the house because the deceased was there. He also said he was not aware of a time when he and the deceased were arguing and Miss Richardson had to call the police because the deceased left with his child.

[29] The appellant further maintained that on the day of the incident, when Miss Richardson called and informed him that the deceased was there, he did not know who she was referring to. She told him the deceased was threatening to kill her and had a gun, so he went to defend her, although he did not have any weapon. Up to that time, he did not know who the deceased was and did not know whether he was a "don". He explained that he went to the house to see that Miss Richardson's "life was okay and nothing naw gwaan". He had no plan as to how he was going to defend her. He did not pass any police station on the way home. The appellant accepted that when he arrived

at the home, Miss Richardson did not look as if her life was in danger and she was not in close proximity to the deceased. Additionally, he did not know that the man standing in his yard was the deceased, hence his need to ask the man he saw why he was in his yard. He only recognised the deceased's name and learnt his identity when he contacted Miss Richardson after the incident to advise her that what happened was an accident. He insisted that he was not upset or vexed when he arrived home and saw the deceased.

[30] Further, in cross-examination the appellant demonstrated the distance between himself and the deceased after the deceased pushed him off at the time he heard the explosion. The distance, when measured, was 3.2 feet. He said that at the time of the explosion he and the deceased were facing each other. He was invited to demonstrate how the twisting of the hand took place, and he said it was a "rough struggle". When asked specifically about the position of the gun in the deceased's hand when he heard the explosion, the appellant said, "[i]t a guh up and it a come down. We a wrassle". He denied that when he called Miss Richardson he told her that he was sorry that he killed the deceased. He agreed that he had told her it was an accident. He also agreed that he told Detective Sergeant Simpson that he was defending himself. The appellant said that up to the time he was apprehended in Kellits, he did not know the deceased was dead. He denied the suggestions put to him based on Miss Richardson's account and that he deliberately and intentionally shot the deceased.

The verdict

[31] The jury retired for deliberation at 2:36 pm and returned at 3:22 pm. The foreman, in response to questions from the registrar, indicated that they were not all agreed. When asked how they were divided, the response was simply "two". The learned judge gave further directions and instructed them to retire once more. The jury then retired at 3:35 pm and returned at 4:05 pm. Initially, the foreman said the jury had reached a unanimous verdict of guilty of murder. However, the following exchange then took place:

> "REGISTRAR: You say you find the accused man, Mr Jermaine Minott, guilty of murder that is your verdict and so [say] all of you?
>
> MADAM FOREMAN: I'm sorry, can you read that again.
>
> REGISTRAR: Do you say you find the accused man, Mr Jermaine Minott, guilty of murder, that is your verdict and so say all of you?
>
> MADAM FOREMAN: No"

On the instructions of the learned judge, the registrar re-started the exercise of taking the verdict. The foreman then said they had arrived at a unanimous verdict of not guilty of murder but guilty of manslaughter.

The appeal

[32] When the matter came on for hearing, Mrs Melrose Reid, on behalf of the appellant, applied for and was granted permission to abandon the original grounds, which the appellant had filed, and to argue nine supplemental grounds. The following are the grounds that were pursued, after an amendment to GROUND 2:

> "**GROUND 1**- The Learned Trail [sic] Judge (LTJ) failed to properly examine the case as a whole and failed to point out to the jury **the lurking doubts**, and to explain that the Crown's evidence had not reached the criminal standard of proof beyond a reasonable doubt.
>
> **GROUND 2**- The LTJ failed to adequately wrap up the case in such a legal manner so that the Jury could understand the meaning and implication of an **accident**, which would result in the acquittal of the Appellant.
>
> **GROUND 3**- The LTJ made reference to **honest belief**, but confused the Jury with a multitude of definitions, entangled with other areas of law, which resulted in the Jury arriving at a wrong verdict.
>
> **GROUND 4**- The LTJ gave the jury a rather commingled definition of **self-defence** which utterly confused the Jury, resulting in an incorrect verdict.

> **GROUND 5** – The LTJ muddled the water by leaving **manslaughter** by provocation to the Jury, resulting in the Jury finding the Appellant guilty of manslaughter, instead of an acquittal.
>
> **GROUND 6** – The Learned [sic] LTJ failed to adequately wrap up the ***inconsistencies*** so that the Jury could get a proper picture of the defence's case.
>
> **GROUND 7 –** Overall the LTJ failed miserably in the ***summing-up*** of the case and gave confusing definitions on the various aspects of the law, being: self-defence, provocation, honest belief, accident, murder and manslaughter, resulting in an unfair and unreasonable verdict.
>
> **GROUND 8 –** The LTJ misdirected the Jury **on the verdicts** that they could arrive at, resulting in the Jury finding the Appellant guilty of Manslaughter.
>
> **GROUND 9 –** The LTJ failed to assist the Jury when the Jury returned, resulting in a wrong verdict, AND further misdirected the Jury on unanimous verdict." (Emphasis as in the original)

[33] In the original submissions filed, there was an indication that the appellant would not be pursuing the appeal against sentence, and that the sentence should not be disturbed unless "in the circumstances a lesser sentence should be imposed". At the hearing, Mrs Reid, however, sought to pursue the appeal against the sentence on the basis that it was manifestly excessive, it being wrong in law. She was also permitted to advance further submissions, with respect to the issue of a possible breach of the appellant's constitutional right to a fair trial within a reasonable time as it related to the issue of a re-trial, and a reduction in sentence.

[34] The issues arising from these grounds for our consideration can conveniently be dealt with under five broad headings, namely:

(1) The applicability of the lurking doubt principle (GROUND 1)

(2) The adequacy of the directions in relation to the defences of accident and self-defence and on the issue of inconsistencies (GROUNDS 2,3,4,6, and 7)

(3) The basis on which manslaughter was left to the jury (GROUNDS 5 and 8)

(4) The taking of the verdict (GROUND 9)

(5) The sentence

The applicability of the lurking doubt principle (GROUND 1)

The submissions

[35] Mrs Reid submitted that the learned judge failed to point out to the jury the several doubtful issues in the case and "which doubt defies the very principle of the criminal standard for a conviction". She pointed out that pursuant to section 14(1) of the Judicature (Appellate) Jurisdiction Act ('JAJA'), this court has the power to overturn a conviction in the interests of justice where the evidence does not support a conviction. Counsel submitted that the lurking doubt principle allows this court to overturn a conviction even where the judge gave the correct directions. Reliance was placed on the case of **R v Cooper** [1969] 1 All ER 32.

[36] Mrs Reid contended that in this case, the learned judge "went on a winding road/a labyrinth of confusions in the definitions in law as she perceived them in this case and perfectly confused the jury". Counsel highlighted that some of the lurking doubts related to: (i) the forensic evidence on the Crown's case, which left it unsure as to how the deceased was shot; (ii) the evidence of Miss Richardson that the appellant shot the deceased from behind, which was destroyed by the forensic evidence; (iii) the location of the gunshot injury, which was "inconsistent with a man pointing a firearm at another to kill; more so shooting from behind"; and (iv) Miss Richardson's admission that she was not near to the incident when it happened, which made her an unreliable witness. Mrs

Reid submitted that, ultimately, the forensic evidence was inconsistent with the Crown's case, and she posed the question, "how did the victim get shot? If it was by the appellant, was it an accident or self-defence?" She contended that the lurking doubt was overwhelming.

[37] Mrs Reid's conclusion on this issue was that the verdict was palpably wrong and went against the weight of the evidence which rendered it unreasonable, unsafe and a miscarriage of justice. She referred to **R v Joseph Lao** (1973) 12 JLR 1238; **Everett Rodney v R** [2013] JMCA Crim 1; **R v William March**, **Michael Lawrence**, **Anthony Grant and Anthony Bailey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156 and 157/1976, judgment delivered 13 May 1977; and **Charles Salesman v R** [2010] JMCA Crim 13.

[38] In response, Miss Donnette Henriques, on behalf of the Crown, submitted that the concept of lurking doubt is not applicable. She noted that there was a different standard which arises from section 14(1) of the JAJA than that which arises in England which permits the overturning of a conviction in circumstances where there was a lurking doubt as to the safety and correctness of the verdict of a jury. The standard under the JAJA called for a consideration of whether the verdict was palpably wrong given the evidence. She relied on **Alrick Williams v R** [2013] JMCA Crim 13 and **Michael Reid v R** [2011] JMCA Crim 28.

Discussion and analysis

[39] Mrs Reid is correct that the concept of the lurking doubt principle appears to have its genesis in **R v Cooper**, a decision from the Court of Appeal of England. It is necessary to appreciate the legislative framework that gave rise to the principle. At that time, section 2(1)(a) of the Criminal Appeal Act of England, 1968 before its amendment, provided so far as was relevant:

> "(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think –

(a) That the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory…"

[40] In **R v Cooper**, the appellant was convicted in what was described as "a difficult identity case". The complainant identified the appellant as the man who had assaulted her one night. The difficulty arose firstly from the fact that a witness for the appellant testified that another man had admitted to him that he had committed the offence. This was compounded by the fact that there was "unquestionably a close physical similarity between the appellant and this other man". There was no criticism of the summing up, which counsel for the appellant indicated was entirely fair. Lord Widgery, writing on behalf of the court, stated:

> "It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court would be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. **Indeed, until the passing of the Criminal Appeal Act 1966 (1) – provisions which are now to be found in s. 2 of the Criminal Appeal Act 1968 (2) – it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.**" (Emphases supplied)

[41] The application of the lurking doubt principle could arise where the legislative framework permits an appellate court to analyse the evidence and the trial process to determine whether the verdict of the jury is unsafe or unsatisfactory, thus permitting the court to entertain doubt as to the conviction. Section 14(1) of the JAJA, which sets out the powers of this court, 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 other ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:…"

[42] A reading and appreciation of this provision leads to the irresistible conclusion that Miss Henriques is correct that a different standard applies to the powers of this court when compared with that which existed in England. In **Alrick Williams v R,** this court identified the difference. Brooks JA (as he then was) at para. [16] stated:

> "… This court has made it clear that it will not overturn the findings of a tribunal of fact unless those findings are so against the weight of the evidence as to be 'obviously and palpably wrong'. The decision in **R v Joseph Lao** (1973) 12 JLR 1238 requires a more objective and definitive test than that propounded in **R v Cooper** [[1969] 1 All ER 32], and, as mentioned before. [sic] **R v Lao** has been relied on by this court for years. The relevant portion of that judgment is accurately set out in the headnote:
>
> > '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 prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the 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**.'"
> (Emphasis as in the original)

[43] In **Michael Reid v R**, this court was asked to apply the lurking doubt test from **R v Cooper** to determine that the appellant's conviction for rape was unsafe. Hibbert JA (Ag) (as he then was), writing on behalf of the court, succinctly put the matter beyond dispute. After setting out the statutory provisions of the English Criminal Appeal Act and the JAJA, he stated at para. [24]:

> "The statutory provisions clearly show a difference in the powers exercisable by the Courts of Appeal in England and in Jamaica and that the lurking doubt test is not applicable in Jamaica."

[44] In the instant case, Mrs Reid's invitation to apply the lurking doubt principle must be declined. Based on the statutory provisions that guide this court, there is no power to disturb the verdict of the jury based on asking ourselves a subjective question to assess whether the conviction is unsafe or unsatisfactory. It should also be noted that even if the principle were applicable in Jamaica, the submission that it was for the learned judge to identify and point out any lurking doubts that arose on the Crown's case to the jury would not be a correct interpretation of the principle. There is ultimately no merit to GROUND 1.

The adequacy of the direction given in relation to the defences of accident and self-defence, and on the issue of inconsistencies (GROUNDS 2,3,4,6, and 7)

<u>The submissions</u>

[45] The underlying complaint about the learned judge's directions concerning the defences of accident and self-defence is that they lacked clarity and were confusing. Mrs Reid contended that the entire summing up was a "tangled web". She submitted that judges should be encouraged to stop "regurgitating evidence and intelligently wrap up a case" for the jury to understand the issues in the case.

[46] Regarding the defence of accident, Mrs Reid submitted that the learned judge failed to "wrap up the case in such a legal manner" so that the jury could understand the meaning and implication of the defence. She contended the defence's case was that it was an accident but not wherein the appellant acted unlawfully and involuntarily but rather that with an aim to prevent his own death, he struggled with the deceased and the deceased's own gun went off. Further, she contended, the learned judge "mentioned accident and mixed it up with provocation and she blended it in self-defence and killed it up with murder and the jury did not get a clear picture of what constitute [s] an accident and how an accident as in this case was a complete defence to murder".

[47] Mrs Reid examined the pathologist's evidence, emphasising his description of the entry wound's location, the bullet's trajectory through the deceased's body, and where it ultimately exited. She was of the view that this evidence did not support the offence of murder. She submitted that the Crown had failed to prove beyond a reasonable doubt that the appellant was the one holding the firearm and pointing it at the deceased, which resulted in his death. In her estimation, the strongest the Crown's case could be, was based on the balance of probabilities.

[48] Mrs Reid challenged the manner in which the learned judge referred to honest belief, which she complained was entangled with other areas of law. She contended that the learned judge elaborated on the defence of accident but went on "to muddle" the definition through the rest of the summation. Counsel noted that at one point, the learned judge stated: "If you are sure that the [appellant] did not honestly believe that he needed to defend himself…So, if you don't believe, you are sure that he did not honestly believe that he needed to use force or he needed to defend himself, then you would go onto [sic] look at provocation". Mrs Reid complained that honest belief had nothing to do with force. The appellant was trying to prevent an attack and there was no issue as to whether he held an honest belief that something was to happen and acted first.

[49] In her written submissions, counsel identified what she describes as the sense in which "honest belief arrived" in these terms:

> "…[I]f the Appellant said he saw [the deceased] stretched his hands to the left side of his waist, and if he is to be believed, that the baby mother called to say [the deceased] was there threatening her and that he had a firearm, and if it is to be believed that he grabbed onto [the deceased] and a struggle ensued and that he had not disarmed [the deceased] and during the struggle the firearm went off; and from the forensic evidence the shot was to the waist down to the groin; that would amount to an accident."

It was thereafter submitted that although the learned judge tried to explain the defence of accident, had she separated it, "picked the bones from the flesh" and juxtaposed murder with accident, the verdict would have been not guilty.

[50] Mrs Reid referred to **He Kaw Teh v The Queen** (1985) 157 CLR 523, and submitted that the court, in that case, distinguished *mens rea* as an ingredient of an offence and an honest belief in a state of facts which, if they existed, would make a defendant's act innocent. She relied on **R v Tolson** (1889) 23 QBD 168, **Bank of New South Wales v Piper** [1897] AC 383, and **Papajohn v The Queen** [1980] 2 SCR 120 as supportive of this general principle. Counsel submitted that when fulsomely examined, this case has to be one of an accident, and had the learned judge spent the time to properly link honest belief with the defence of accident, the jury could not have convicted the appellant.

[51] Regarding the issue of self-defence, Mrs Reid submitted that this was "not a 'clear-cut' self-defence case". She contended that it arose only from the appellant's case, in that he foresaw injury to himself from the deceased, and in an effort to prevent the deceased from harming him, the appellant wrestled with the deceased who had the firearm, and a single bullet was discharged. Counsel relied on **Solomon Beckford v R** (1987) 36 WIR 300 where she noted the test of self-defence was fully explained. She submitted that had the learned judge given a proper direction to the jury on self-defence, the appellant would not have been convicted. Mrs Reid described the directions given by the learned judge as a good attempt at defining and explaining self-defence but was inadequate. She

pointed to one sentence in the summation where she complained the comment made was an incomprehensible definition.

[52] The complaint in relation to the learned judge's treatment of the issue of inconsistencies was that the learned judge "failed to adequately wrap up the inconsistencies so that the jury could get a proper picture of the defence's case". Mrs Reid submitted that the learned judge mentioned the inconsistencies "in scattered forms but not intelligently and legally" for the jury to see the quality of Miss Richardson's evidence and determine whether they could believe her. Counsel pointed to the evidence of Miss Richardson that she saw when the appellant pulled the gun from his waist and pointed it at and shot the deceased. She noted that at another point in her testimony, Miss Richardson said she was not near to either of the men. Further, it was noted that Miss Richardson lied about the appellant not living at her home when she told the police that she had asked the appellant to move in with her because of her fear of the deceased. Counsel examined the evidence Miss Richardson gave in relation to the position of the men when the shot was fired and contended that it was inconsistent with that of the pathologist as to the location of the entry wound on the deceased body. One final aspect of Miss Richardson's evidence that Mrs Reid highlighted was the fact that Miss Richardson had said that the appellant called and threatened her but admitted that she had not mentioned that to the police when she gave her statement.

[53] Mrs Reid concluded on this issue of inconsistencies that under cross-examination, Miss Richardson told numerous lies and, although the learned judge highlighted some of them, she "failed to wrap up the inconsistencies in such a manner that the jury could get an intelligent picture of the motive of the so-called witness". Counsel further submitted that the inconsistencies were left unresolved, and the learned judge had not sufficiently shown the jury the devastating effect of the inconsistencies resulting in their erroneous finding. Counsel referred to **R v Byron Young and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 65, 66, 67 & 134/1990, judgment delivered 16 March 1992.

[54] Mrs Reid contended that given the numerous defences that arose in this case, the learned judge should have adopted the approach recommended in **Murrell v R** [2014] VSCA 334. This approach includes identifying the main issues, presenting sufficient evidence for the jury to resolve those issues, directing the jury on the relevant law for their decision, and explaining how the law applies. Counsel referred to **R v Lawrence** [1981] 1 All ER 974 in support of this aspect of her submissions.

[55] In response, Miss Henriques submitted that the defences were all legal principles that have separate definitions and although they appeared to be intertwined in the summation, this was necessary as the circumstances of the case and the evidential overlaying of those issues required that the learned judge deal with them together. Counsel contended that the learned judge addressed the issue of accident throughout the summation, and properly outlined the legal definition of the defence. Counsel referred to the definition of accident as found in the text, Cross and Jones' Introduction to Criminal Law, 9th edn, para. 4.12. She submitted that the jury, having observed and assessed the witnesses for the Crown, was in a position to evaluate the significance of the pathologist's evidence in relation to the location of the entry wound and the path of the bullet. The jury could then decide as to what aspects of the evidence they would rely on to establish the facts in the case.

[56] Miss Henriques submitted that in relation to the learned judge's reference to honest belief, it was clear from the transcript that the learned judge addressed the issue of accident and had moved on to the issue of self-defence, to which honest belief was relevant. In that regard, counsel noted that directions on self-defence ran throughout the summation as well. She concluded that this area was adequately addressed.

[57] Counsel contended that while the manner in which the learned judge outlined the relevant defences could have been "tidier", they were sufficiently legally defined. By way of example, she noted that the jury was aware that a finding of accident constituted a complete defence and the appellant would not be guilty as a result.

[58] Miss Henriques submitted that even where there are weaknesses in the summation, the case was short and uncomplicated and the evidence in support of both self-defence and accident was weak to non-existent. She relied on the overarching principle regularly referenced by this court that it is slow to disturb findings of fact by the tribunal entrusted with that task. Counsel referred to **Alrick Williams v R**; **R v William March, Michael Lawrence, Anthony Grant and Anthony Bailey**; and **Wayne Samuels v R** [2013] JMCA Crim 10.

[59] In relation to the manner in which the learned judge dealt with the issue of inconsistencies, Miss Henriques submitted that the learned judge had done all that was required having highlighted the issues relevant to this area and informed the jury that it was relevant for assessing the witness' credibility. As a result, the jury received comprehensive guidance on how to evaluate any inconsistencies or discrepancies, and the learned judge provided examples of evidence that could be considered inconsistent. She contended that there was no material inconsistency on the Crown's case which would go to the root of the particulars in the indictment. She further contended that the specific complaints made by the appellant were not inconsistencies but were possibly omissions. If they affected any aspect of the case, it was the credibility of the witness, a matter on which the jury was adequately guided. Counsel relied on **Anthony Russell v R** [2018] JMCA Crim 9.

Discussion and disposal

[60] In light of the nature of the complaints regarding the judge's summation, it is beneficial to consider the recognised purpose a summation is intended to achieve. The guidance given by Carey JA in **Sophia Spencer v R** (1985) 22 JLR 238 remains relevant. At page 244, he states:

> "A summing up, if it is to fulfill its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as

> the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronising nor technical, then it cannot fail but be helpful to a jury of reasonable [men] and women…"

[61] It has also been acknowledged that the summation must be properly structured to fit the issues and circumstances of the specific case. In **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, Lord Morris stated at page 507:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful…"

[62] In the instant case, the summation of the learned judge is being attacked for how she treated the issues of accident, honest belief, self-defence, and inconsistencies. Mrs Reid described aspects of the summation as confusing. To avoid that possibility here, it is best to examine each issue separately.

Accident

[63] The appellant's testimony describing how the incident occurred was disjointed given the manner in which it was led. Putting together the salient descriptions of the action in his own words, the following scenario emerges from the answers given by the appellant:

> "A. [The deceased] started to cuss, him bend up him face.
>
> …
>
> A. [The deceased] start walk towards me
>
> …
>
> A. Start use him right hand…
>
> …

A. Cross him left side, trying to pull something from him waist.

...

A. As me see him a try fi pull something from him waist…I have to hold on, rush on him and hold him.

…

A. Him shub mi off, shub mi off and mi hold on to the hand him pull out, mi realise say a gun him have in a him hand, so mi a try fi turn…

…

A. Mi try fi twist him hand, … so the two a wi a wrassle.

…

A. Hold on him hand like this, twisting him hand around. (witness demonstrates)

Q. So you are using your right hand to hold the left hand, you are twisting the arm?

A. Yes

Q. Twisting the wrist?

A. Yes

…

Q. And why were you twisting the hand on that day in question?

A. Trying fi defend mi self.

…

Q. …What, if anything, happened whilst you were tussling with [the deceased]?

A. Tussling and hold on together, then shub off, him shub mi hand.

…

A. As him shub mi off at around two to three arm's length I heard an explosion.

...

Q…Where was the gun when you heard the explosion?

A. In [the deceased] hand.

…

Q. What were you trying to do during the tussle as it regards the gun?

A. Trying to save my life."

[64] Under cross-examination, the appellant maintained that the gun remained in the hand of the deceased throughout the struggle. The appellant's evidence, therefore, was that he had not handled the gun. Initially, he was twisting the hand of the deceased while the gun was in the deceased's hand to prevent being shot. Thus, at this stage, he was acting in defence of himself. Further, on his account, at the time the shot that led to the deceased's death was fired; the deceased was a little distance away, with the firearm still in his own hand. Under the circumstances, the appellant's defence was that he could not have pulled the trigger thus firing the bullet that hit the deceased. The appellant went on to testify that he had called Miss Richardson and told her "a [the deceased] did have the gun, it is a[n] accident, it is a 'tasseling' up". Further, under cross-examination, when asked if he was defending himself or whether it was an accident, the appellant responded that it was "by accident". In these circumstances, the learned judge could hardly be faulted for having thought it best to leave the defence of accident with the jury, the appellant having raised it himself.

[65] A significant decision from this court that addresses the issue is **R v Henzel Muir** (1995) 48 WIR 26. In that case, this court examined the appropriate instructions needed when an accused charged with murder presents the defence of accident, claiming that the death resulted from an accident caused by the deceased. The applicant and the

deceased were unarmed security guards posted at the same location. They were not authorised nor licensed to use a firearm. A senior security guard was given a firearm by a colleague, and he was convinced by the applicant to hand the firearm over to the applicant, although this was not the correct procedure. Sometime later, the senior security guard's attention was drawn to the storeroom at the location, and he saw the applicant with the firearm coming from the storeroom. The deceased was found in the storeroom suffering from a gunshot wound. The applicant told an investigating constable that the deceased had shot himself. Under caution when arrested, the applicant was said to have explained that it was the deceased who had "cock the gun; hold it by the mouth and gave it to [the applicant] by the handle, to release the hammer. In doing so, he pulled the trigger and a bullet went off, hitting [the deceased]".

[66] The evidence of the applicant, as narrated by the judge to the jury, was that the applicant said the deceased was handing him the gun with the deceased holding the body of the gun from the barrel down so that only the handle of it was being given to the applicant. The applicant said the muzzle was pointed towards the deceased and while handing it to the applicant, the deceased asked the applicant to release the hammer. The applicant urged the deceased to stop playing with the company firearm, but the deceased insisted the applicant should release the hammer. The applicant testified that "[i]n so doing [he] heard an explosion", and the gun fell from the deceased. This court found that on the applicant's version of the incident, he at no time pulled the trigger of the firearm to cause the shooting of the deceased, nor did he do any act which caused the firearm to go off killing the deceased. The applicant's defence was that he did not cause the death of the deceased who had died by his own hand, whether by accident or by suicide.

[67] On appeal, it was submitted that the trial judge had erred when he told the jury that manslaughter did not arise. Patterson JA, writing on behalf of the court, stated at pages 265-266:

> "It is undoubtedly the duty of the judge to leave for the consideration of a jury all issues arising from the evidence, and to assist the jury by pointing to such evidence and dealing

> adequately with it. If, upon the evidence, a verdict of a lesser offence than the one charged in the indictment becomes possible, it is the duty of the judge to point a jury to the evidence and leave the issue for their determination, although the defence may not have relied on it or even mentioned it. But, equally, a judge should leave an issue to a jury if, and only if, evidence has been adduced which is fit for their consideration. A jury should not be asked to speculate; their verdict must be based on the evidence in the case and the reasonable inferences that may be drawn from the proved facts."

After reviewing the directions given by the trial judge, Patterson JA remarked on page 269:

> "In our view, these directions of the trial judge made it quite clear to the jury that the question of accident or suicide arose by way of explanation by the applicant as to the possible cause for the deceased shooting himself. He told the jury what the defence was, namely that the applicant 'did not do the act'. If the evidence supported a finding that the deceased died at the hands of the applicant as a result of an unfortunate mishap, an event which was 'not expected or designed', then it would have been incumbent on the trial judge to direct the jury accordingly and to explain the meaning of accident. But since, in our view an accidental killing of the deceased by the applicant did not arise on the prosecution's case or on the defence, we consider the directions adequate and it was unnecessary to explain the meaning of accident."

[68] Against this backdrop, an examination of the learned judge's directions will be undertaken. The learned judge first addressed the issue when defining murder and the ingredients which the Crown had to prove. Early in the summation, she stated:

> "Now, the prosecution also needs to show that the act was voluntary and deliberate, that it was not accidental. This is important for you to consider in this case because you heard [the appellant] and the [appellant] maintained that what happened that day was an accident."

[69] Shortly after outlining the ingredients for the offence, the learned judge identified the issues in the case, one of which was "whether the deceased died as a result of an

accident and not due to any deliberate and intentional action by the [appellant]." In giving a synopsis of the case for the defence, before reviewing the evidence, she stated:

> "… [The appellant] said he went there and at the time he was not upset, he told [the deceased] to leave. [The deceased] and him--he said he and [the deceased] was a [sic] tussle, [the deceased] pulled a gun and he was not trying to get hurt with a gun, so he wrestled with [the deceased], twist his arm other than [sic] and he heard an explosion, this is he said an accident and the gun went off in a tussle and that the deceased…was not killed by any deliberated [sic] or intentional action by his."

[70] The learned judge reviewed all of the evidence in an entirely fair and unobjectionable manner, and while dealing with that of the appellant, she identified the defences that arose, namely accident, provocation and self-defence. She then said:

> "Now, accident: A person is generally taken to be responsible for his actions unless they are accidental, so if the defence of an accident is seen, it is a complete defence in law.
>
> Before you the jury can convict the [appellant] of murder, the Prosecution must prove several things. They must prove that the act which caused the injury leading to the death of the deceased was a conscious act by the [appellant] and that it was he and he was in command of his faculties; that it was deliberate and intentional without lawful justification and excuse or that it was not accidental because if the injury causing the death was inflicted accidentally, then no crime would have been committed and the [appellant] is entitled to an acquittal; so, the Prosecution must negate accident. They must show by evidence that the injury leading to the death of [the deceased] was not caused accidentally. The [appellant] does not have to prove anything he is presumed to be innocent and that presumption remains throughout the trial until after your deliberation you find him guilty of the offence as charged. There is no onus or responsibility on the [appellant] to prove anything. The issues of fact for your determination on the issue of accident involve an assessment of the evidence in this case.

> … [The appellant] said the firearm which the deceased had in his hand went off shooting him. The deceased death was not due to any deliberate or intentional action on his part and that this was an accident.
>
> …You must find him not guilty, if you believe that the firearm may have gone off during the tussling and wrestling and[sic] have gone off accidentally, if you find it was not deliberate and intentional and therefore was or may have been an accident, then you must find him not guilty of murder.
>
> Accident is a complete defence to a case of murder and so this would be the end of the case, if you believe it is an accident."

[71] Certainly, these directions were sufficiently accurate in keeping with what was required in the circumstances of this case. The learned judge went on to use similar terms to define accident when she outlined to the jury the route to the possible verdicts open to them. Significantly, it was during this aspect of the summation that the comment highlighted by Mrs Reid as "muddling the definition" was made. The full context of the sentence is of course relevant:

> "Remember I told you for murder is one of the ingredients, deliberate and voluntary. If it is not deliberate and voluntary and accidental, not guilty. If you are sure that the [appellant] did shoot [the deceased] and you feel that he did so deliberately and intentionally, then you go on to consider the issue of self-defence. For self-defence we go to question one first.
>
> Did the [appellant] honestly believe that he needed to use force to defend himself. If you are sure that the [appellant] did not honestly believe that he needed to defend himself, you need not answer question two, and you will go straight on and consider provocation. So, if you don't believe, you are sure that he did not honestly believe that he needed to use force or he needed to defend himself, then you go onto look at provocation."

As Miss Henriques correctly noted, it is clear that the learned judge had moved from the issue of accident and was discussing the issue of self-defence to which honest belief is

relevant. The complaint that the learned judge tried to link the honest belief with accident is entirely unfounded.

[72] We cannot agree with Mrs Reid that the learned judge failed to adequately address the issue in a manner, which assisted the jury in understanding the meaning and implication of an accident in the context in which it was raised by the appellant. We are satisfied that the reference to honest belief highlighted by Mrs Reid was in no way connected to the issue of accident thus leading to any confusion. There is, accordingly, no merit to GROUNDS 2 and 3 in so far as they relate to the issue of accident.

Self-defence

[73] It is well settled that no special words are necessary to convey to the jury the meaning of self-defence. In the iconic judgment of the Privy Council in **Sigismund Palmer v The Queen** [1971] AC 814, their Lordships stated at page 831:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide."

[74] In the instant case, there is no challenge to the correctness of the directions given in relation to the issue of self-defence. The learned judge identified it as arising on the evidence of the appellant and explained the meaning in a sufficiently accurate and unexceptional manner. Indeed, Mrs Reid acknowledged that the learned judge made a good attempt at defining and explaining self-defence. The real complaint was regarding this portion of the summing-up that came towards the end of the summation:

> "Remember I told you for murder is one of the ingredients, deliberate and voluntary. If it is not deliberate and voluntary and accidental, not guilty. If you are sure that the accused did

> shoot [the deceased] and you feel that he did so deliberately and intentionally, then you go on to consider the issue of self-defence…"

Mrs Reid described this as a definition that was incomprehensible.

[75] An appreciation of the full context from which this part of a sentence is extracted reveals that the learned judge was engaging the jury in the route to verdict exercise where she was guiding them as to how to assess the evidence when considering the verdicts open to them. After thoroughly defining and explaining self-defence as well as the other issues, the learned judge instructed the jury on how to assess the evidence related to each issue, emphasising the need to consider one issue before progressing to the next, if necessary. In those circumstances, she reminded them of the requirements that needed to be proven for the offence of murder and instructed them to determine whether they were convinced that the offence had been proven to the required standard. She then urged them to consider the evidence of whether the deceased was killed as a result of an accident and if they found that this was so, or may have been, the appellant would not be guilty of murder. She then went on to direct them that if they found it was not an accident, they should then go on to consider whether the killing was deliberate and intentional but was done in lawful self-defence. If they were satisfied the appellant was acting in self-defence, then he was not guilty. If they were satisfied the appellant was not acting in self-defence the jury was instructed to consider provocation. She then directed them that if they were sure he was not provoked in the legal sense, then the verdict would be guilty of murder.

[76] The learned judge then outlined the possible verdicts, and it was at this point that the direction being disputed was given. The learned judge remarked:

> "So the possible verdicts open to you are, a; not guilty of murder by reason of accident. Not guilty of murder by reason of self-defence. Guilty of manslaughter by reason of provocation. Guilty of murder as a reason of provocation. Being so, if you don't accept provocation, it will mean that the prosecution has disproved it and it means the [appellant] would be guilty of murder.

> Let us look at accident. If you believe that the [appellant] may have not voluntarily or deliberately and intentionally shot the accused [sic] then he is not guilty of murder and that will be the end of the case.
>
> Remember I told you for murder is one of the ingredients, deliberate and voluntary. If it is not deliberate and voluntary and accidental, not guilty. If you are sure that the [appellant] did shoot the deceased and you feel that he did so deliberately and intentionally then you go on to consider self-defence. For self-defence we go to question one first. Did the [appellant] honestly believe that he needed force to defend himself. If you are sure that the [appellant] did not honestly believe that he needed to defend himself, you need not answer question two, and you will go straight on and consider provocation…
>
> If, however, you think that the [appellant] may honestly have believed that he needed to defend himself, you go on to question two. Question two is, did the [appellant] use reasonable force to defend himself? If you are sure the force used was unreasonable, you go to the question of provocation… If you think the [appellant] may have used reasonable force then he is not guilty by reason of lawful self-defence."

[77] It is clear that the sentence complained about was not intended to be the definition of self-defence and was followed with the learned judge succinctly leaving the matters relevant to the defence for the jury's consideration. Thus, the complaint that the sentence by itself was an incomprehensible definition is unfair when it is read in its entire context. There was no co-mingling of the definition, evident from the manner the learned judge appropriately considered each issue separately and then left directions near the end of the summation to ensure that the jury would retire with the issues at the forefront of their minds. GROUND 4 is entirely without merit.

Inconsistencies

[78] A trial judge's duty to provide appropriate directions to the jury concerning inconsistencies and discrepancies that occur in the evidence of witnesses has been

considered by this court in several decisions. Edwards JA (Ag) (as she then was) in **Vernaldo Graham v R** [2017] JMCA Crim 30 stated:

> "[106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence may be summed up as follows:
>
> 1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there maybe, but the trial judge may give some examples of them or remind the jury of the major ones.
>
> 2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.
>
> 3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.
>
> Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited."

[79] Edwards JA (Ag) also cited at para. [109], with approval, the following passage from **R v Oliver Whylie** (1977) 15 JLR 163 at 166:

> "[109] It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

[80] Notably, in this case, there is no challenge to the general directions which the learned judge gave on the issue of inconsistencies and discrepancies. Mrs Reid contended that the learned judge failed to adequately "wrap up" the inconsistencies that arose from the numerous lies told by Miss Richardson. Mrs Reid contended that although the learned judge highlighted some of them, all of the inconsistencies were material and left

unresolved, and the learned judge did not sufficiently show the jury the devastating effect of the inconsistencies.

[81] Mrs Reid highlighted aspects of the evidence from Miss Richardson in an attempt to demonstrate the inconsistencies that she maintained were not properly addressed by the learned judge. She pointed to Miss Richardson stating that she saw when the appellant pulled out the gun, pointed it at the deceased, and shot him. Counsel then pointed to the fact that in cross-examination Miss Richardson said four times that she was not near to the men when the shooting took place. For counsel, this was proof that Miss Richardson was indeed not near to the incident or otherwise would have seen that the shot was to the waist near the groin of the deceased. However, in her evidence-in-chief, Miss Richardson stated that she "did deh far same distance, far down in di end a di house down deh suh, suh mi nuh deh near dem nuh weh at all". Thus, when she said under cross-examination that she was not near to the men as Mrs Reid highlighted this was clearly not an example of an inconsistency. Whether she was, in fact, able to see where on his body the deceased was shot was a matter for the jury to determine based on her consistently putting herself at a distance away from the men when the shooting took place.

[82] Counsel pointed to the fact that Miss Richardson was challenged as to whether she had previously reported to the police that the appellant had threatened her. It was during re-examination that Miss Richardson testified that the appellant threatened her after the incident. Further cross-examination was permitted, during which this assertion was challenged, with the issue being whether she had told the police that the appellant had threatened her such that it could have been recorded in her statement. She maintained that she did not remember telling them and, at one point, said she did not think she told them. She was, however, insistent that the matter was reported separately at a police station near to where she lived. This, again, does not amount to an inconsistency.

[83] Mrs Reid highlighted Miss Richardson's evidence concerning whether the appellant had lived with her. Initially, Miss Richardson said she lived only with her children. When asked under cross-examination if the appellant had not moved into the house at some point before the incident, she said no. She was confronted with her statement to the police where it was recorded that she said she invited the appellant to live with her due to her fear of the deceased. She conceded that the appellant had, indeed, lived with her for a while before returning to his residence and she agreed that she had asked the appellant to stay with her due to her fear of the deceased. Under re-examination, she sought to explain that her telling the police that the appellant had moved into her home was due to how she was questioned when giving her statement. Thus, she explained the initial denial that the appellant had lived with her.

[84] The learned judge addressed the issue as follows:

> "Miss Aneika Richardson was the first witness for the Prosecution, she told you she was living with her children at the time and no one else. Under cross-examination, she told you that she told the police that [the appellant] had lived with her in 2011; this you might find to be an inconsistency. In re-examination, she went on further to say [the appellant] had been living with her but it was the way they asked the questions, because although he had been living with her, he had moved out and was living down the road long time before the incident, that was her explanation. So it's a matter for you, what you make of that. Was she lying, did she understand the question. It is a matter for you. She will [sic] have spoken quite clearly of [the appellant] that he was not living with her at the time. In fact, she said that that morning, [the appellant] had come for his baby. What do you make of that? Is it important for the case and how you treat with it?"

[85] These were sufficient directions to deal with this issue. The learned judge pointed out that it could be an inconsistency and invited the jury to assess how it affected their view of the witness and how it affected the case. This inconsistency was resolved in that the witness had offered an explanation and it was properly left for the jury to consider in assessing the witness's credibility and the impact on the case.

[86] The examples given by Mrs Reid do not support her contention that the learned judge failed to wrap up the inconsistencies intelligently and legally. On our reading of the transcript, we could find nothing that supported such a contention. Accordingly, we see no merit in GROUND 6.

The basis on which manslaughter was left to the jury (GROUNDS 5 and 8)

<u>The submissions</u>

[87] Mrs Reid submitted that the learned judge "muddled the water by leaving manslaughter by provocation to the jury, resulting in the jury finding the appellant guilty of manslaughter, instead of an acquittal". She contended that there was no indication of the appellant being provoked by the deceased or by Miss Richardson to avail the appellant of the defence of provocation. She noted that it was Miss Richardson who had called the appellant on the day in question. Counsel submitted that in summing up the prosecution's case, the learned judge did not show where any form of provocation from the deceased existed in words or action such that the appellant could have been provoked. Thus, the learned judge could not have directed the jury on a sudden and temporary loss of self-control on the part of the appellant. Counsel further submitted that on an examination of the appellant's case, there was no evidence that provocation arose. She contended that the learned judge misdirected herself on the law of cumulative provocation by referring to several incidents that occurred between Miss Richardson and both men before the incident, which could not amount to cumulative provocation.

[88] Counsel submitted that in very rare cases, the law does acknowledge the transfer of provocation, but the provocation would have to be alive at the time of the incident to cause the defendant to have lost self-control and act. She contended that in the instant case, even if the deceased had previously been threatening Miss Richardson and treating her in the manner she complained of, that provocation of Miss Richardson could not be transferred to the deceased. Mrs Reid submitted that from the evidence, there was no immediacy or provocative words or actions from either Miss Richardson or the deceased for the appellant to have lost his self-control.

[89] Mrs Reid further submitted that an evidential bar had to be met before the issue of provocation could be left to the jury; there must be some evidence of provocation in an active sense. Counsel relied on **R v Acott** [1996] 4 All ER 443 and **Bernard Ballentyne v R** [2017] JMCA Crim 23.

[90] Mrs Reid acknowledged that there are cases that support the fact that once there is evidence that suggests that an accused person may have been provoked, even if such evidence is slight or tenuous and whether it arises on the prosecution's or the defence's case, it is the duty of the judge after a proper direction to leave it open to the jury to return a verdict of manslaughter. Failure to do so would deprive a defendant of the right to have the issue left to the jury and would constitute a grave miscarriage of justice. Counsel referred to **R v Stewart** [1996] 1 Cr App Rep 229 and **Joseph Bullard v The Queen** [1957] AC 635.

[91] Counsel contended that the learned judge "went into a most corrupt definition of provocation, a rather confusing definition" when she said:

> "Again, if you have provocation, you would find him guilty of murder by reasonable force but only if you are sure the force was reasonable you go to the question of provocation below."

[92] It was Mrs Reid's submission that if manslaughter arose, it would be involuntary manslaughter, which can be, in some circumstances, a complete defence. She challenged the learned judge's directions to the jury on the verdicts open to them which resulted in them finding the appellant guilty of manslaughter. She noted the following, which she described as the learned judge's charge to the jury:

> "So the possible verdicts open to you are, a; not guilty of murder by reason of accident. Not guilty of murder by reason of self-defence. Guilty of murder as a reason of provocation. Being so, if you don't accept provocation, it will mean that the prosecution has disproved it and it means the [appellant] would be guilty of murder…"

[93] Mrs Reid submitted that the final instructions to the jury were confusing, and had the learned judge narrowed the issue to that of murder or accident, and buttressed it with the law and circumstances of the case, the jury would have returned a not guilty verdict.

[94] Miss Henriques countered that the circumstances of the case supported that provocation was properly left to the jury. She pointed to the evidence of the circumstances under which the appellant was called to the house, the background of animus between the men, and the fact that the appellant spoke aggressively to the deceased when he arrived at the house, which was followed by a physical altercation between the men. Counsel referred to **Raymond Bailey v R** [2021] JMCA Crim 34 and **R v Pearson** [1992] Crim LR 193.

[95] Miss Henriques characterised the learned judge's direction to the jury that they could find the appellant "guilty of murder by reason of provocation" as a slip of the tongue. She submitted that the learned judge had correctly articulated the law on this area on multiple occasions throughout the summation. She posited that the summation could be tidier and better organised. Counsel contended that where the learned judge incorrectly stated aspects of the law, the errors were corrected. However, she submitted when the summation is looked at as a whole, it is clear that predominantly, the learned judge correctly summarised the issue of provocation and other issues relevant to the case.

Discussion and disposal

[96] It is well established that where on the evidence in a case, a particular defence arises, and even though not relied on by the defence, a trial judge is duty bound to leave the possible defence for the consideration of the jury. Equally settled is that there has to be some credible evidence that a jury could reasonably accept before the defence can be left for their consideration. The duty does not extend to leaving a defence on evidence, that "is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it" (see **Alexander Von Starck v The Queen** [2000] 1 WLR 1270).

[97] An assessment of whether the learned judge made an error in including the defence of provocation should start with an acknowledgement of the statutory basis for the defence, which both counsel mentioned in their submissions. Section 6 of the Offences Against the Person Act provides:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man."

[98] In **Raymond Bailey v R**, this court considered the import of the section. Brown JA (Ag) (as he then was), writing on behalf of the court, noted that "the section speaks to three things: the provocative conduct, the causative link between the provocation and the loss of self-control and the objective assessment of the defendant's response to the provocation" (see para. [69]). His observations of provocative conduct are useful for the resolution of the issue raised in this matter. He stated as follows:

> "[70] There is, therefore, an evidential bar that has to be met before the issue of provocation can be left to the jury for their consideration. According to Rougier J in **R v Acott** [1996] 4 All ER 443 (CA), at page 453, 'there must be some evidence of provocation in its active sense' before the jury is asked to consider the issue. This requirement is captured by the draftsman in the parenthesised words, 'whether by things done or by things said or by both together'. This was how McDonald-Bishop JA expressed it in **Bernard Ballentyne v R**, at para. [43]:
>
> > 'The clear wording of the statute imports the fundamental requirement that before the defence of provocation could have been properly left to the jury, there had to be some evidence, either direct or inferential, as to what was either said or done by the deceased (or someone else) to the applicant, which

> would have provoked the applicant to lose his self-control at the time the fatal injuries were inflicted…'
>
> [71] The section does not limit the source of evidence of provocation. Meaning, evidence of provocation may arise on the case for the prosecution, as well as, or, on the case for the defendant (see **Bullard v R**). Neither is the evidence of provocation confined to things done or said by the victim. The provocative conduct may come from someone other than the victim. (see **R v Davies**,) at page 701).
>
> [72] So then, at the close of the case for the defendant, the trial judge is required to make a global assessment of the evidence and unsworn statement, to ascertain if there is material upon which a reasonable jury may find that that the reasonable man test has been met (see Archbold Pleading, Evidence & Practice in Criminal Cases 36th edition, at para. 2508). It is now established that even if the judge considers that the evidence of provocation is slight or tenuous, he ought to leave it to the jury notwithstanding (see **R v Stewart** [1995] 4 All ER 999, at page 1006). Furthermore, the judge is compelled to leave the issue of provocation to the jury, although it was not relied on as a defence, even in circumstances where it may be inconsistent with the primary defence (see **R v Stewart**, at page 1006)."

[99] In **R v Acott** [1997] 1 All ER 706, Lord Steyn considered the need to satisfy the requirement that there must be some provocative conduct towards a defendant at the material time before the provocation can be left for the jury's consideration. At page 712, Lord Steyn said:

> "A loss-of self-control caused by fear, panic, sheer bad temper or circumstances (eg a slowdown of traffic due to snow) would not be enough. There must be some evidence tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge."

Further, at page 713, His Lordship went on to say:

> "It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation

> resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation."

[100] It must first be noted that Mrs Reid's submission that if manslaughter arose, it would be involuntary manslaughter, which can in some circumstances be a complete defence, is incorrect. A finding of manslaughter on whatever basis is a finding of culpability. The first challenge raised by Mrs Reid is that there was no evidence of any provocative conduct, which could have caused the appellant to be provoked. The question, therefore, is whether there is any evidence of acts done or words uttered at the material time that could have caused the appellant to lose his self-control. The learned judge was obliged to identify and indicate to the jury what evidence might support the conclusion that there was such.

[101] The learned judge left the issue of provocation for the jury's consideration in the following way:

> "Provocation is words spoken or acts done by the deceased, which could cause any reasonable person and actually cause the [appellant] suddenly and temporarily to lose his self-control and kill. There is, therefore, a two-stage to be applied. The first stage is: was the [appellant] by words spoken or acts done by ..., the deceased, suddenly and temporarily cause [sic] to lose his self-control.
>
> The [appellant] told you that he loved Anika Richardson and that he was looking forward to a future life with her and his child. Aneika Richardson told you that [the deceased] wanted her back. She told you of certain events involving [the deceased] which took place. She told you that on one occasion, she was cooking for [the appellant] and [the deceased] came there, he wouldn't leave. While he was there, [the appellant] came. She told [the appellant] that he couldn't come in as [the deceased] was there. [The deceased] eventually left taking his child, Aneika had to call the police.

> Aneika told you of [the deceased] removing all of her furniture from her house and that he came there with two men to do so. She told you that although [the appellant] and the [deceased] had never fight, they had quarrelled before. She told you that [the deceased] had threatened to kill her before and that he was a problem. In fact, she said the two of them are a problem to her. She even admitted that she had asked [the appellant] to move in with her because of her fear of [the deceased], [the deceased] being in prison and returned. She had a baby for [the appellant] while [the deceased was in prison. There was no dispute that she called [the appellant] that morning to tell him [the deceased] was there. [The appellant] said, she said [the deceased] was threatening her and she believed he had a gun.
>
> Did [the appellant] come there and find another man who he knew was after his woman, and who had been harassing and pestering and even threatening her and may have had a gun? Matter for you. Were these actions or words, acts or words of, or may have been acts or words of provocation which culminated in the intentional and deliberate shooting of [the deceased] that morning? What is required is a sudden temporary loss of control, mere anger or desire to teach [the deceased] a lesson for his behaviour is not enough. If all [the deceased] was doing was 'manning it up' to show who was in charge or as Aneika said 'exalt himself', this would not be enough."

Later in the summation, she said:

> "I told you about provocation just a short while ago and just a quick recap. The prosecution is saying there was no provocation on the day of the incident, that [the deceased] said or did nothing that would have caused the [appellant] to be lawfully provoked in the legal sense, legally provoked, but you need to consider whether in fact there was any provocation.
>
> As I said to you before, Miss Richardson told you that [the deceased] had threatened her before. She told you that this is one of the main reasons that [the appellant] moved in with her. She said that while she was there cooking for [the appellant], [the appellant] came there but [the deceased] was there. She told you that they had cursed before, she told you that he had moved her furniture, she told you that the two of

> them were a problem and she told you that [the deceased] was a problem and those are matters that [sic] indicated to you earlier that you need to consider it as it relates to provocation."

[102] The learned judge chose to focus on the Crown's case to identify the provocative conduct that may have caused a sudden temporary loss of self-control by the appellant. Thus, the learned judge pointed to the history and nature of the relationship that existed between the two men in her directions on the issue of provocation. Although the appellant sought to deny any prior knowledge of the deceased, if the jury believed Miss Richardson, they would have been left with a picture of two men who had previously quarrelled and had a tempestuous relationship. The undisputed evidence was that on that fateful morning, Miss Richardson called the appellant and advised him of the presence of the deceased at the home. The appellant said he was led to believe that the deceased had a gun. Having highlighted those issues, the learned judge did not point out any event during the confrontation that morning for the jury to consider in assessing whether the appellant was or may have been provoked.

[103] The learned judge seemingly treated the history and nature of the relationship between the two men as the trigger that caused the mere presence of the deceased in the yard, in the circumstances the appellant believed them to be, as sufficiently provocative. She stopped short of indicating any provocative conduct at the material time. The evidence was that Miss Richardson alerted the appellant to the deceased's presence and he travelled back to the home with that knowledge. Notably, Miss Richardson said he had arrived at the yard "half hour or so to a [sic] hour" after she had called him. The appellant may have been already upset when he got to the house. Miss Richardson said he had sounded very aggressive when, upon his arrival, he asked the deceased what he was doing there and told him to leave.

[104] After the deceased was ordered to leave, Miss Richardson said the deceased raised his hands in the air, said "all right" and moved towards the gate. He had to pass the appellant, who was at the gate to exit. On her version, the appellant grabbed the

deceased, who pushed him off, and thereafter, the appellant took out the gun and fired the fatal shot. The only act said to have been done by the deceased towards the appellant was to push the appellant, when the appellant grabbed at him as he walked towards the gate to exit it. The question, therefore, now becomes whether, on the totality of this evidence, the jury could have concluded that the appellant was or may have been provoked. That would have been a question for the jury, which the learned judge did not leave to them as part of the narrative presented by the prosecution's eyewitness. Therefore, she pointed out no material evidence on the prosecution's case as to what transpired between the appellant and the deceased at the material time that could have caused the appellant to suddenly lose his self-control.

[105] Furthermore, the learned judge did not address whether the issue of provocation was raised on the appellant's case. In **Raymond Bailey v R**, Brown JA (Ag) pointed out that where the defence of provocation may be inconsistent with the primary defence, "the judge may have a fine line to thread in leaving provocation for the jury's consideration" (see para. [73]). As we have already found, there was sufficient evidence from the appellant for the defences of accident and self-defence to be left to the jury. It is accepted that evidence that supports an unsuccessful defence of self-defence may be relied on as giving rise to provocation that would reduce the offence from murder to manslaughter (see **Joseph Bullard v The Queen**). In the circumstances of this case, as outlined above in consideration of the issues of self-defence and accident, there was no evidence from the appellant of acts done or words uttered that could have caused him to suddenly and temporarily lose his self-control. Therefore, provocation was not raised on his case.

[106] The critical question is whether the verdict would have been different if the learned judge had indicated to the jury the evidence of Miss Richardson regarding what had transpired at the material time when the deceased received his injury. Given the background regarding the circumstances in which the appellant was called to the house, the bad blood between him and the deceased, the characteristics of the deceased, what

was told to the appellant regarding the deceased's conduct at the house, and the short altercation immediately before the deceased was shot, it cannot be said with any certainty that the jury would not have concluded that there was or may have been provocation. Accordingly, we cannot conclude that the jury would not have returned the same verdict had the proper direction been given.

[107] In any event, the ground of appeal that the learned judge erred in leaving provocation to the jury, even if meritorious, cannot avail the appellant. If there was no basis for the learned judge to leave manslaughter for the jury's consideration on the facts on which she directed them, it logically means that this was a case of murder. The Crown's case was that the appellant was armed with the gun and deliberately shot the deceased who was unarmed. The defence gave rise to the defence of accident, which was left for the jury's consideration. However, the learned judge also left self-defence for the jury's consideration. The jury rejected both defences. The learned judge instructed the jury that if they rejected self-defence, before they convict for murder, they were first to consider whether there was provocation, which would reduce murder to manslaughter. They were told that if they concluded that he was provoked or may have been provoked, then the verdict would have to be guilty of manslaughter and not murder. The jury returned the verdict of guilty of manslaughter.

[108] Had manslaughter not been left to them on the basis that the judge did, it is inevitable that the jury would have returned a verdict of guilty of murder given the route to verdict outlined to them by the learned judge. Both self-defence and provocation are predicated on the appellant having the gun in his possession and using it by a voluntary and deliberate act to injure the deceased. The jury, in convicting him for manslaughter, obviously accepted that he shot the deceased with the necessary mental element for murder, but in doing so, he was provoked or may have been provoked.

[109] In **Director of Public Prosecutions ('DPP') and Leary Walker** (1974) 1 WLR 1090, the respondent was tried for the murder of his wife and found guilty of manslaughter on the basis of diminished responsibility. At trial, the respondent, Walker,

relied on the defences of automatism, provocation and diminished responsibility. He appealed against his conviction for manslaughter on the ground that self-defence should have been left to the jury although neither he nor his counsel had raised the issue at trial. This court agreed and allowed the appeal. The DPP appealed to the Privy Council. The Privy Council allowed the DPP's appeal, concluding that the trial judge was right not to have left self-defence to the jury. There was no evidence that self-defence arose. Their Lordships observed that having convicted the respondent of manslaughter, it was obvious that the jury decided that it was the respondent who stabbed his wife to death.

[110] In applying the logic of their Lordship's reasoning to the instant case, it can be similarly concluded that having convicted the appellant of manslaughter, it is obvious that the jury accepted that he deliberately (not accidentally) killed the deceased without lawful justification (not acting in lawful self-defence). This is evident from the directions the learned judge gave the jury regarding their task in arriving at a verdict. In directing the jury, the learned judge stated in so far as is immediately relevant:

> "If you feel sure, that the deceased was not killed in lawful self-defence, you go on to consider provocation. If you find that he was, that the [appellant] was or may have been provoked in the legal sense, then your verdict would be guilty of manslaughter by reason of provocation.
>
> **If you are sure that he was not provoked in the legal sense, then your verdict would be guilty of murder.**
>
> So the possible verdicts open to you are, a; not guilty of murder by reason of accident. Not guilty of murder by reason of self-defence. Guilty of manslaughter by reason of provocation. Guilty of murder as a reason of provocation. Being so, if you don't accept provocation, it will mean the prosecution has disproved it and it means the accused man would be guilty of murder." (Emphasis added)

[111] It is necessary to note that in referring to the route to verdict, the learned judge also seemed to have given the jury some document to assist them. As she began to wrap up the summation, she said:

> "Jurors I have, we have reached almost to the end, what I pass you there, is the route to verdict document which has just been introduced in this jurisdiction and perhaps the first time I am actually using it but I think it is very useful in a case like this where you are going one direction and another direction and another direction, so I am going to go through it with you, right."

Thus, her final words may have been the "going through" of that document as promised. She stated:

> "Please consider question one and proceed as directed. Question one: Did the [appellant], by his deliberate and unlawful act, kill [the deceased]? If you are sure this is so, then you proceed to question two. Question two: Did the [appellant] who shot the deceased, intended [sic] either to kill or to cause him really serious harm. If you are sure the [appellant] intended to kill or cause really serious injury, then you go onto question three. When the [appellant] shot [the deceased] had he suddenly and temporarily lost his self-control as a result of words used by him or the conduct of [the deceased]. If you are sure that the [appellant] did not suddenly and temporarily lose self-control, as a result of words used or by the conduct of [the deceased], then you need to go look a little further and he is guilty of murder. If you conclude that he did or may have suddenly and temporarily lose [sic] self-control as a result of words used or the conduct of the deceased, you then proceed to question four. Question four: Would a reasonable man, placed in the [appellant's] situation have reacted to the provocation and killed as the [appellant] did. If you are sure the reasonable man would not, then you must find the [appellant] guilty of murder. If you conclude that he would, this is a reasonable man would or may have done, then you must return a verdict of not guilty of murder but guilty of manslaughter on the ground of provocation, understand?"

It is clear from the preceding directions that if provocation was not left to the jury, the only offence for their consideration would have been murder; and once they rejected accident and self-defence, which they obviously did, there would have been no basis to return a verdict of guilty for anything but murder. Contrary to the belief of Mrs Reid, the absence of provocation as a defence would not mean an acquittal for murder, but rather

means that there is nothing to reduce murder to manslaughter. The appellant, having been acquitted of murder, cannot be retried for that offence even if manslaughter was wrongly left to the jury for consideration.

[112] In the circumstances, although the learned judge erred in leaving manslaughter for the jury's consideration on the insufficient factual basis that she did, there is no miscarriage or substantial miscarriage of justice. The appellant would not have been entitled to an acquittal on the charge of murder if provocation was not left to the jury. Therefore, the conviction for manslaughter is far more advantageous to him than prejudicial. Accordingly, although there is merit in GROUND 5, it is not enough for the court to disturb the conviction for manslaughter.

[113] We conclude that the error of the learned would not justify the quashing of the conviction. The appellant substantially benefitted from the jury's consideration and generous finding of provocation emanating from the erroneous basis on which the learned judge left provocation for their consideration. Accordingly, there has been no miscarriage or substantial miscarriage of justice emanating from the conviction for manslaughter on the basis of provocation. Therefore, we invoke the proviso to section 14(1) of the JAJA and hold that the appeal against conviction on GROUND 5 is dismissed.

[114] The appellant, has, however, made another complaint regarding the verdict for manslaughter, which we have also found to have no effect on the conviction. The appellant maintained that the learned judge misdirected the jury on the verdicts open to them resulting in the verdict of guilty of manslaughter. Having reviewed the extracts from the transcript reproduced above at paras. [92] and [110], it is accepted that the learned judge may have caused some confusion when directing that the appellant could be found guilty of murder "as a reason of provocation". It is noted, however, that immediately after the impugned direction, she made an effort to clarify that confusion. In the end, after referring to the written route to verdict and directing them in accordance with it, she stated:

> "Now, Mr. Foreman and your members, please bear in mind the law and I remind you that you must apply in this case, as well as the review of the evidence I have conducted, always bearing in mind that you have to accept the law from me but the facts are yours alone to decide. Remember, Mr. Foreman and your members, that the possible verdicts open to you are not guilty of murder by reason of accident, not guilty of murder by reason of self-defence, guilty of manslaughter by reason of provocation, guilty of murder as a result of provocation being disproved by the prosecution, which is another way of saying that you don't find provocation, lawful provocation."

[115] This final direction was sufficiently in keeping with this court's recommendation as to the correct approach for judges when leaving the options for verdict open to a jury. In **Marlon Campbell v R** [2023] JMCA Crim 9, D Fraser JA, writing on behalf of the court stated:

> "[75] As the jury should normally first consider the defence case, it may be best to leave the verdict that would result in a clean acquittal first, then the verdict that would result in conviction of a lesser offence, if any, and then the option of conviction of the offence charged, if the defence or, where relevant, each defence has been rejected."

We conclude that there is no merit in the complaint that the verdict of guilty of manslaughter resulted from a misdirection by the learned judge regarding the verdicts open to the jury.

The taking of the verdict (GROUND 9)

[116] Mrs Reid contended that the learned judge failed to assist the jury when they returned, resulting in a wrong verdict and further misdirected them on unanimous verdict. She further contended, "this ground becomes a supporting ground for an overturn of the conviction". Counsel pointed to the comments of the learned judge and highlighted:

> "You may have heard of majority verdicts but you should put this out of your mind…. If a time comes when the Court could accept a majority verdict then we would deal with the issue at that time and **this would only happen if I were to**

> **decide if it's an appropriate course to take** (particular emphasis supplied)."

Counsel, thereafter, submitted that the jury was wrongly directed. She also pointed to the learned judge stating "[a]s I say, you might have disagreement amongst you, try to arrive at a unanimous verdict….".

[117] Counsel acknowledged that at the time of trial the amendment to the Jury Act of 2016 had come into effect such that a verdict of not less than five jurors for non-capital murder could be accepted. She contended that "the jury was not directed on a majority verdict as of the amendment". She submitted that the failure of the learned judge to give the correct direction in law "compromised the jury's decision" which was seen from what transpired when they subsequently returned. Counsel also complained that the learned judge failed to ascertain the reason for the return of the jury but instead "gave them a lecture taking up three pages".

[118] In response, Miss Henriques noted that pursuant to the provisions of the Jury Act the majority verdict could not have been taken in relation to any offence left for the jury's consideration when they first returned. She submitted that at the time of this initial return, the learned judge correctly directed the jury that they were to make attempts at coming to a unanimous verdict which was in keeping with the guidance given in the Supreme Court of Judicature Criminal Bench Book ('the Bench Book'). Further it was her submission that the learned judge did not use words which offended the legal principles stated in the Bench Book.

[119] Miss Henriques identified as the real gravamen of the complaint the failure of the learned judge to enquire into the reasons for the lack of unanimity. She noted that there was no indication that the jury requested any assistance and the manner in which the learned judge dealt with the matter was appropriate in the circumstances. She referred to **Linton Berry v R** [1992] 3 All ER 881, **Machel Gouldbourne v R** [2010] JMCA Crim 42 and **Dwayne Green v R** [2016] Crim 35.

Discussion and disposal

[120] The Jury Act section 44(1A) and (2) provides:

> "(1A) On trials on indictment for murder not falling within subsection (1) (a), after the lapse of two hours from the retirement of the jury a verdict of a majority of not less than five to two, of conviction or acquittal of any person for such murder, may be received by the Court as the verdict of the jury.
>
> (2) On a trial on indictment for murder, after the lapse of one hour from the retirement of the jury a verdict of majority of not less than five to two of conviction of manslaughter, or of acquittal of manslaughter, may be received by the Court as the verdict of the jury."

[121] It is irrefutable that the law permits the entering of a majority verdict only if the jury is divided in particular numbers, after the relevant time had elapsed. Once the time had elapsed the judge can then make an enquiry as to how they were divided and if they were divided in a manner which could be received by the court as their verdict, the judge would then be obliged to consider the question of accepting the majority verdict (see **Dwayne Green v R**).

[122] In **Jerome Dixon v R** [2022] JMCA Crim 2, this court considered the propriety of the majority decision. Reference was made to the principle as set out in the Bench Book, which includes, at page 348 para. 8, that it is for the judge to decide when a majority direction is given (see para. [164]).

[123] At para. [177], this court stated:

> "In R v **Noel Phipps, Shawn Taylor and Phillip Leslie** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 21, 22 and 23/1987, judgement delivered 11 July 1988, which was referred to by the court in **R v Fitzroy Greenland** (at page 562), this court indicated, at page 23, that 'in practice a judge ought not to give a majority verdict until the necessity for such a direction arises due to the passage of time and an intimation that the jury are

> hopelessly divided, it seems desirable that a direction on unanimity can be most effectively given when a problem arises in the return of a verdict'. These sentiments are also set out in the Bench Book (see pages 347-348)."

[124] The first significant point to be noted is that the comments Mrs Reid highlighted were made prior to the time the jury was first invited to retire. Certainly, at that stage, the learned judge was not required to give directions on a majority verdict and did not err when she directed them to try to arrive at a unanimous verdict. She also did not err when she advised them that if the time came when a majority verdict could be accepted, she would be able to deal with it. She would then be obliged to make a decision as to whether it was an appropriate course to take which was contingent on how the jury was divided. Her directions on the issue at this stage were entirely appropriate and notably in keeping with the guidance given in the Bench Book.

[125] The next complaint by Mrs Reid was concerning the learned judge's failure to ascertain the reason for the jury's return and instead gave them, at that point, directions on a majority verdict. The jury retired at 2:36 pm and returned at 3:22 pm. This timeline fell short of the hour required before a majority verdict for the offence of manslaughter could have been received and well short of the two hours required for a verdict in relation to murder. Although the learned judge enquired of the foreman how they were divided, she could not have accepted the majority verdict at that stage in any event.

[126] In **Jerome Dixon v R**, this court noted the observations of Carey JA in **R v Fitzroy Greenland** (1990) 27 JLR 558, where it was held that the directions on unanimity were not required where the jury had retired for 25 minutes and returned indicating they were partially agreed. Carey JA stated that at that stage, the judge ought to have sent them back for further deliberation and since no problem had arisen, directions on unanimity could be characterised as "a benign academic flourish".

[127] In the instant case, the learned judge determined and expressly stated that the jury may have been experiencing difficulty in reaching a unanimous verdict. In the circumstances, her decision to give directions on the need for unanimity cannot be

faulted, and the directions given were unobjectionable. At that stage, there was no indication that the jury required any assistance. This was made apparent in the fact that they subsequently returned with a unanimous verdict of not guilty of murder but guilty of manslaughter. Failure to make an enquiry of the jury as to the reason for their return at the time they did was not fatal. Accordingly, there is no merit in GROUND 9. It too fails.

[128] We conclude that the conviction for manslaughter ought not to be disturbed.

Sentence

[129] Having been convicted for manslaughter, the appellant should have been sentenced in accordance with section 9 of the Offences Against the Persons Act which provides:

> "Whoever shall be convicted of manslaughter shall be liable to be imprisoned for life, with or without hard labour or to pay such fine as the court shall award in addition to or without any such other discretionary punishment as aforesaid."

[130] The learned judge clearly erred when she imposed a sentence of life imprisonment with the recommendation that the appellant serve 13 years' imprisonment before being eligible for parole, given that for manslaughter, a court is not empowered to stipulate a period to be served before eligibility for parole. Furthermore, it is generally accepted that the imposition of the maximum sentence of life imprisonment for the offence is to be reserved for the most egregious cases. As such, although the shooting of an unarmed man using an illegal weapon can be regarded as egregious, it is not the worst of this type of offence. It was a single act of the appellant in discharging the firearm that resulted in one entry gunshot wound to the thigh of the deceased that proved fatal and an exit wound. This is not a case of multiple injuries, and there is no indication that the appellant poses a dangerous threat to the public. There are also other factors considered below, which militate against the imposition of the maximum sentence of life imprisonment.

[131] Mrs Reid was, therefore, correct in her oral submissions that this was a sentence which was wrong in law. Hence this court is obliged to interfere with the learned judge's exercise of her discretion in imposing this sentence.

[132] The circumstances of this case are not such that a consideration of a fine would be appropriate. A custodial sentence is the only option. The comprehensive review of sentences for manslaughter conducted by Brooks JA (as he then was) in **Shirley Ruddock v R** [2017] JMCA Crim 6 continues to provide useful assistance to this court in a consideration of the appropriate sentence for manslaughter although the case was decided some seven years ago and the review was related to a period of six years prior to that. The review revealed a range of between seven and 21 years, with 15 years being the most common, where personal violence was used (see para. [27]) of the judgment). Brooks JA noted that "among the cases in which sentences of 15 years' imprisonment for manslaughter were imposed, a common feature was the fact that the offender and the victim were known to each other or had some mutual connection, and the incident giving rise to the killing arose from that situation".

[133] It is now well settled that the correct approach to the sentencing exercise is that as recommended by this court in **Meisha Clement v R** [2016] JMCA Crim 26 and as set out in the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines'). It is to be noted that although the learned judge ultimately imposed a sentence which was wrong in law, she demonstrated an awareness and application of the correct approach.

[134] Applying the now-accepted approach, the first thing to be done is to determine an appropriate starting point within the usual range for offences such as this. The Sentencing Guidelines provide that the normal range for the offence of manslaughter is between three and 15 years, with the usual starting point being seven years. The fact that this was a killing done with an illegal firearm and that the evidence of provocation was, at best, slight and tenuous would justify a starting point at the higher end of the range of 12 years. Other aggravating factors that must be considered are that the deceased was

unarmed at the time, the appellant deliberately went back to the home to confront the deceased, the shooting was in the presence of the mother of his child, the appellant was apprehended months later in another parish, suggesting his deliberate effort to evade the police even after he had called Miss Richardson and admitted to shooting the deceased, and the prevalence of these types of offences in the society. These factors would increase the sentence to 18 years' imprisonment. The mitigating factors are the relatively favourable things said about the appellant as recorded in the social enquiry report, and the absence of a previous conviction at the time of the commission of this offence. We note that the appellant had one previous conviction at the time of sentencing, which was recorded on 17 April 2015, after this offence had been committed and is not of a nature that should impact the sentence to be imposed here. For this reason, the appellant is treated as having no previous conviction. However, when the aggravating and mitigating factors are balanced, the former far outweighs the latter. An appropriate sentence, therefore, is 16 years' imprisonment.

[135] During the sentencing exercise it was revealed that the appellant had been in custody from the time of his apprehension on 14 January 2013. This meant that he spent a little over five years in custody prior to the sentencing exercise which took place on 25 January 2018. However, it was disclosed that for some of this period he had also been on remand for another offence; namely rape. The rape matter was reported to have been disposed of two years prior to the trial of this matter and the appellant remained in custody thereafter until the trial. Unfortunately, the precise dates were not disclosed, however, it can fairly be taken that the appellant remained in custody for at least two years. It is irrefutable that the appellant is entitled to have the pre-sentence remand period taken into account. Equally irrefutable is that he is not entitled to be credited with the period he spent on remand for some other offence unconnected with this one for which he is being sentenced (see **Romeo Da Costa Hall v R** [2011] CCJ 6). In the circumstances, the appellant is entitled to credit for two years. Having made allowance for the two years spent in pre-sentencing custody on account of this offence, we would impose a sentence of 14 years' imprisonment.

[136] Accordingly, the appellant succeeds in relation to the issue of the sentence. As a consequence, the sentence of life imprisonment imposed by the learned judge with her recommendation that the appellant serves 13 years before eligibility for parole cannot stand. It must be set aside and the sentence of 14 years' imprisonment substituted therefor. We will, therefore, grant the application for leave to appeal the sentence and make the necessary consequential orders, allowing the appeal against sentence.

Conclusion

[137] The lurking doubt principle is totally irrelevant in our jurisdiction and inapplicable to the circumstances and evidence of this appeal. The grounds of appeal seeking to challenge the directions given by the learned judge in relation to the issues of self-defence, accident and inconsistencies are without merit. The learned judge gave sufficiently appropriate directions to the jury to facilitate their consideration of these issues which arose from the evidence as presented to them. The learned judge may have erred in leaving manslaughter for the jury's consideration on the basis that she did, but there is no miscarriage or substantial miscarriage of justice. The sentence of life imprisonment with the recommendation that the appellant serve 13 years before being eligible for parole for the offence of manslaughter is wrong in law and must be set aside. In its stead, the sentence of 14 years' imprisonment at hard labour should be imposed.

[138] Accordingly, we make the following orders:

1. The appeal against conviction is dismissed.
2. The application for permission to appeal against sentence is granted and the hearing of the application is treated as the hearing of the appeal.
3. The appeal against sentence is allowed.
4. The sentence of life imprisonment with the recommendation that the appellant serves 13 years' hard labour before eligibility for parole is set aside. Substituted therefor is a

sentence of 14 years' imprisonment, account having been taken of the two years spent in pre-sentence custody.

5. The sentence is to be reckoned as having commenced on 25 January 2018, the date on which it was imposed.