JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00082

OSHANE THOMPSON v R

Mrs Jacqueline Samuels Brown KC and Robert Fletcher for the appellant

Miss Ruth Anne Robinson for the Crown

The appellant appeared by way of videoconference from the correctional facility

25, 26, 27, 28 March, 27 June and 31 July 2025

Criminal law – Conduct of defence – Failure on the part of defence counsel to properly represent and advance the appellant's case of self-defence during cross-examination – The impact of defence counsel's failure to properly put the appellant's case on the fairness of the trial and verdict – The role of a trial judge – Judicial duty to engage counsel on key issues – Unfavourable judicial comment on unraised defence – Whether trial judge erred in failing to consult defence counsel – Retrial – Whether a new trial should be ordered – Factors to be considered – Section 14(2) of the Judicature (Appellate Jurisdiction) Act

FOSTER-PUSEY JA

[1] Mr Oshane Thompson ('the appellant') was charged on an indictment with the murder of Kriston Pearson on 7 May 2017. After a trial before Tie-Powell J ('the learned trial judge'), sitting without a jury, he was convicted of the offence on 24 September 2021. On 26 November 2021, the learned trial judge imposed a sentence of life imprisonment with the stipulation that he should serve 20 years and eight months before being eligible for parole.

[2] The appellant sought leave to appeal his conviction and sentence. A single judge of this court granted his application to facilitate "the exploration of the issue as to whether defence counsel properly put the case of the [appellant] to the witnesses of the Crown". The single judge noted that the learned trial judge "repeatedly remarked on the fact that it was never suggested to the Crown witnesses that the deceased attacked the [appellant] by hitting him to the face, or that the deceased had a broken bottle". The single judge observed that this omission could be seen as eroding the credibility of the appellant's case.

[3] We heard the appeal over the period 25 to 28 March 2025. In light of the manner in which the arguments progressed, we requested that the Crown file and serve written submissions and an affidavit concerning the availability of witnesses and exhibits on or before 2 April 2025. The appellant was permitted to file and serve submissions and affidavits (where relevant) on or before 9 April 2025. We committed to delivering our decision on the matter at the earliest possible date.

[4] On 27 June 2025, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The conviction and sentence are set aside.
>
> 3. The matter is remitted to the Saint Mary Circuit Court for retrial.
>
> 4. The matter is fixed for mention on the opening day of the next sitting of the Saint Mary Circuit Court, 7 July 2025."

[5] Below are the reasons for our decision.

The grounds of appeal

Original grounds

[6] The appellant's original grounds of appeal are:

"(a) Misidentity by the witness: That the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.

(b) Lack of evidence: That the prosecution failed to present to the court any 'concrete' piece of evidence (material, forensic or scientific) evidence [sic] to link me to the alleged crime.

(2) Lack of evidence: That the court failed to recognised [sic] that I only acted in self defence after been [sic] attacked by the deceased.

(c) Conflicting testimonies: That the prosecution witness presented to the court conflicting and contrasting testimonies which amount to perjury thus call [sic] into question the soundness of the verdict.

(d) Poor legal representative: That I was misrepresented by my defence attorney-at-Law.

(e) Unfair trial: That the evidence and testimonies upon which the learned trial judge relied on for the purpose to convict me lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.

(2) Unfair trial: That the court failed to adequately address the matter of self defence on my part.

Miscarriage of justice: That the prosecution failed to recognised [sic] the fact that I had nothing to do with the alleged crime for which I was wrongfully convicted of.

Note: other grounds will be filed by my Attorney-at-Law if needed." (Underlining as in the original)

[7] At the hearing before us, counsel for the appellant sought and received leave to argue supplemental grounds of appeal along with the original grounds, with the exception of ground (a).

Supplemental grounds

[8] Counsel for the appellant filed these supplemental grounds on 23 September 2024:

"1. The appellant has been denied his constitutional and common law right to a fair trial.

2. The appellant's constitutional right to a fair trial has been breached by the failure of counsel in his representation to, inter alia, put the appellants' [sic] case of self-defence to the witnesses for the prosecution. This failure and other attendant deficiencies impugned the credibility of his defence and has denied him a true and fair consideration of his case and a real chance of acquittal.

3. The appellant has been deprived of his right to disclosure of relevant material in the possession of the prosecution and to which the prosecution had access, as a consequence of which his right to a fair trial has been impaired.

4. The prosecution, in its duty, failed to carry out a thorough investigation of material emerging during said investigation thereby disenabling itself from full disclosure. This failure denied him a fair trial.

5. The learned trial judge erred in not exercising her overarching responsibility to determine whether the appellant should have been called upon to answer, there being evidence on the prosecution's case which raised self-defence and erred in calling upon him to answer.

6. The learned trial judge ought to have acquitted the appellant on the basis of self-defence and in failing to do so denied him a real chance of acquittal.

7. The learned trial judge erred, when, in addition to considering the appellants [sic] case of self-defence, failed to consider manslaughter which arose on the facts.

8. The learned trial judge erred in not engaging with counsel for the defence when faced with the substantial and stark contrast between the appellant's unsworn statement, the evidence of the defence witness on the one hand and the evidence of the prosecution's witnesses on the other as it relates to the absence of self-defence on one hand and the evidence of self-defence on the other.

9. The learned trial judge erred when considering the appellant's case of self-defence by placing emphasis on the instances when his counsel failed to put his case of self-defence to the witnesses for the prosecution. This approach was imbalanced and has denied the appellant a fair consideration of his case.

10. The learned trial judge erred by failing to sufficiently consider discrepancies, weaknesses and inconsistencies in the evidence from the prosecution witnesses.

11. The appellants [sic] right to a fair trial has been compromised as testimony from prosecution witnesses was adduced and relied on based on leading questions posed by the prosecution.

12. The sentence is manifestly excessive."

The case for the prosecution

[9] The case for the prosecution was that Mr Kriston Pearson ('the deceased'), along with some friends, including his intimate partner, Miss Henry, and good friend, Mr Walters, attended a party at a venue in Port Maria in the parish of Saint Mary. While they were there, the appellant, a police officer and friend of Miss Henry, greeted her and then touched either her arm or her bottom. An altercation occurred between the appellant and the deceased. During the confrontation, they exchanged profanities and engaged in a tussle. The appellant then shot the deceased. According to the case for the prosecution, the deceased did not have any weapon or harmful object in his hand when the appellant shot him. Miss Henry and Mr Walters testified at the trial.

[10] By agreement, certain statements and documents were admitted into evidence in the prosecution's case. The agreed statements included those of Carolyn Proudlove, Constable Keron Fraser, Corporal Wayne Bartley, and Phillip Anderson. The post mortem report and ballistic certificate were also included. Further factual details will be provided only to the extent that they are relevant to the key issues for determination.

[11] Carolyn Proudlove, the mother of Kriston Pearson, identified his body at the funeral home. Constable Fraser attended the party. He heard explosions, went outside, saw a man lying face down in a pool of blood, and saw the appellant whom he knew before with his Glock pistol in his right hand. The appellant's left hand was covering his mouth, and his mouth appeared to be bleeding. Constable Fraser asked the appellant what had happened, and the appellant said that the man on the ground had hit him in his face, and he had discharged three rounds in his direction in defending himself.

[12] Corporal Bartley issued a Glock 17 9mm Pistol and cartridges to the appellant on 7 April 2017. Mr Phillip Anderson, forensic examiner of the Independent Commission of Investigations ('INDECOM'), went to the incident scene and identified several apparent bloodstains and a live round along Trinity Main Road. In the complex, he found a damaged expended bullet at the entrance, a pool of apparent bloodstain, three cartridge casings, and broken pieces of a Heineken bottle. He collected various items, including two portions of a damaged Heineken bottle. These two portions were dusted for prints in the INDECOM lab, and a picture was taken of the fingerprint backing card.

[13] Detective Sergeant Murdock, the investigating officer, visited the Port Maria Hospital, where he saw the deceased's body. He also went to the scene of the incident and attended the post-mortem conducted by Dr Prasad. Dr Prasad concluded that the deceased died as a result of a gunshot wound to the chest.

[14] By consent, a medical certificate relating to the appellant was entered into evidence. The medical certificate dated 7 May 2017 revealed that the appellant was treated at the Hospital and was suffering from the following injuries: "Abrasions to the inner surface of the lower lip x 3 – one on the right, two to the left". The medical doctor noted a small amount of blood to the appellant's anterior gum, lower left sole. The doctor opined that the injuries were not serious, not likely to be permanent, and were consistent with infliction by a blunt object.

[15] In cross-examining Miss Henry, defence counsel, representing the appellant, explored various matters, including the deceased's body stature, what he was drinking at the party, and Miss Henry's hairstyle. He asked Miss Henry whether she had observed the appellant with any blood or injury during the incident, and established that she and the appellant were friends.

[16] In cross-examining Mr Walters, defence counsel, among other things, suggested to Mr Walters that he was not present when the incident occurred. He asked Mr Walters whether he saw a broken Heineken bottle near where the deceased had fallen to the ground.

[17] Importantly, defence counsel did not put the appellant's version of events to the alleged eyewitnesses.

The defence case

[18] The appellant made an unsworn statement. In summary, he stated that, on 7 May 2017, he attended a party at Farro's lawn, along Trinity Main Road, Port Maria, along with his girlfriend and Dwayne Grey. While at the party, he was attacked by the deceased, who hit him in the face and caused him to bleed. He pulled his firearm from his waistband as the deceased was coming towards him a second time with a broken Heineken bottle in his hand to stab him. In "fear of his life", he fired one shot in the deceased's direction, but he was still advancing towards him. He fired a quick shot in succession, and the deceased fell to the ground.

[19] The appellant stated that all the suggestions that his attorney-at-law put to the witnesses were true. He stated that he had not seen Mr Walters at the event. The appellant also stated that he had given a statement to INDECOM, explaining what had occurred that morning, and photographs were available to show the broken Heineken bottle that he had mentioned earlier. In addition, the medical certificate indicated that he had received injuries. He insisted that he was innocent and only fired his gun to defend

himself, as otherwise he would have been seriously injured or killed by Mr Pearson with the broken Heineken bottle.

[20] Mr Grey testified that, on 7 May 2017, he attended a party with the appellant and the appellant's girlfriend at Farro's place in Port Maria. While they were leaving the party, the appellant saw one of his old friends and touched her on the back. She responded. The deceased injured the appellant by hitting him in the face with a green Heineken bottle. This burst the appellant's nose, and his lip and his hand were bleeding. The deceased then came over to the appellant with a broken bottle to hit him again or stab him. The appellant took out his firearm and fired two shots towards the man's belly area. The man fell to the ground.

[21] The defence also called a character witness for the appellant.

The appellant's complaint of poor legal representation

[22] By notice of application, filed on 19 September 2024, the appellant sought leave to expand the record of the proceedings in the Saint Mary Circuit Court. By his affidavit in support of this application, also filed on 19 September 2024, the appellant deposed that an altercation ensued on 7 May 2017 between him and the deceased. The deceased attacked him and was coming at him again, and to protect himself, he discharged his firearm at the deceased, and he died. Police officers assigned to the Port Maria Criminal Investigation Office in Saint Mary began investigating the shooting death of the deceased. However, very shortly after, on that morning, INDECOM intervened.

[23] The appellant indicated that after he shot the deceased, he gave his firearm to a police officer who was on the scene, and he told the officer, "I had to defend myself". After receiving medical treatment at the Annotto Bay Hospital for the injuries he sustained during the altercation, he was transported to the Annotto Bay Police Station. Mr Dixon of INDECOM introduced himself, interviewed him, and advised him to write a statement. He wrote a statement dated 12 May 2017 and handed it over to INDECOM. On 2 September 2018, he also gave this statement to defence counsel.

[24] The appellant deposed further that in his written statement, and whenever it came up in any meeting with his attorney-at-law, he explicitly stated that he shot the deceased after an initial attack with a Heineken bottle and a subsequent threat with the broken bottle, while someone present shouted that the deceased was going to kill him. The appellant asserted that, from his recollection, on the Saturday before the trial, his attorney-at-law spoke to him at the Annotto Bay Police Station and advised him that, based on the prosecution's documents, he intended to agree to some witness statements going into evidence without cross-examination. Among the names he recalled were Constable Fraser, Mr Phillip Anderson, and Detective Sergeant Glendale Murdock. Notably, the appellant stated, "Mr Phillip Anderson had been the person who collected the broken bottle from the scene as an exhibit, and I wanted my lawyer to question Mr Anderson about the importance of collecting the broken Heineken bottle as an exhibit and the fingerprints on them".

[25] In relation to Constable Fraser, the appellant indicated that he believed that Constable Fraser could be questioned about the injuries he saw on his face immediately after the shooting. He asserted that the response of his attorney-at-law was "he was the lawyer and I should leave that to him". The appellant also stated that during the trial, he heard his attorney-at-law ask the prosecution witness, Mr Leroy Walters, about the broken bottle. However, it was during the learned trial judge's review of the evidence leading to his guilty verdict that he realised his attorney-at-law should have posed questions to the witnesses that supported his claim of self-defence or corroborated his account of being attacked, as outlined in his written statement and their meeting.

[26] He also deposed that his attorney-at-law came to him with a written document and advised him to study it and repeat it to the court as his unsworn statement, which he did. After the closing addresses, his attorney-at-law approached him with a paper to sign, which was headed 'Certificate of Satisfaction'. He added that "while at that time I was not completely happy with the way [defence counsel] represented me I felt that I may as well sign" the 'Certificate of Satisfaction'. However, when he later "heard the trial judge talking about what [defence counsel] had not asked the witnesses or suggested to

them about the deceased's attacks on me casing [sic] to have to defend my life that I realised how serious these omissions were".

Highlights of defence counsel's evidence

[27] On 23 September 2024, defence counsel filed a comprehensive affidavit in response to the affidavit of the appellant. We highlight below key aspects of his response.

[28] Defence counsel deposed that at all times he discharged his duties to the appellant fairly and competently. He listed several steps that he took to do so. Defence counsel indicated that throughout the process, the appellant, as a member of the Jamaica Constabulary Force ('JCF'), never expressed any disagreement with the proposed defence strategy. The appellant was consistently consulted and was asked to share his views and suggestions on the approach to the trial.

[29] Additionally, he asserted that he discussed the content of the prosecution's witness statements with the appellant and how each one affected his defence. He explained to the appellant that he had the option to agree to certain witness statements which positively supported his defence to be admitted into evidence, without the need for cross-examination. The prosecution presented the written forms, which the appellant duly signed, agreeing to the witness statements being admitted into evidence.

[30] Defence counsel acknowledged that the appellant had instructed him that he acted in self-defence. He stated that the prosecution called two witnesses, the first being Miss Henry. Defence counsel noted that during Miss Henry's examination-in-chief on the first day of her testimony, Miss Henry stated that she was not present at the time of the incident, which was a significant departure from her witness statement. Faced with this discrepancy, the prosecution obtained leave from the court to treat her as a hostile witness. However, defence counsel indicated that during cross-examination, Miss Henry confirmed that her previous testimony, given before being treated as hostile, was true. She agreed with him that her initial statement of not seeing what happened was indeed

the truth. Given this confirmation, there was no need for him to press her further on this point.

[31] Regarding the second witness, Mr Walters, defence counsel indicated that the appellant firmly instructed him that Mr Walters was not present at the time of the incident and therefore could not have witnessed it. Therefore, during the trial, he conveyed these instructions to Mr Walters, suggesting that he was not present during the incident and did not witness what he claimed.

[32] On the bases mentioned above, defence counsel stated that the appellant's instructions regarding self-defence could not have been put to either Miss Henry or Mr Walters. In his view, to do otherwise would have been disingenuous, reckless, and in conflict with the appellant's instructions. He therefore rejected the allegation of any serious omission on his part in putting forward the appellant's defence.

[33] Furthermore, he deposed that the issue of self-defence could only have been put before the tribunal through several key pieces of evidence. Firstly, having the prosecution agree on its own case, the statement of Constable Fraser, dated 12 May 2017. Constable Fraser was the first responder with whom the appellant communicated and claimed he acted in self-defence. He saw the appellant's left hand covering his mouth with what appeared to be blood coming from it, which was consistent with the appellant's instructions. Secondly, having the prosecution agree on its own case, the report of Dr Mighty, dated 7 May 2017 that confirmed injuries to the appellant's mouth. This medical evidence supported the appellant's claim of self-defence. Thirdly, the defence called Mr Dwayne Grey as a witness. Mr Grey testified that he was present during the incident and confirmed that the appellant acted in self-defence. Finally, the appellant made an unsworn statement asserting that he acted in self-defence. These elements, defence counsel stated, collectively presented the appellant's claim of self-defence to the tribunal.

[34] Defence counsel highlighted that the appellant told the court, inter alia, that:

> "**All the suggestions that my attorney put to the witnesses, they are all true. I did not see Mr Walters at the event**. If I had seen him, I would have recognised him because of the uniqueness of the hairstyle that he sports. I did not see him." (Emphasis as in original)

[35] Defence counsel denied the appellant's claim that he provided a written document for the appellant to study and repeat as his unsworn statement. He clarified that the appellant chose to give an unsworn statement, and he provided the appellant with a copy of his written instructions to ensure he was adequately prepared and reminded of all elements of his instructions and defence. The unsworn statement given by the appellant was in his own words and reflected his observations of the trial proceedings.

[36] Defence counsel explained some of his several other strategic decisions made during the trial and emphasised that he never told the appellant that he was his lawyer, and he should leave matters entirely to him.

[37] Defence counsel emphasised his closing address to the court, highlighting that his conduct of the appellant's defence ensured a fair trial in line with due process, the appellant's instructions, and his duties as counsel. He contrasted his approach with that of the learned trial judge, suggesting that the learned trial judge erred in her assessment and handling of the prosecution witnesses' evidence and the appellant's case, misinterpreting it. Specifically, he pointed out that the learned trial judge did not sufficiently consider that the issue of self-defence arose from the prosecution's case through the agreed statements.

[38] A fellow counsel in defence counsel's chambers supported his account.

Submissions

[39] Following the submissions made by counsel for the appellant, the court carefully assessed the strength of the arguments advanced in relation to supplemental grounds 2, 8, and 9. The court then invited counsel for the Crown to respond only to those grounds.

Accordingly, the submissions and analysis that follow are confined to these three grounds. These three supplemental grounds gave rise to two overarching issues: the incompetence of counsel (Ground 2), and the role of the learned trial judge (Grounds 8 and 9). Subsequently, we invited counsel for both parties to present submissions on the matter of a retrial.

On behalf of the appellant

[40] Mr Fletcher made the submissions on these grounds. He submitted that this was an exceptional case where the conduct of counsel afforded a basis for appeal. He noted that the appellant's account of what occurred during the incident was consistent throughout. Counsel argued, however, that upon examination of the transcript, at no point did defence counsel make any suggestions to the prosecution's eyewitnesses concerning the appellant's defence of self-defence. In elaborating on this issue, Mr Fletcher highlighted that the defence case was never put to Mr Walters; instead, defence counsel suggested to Mr Walters that he was not at the event. Counsel urged that defence counsel was wrong to translate the appellant's statement that he did not see Mr Walters at the event, to a conclusion that Mr Walters was not there. Mr Fletcher argued that defence counsel's suggestion to Mr Walters that he was not there was not putting the appellant's defence forward. What counsel could have done, if he believed that the appellant was saying that Mr Walters was not there, was to suggest that Mr Walters was not there and "if you were there, this is what you would have seen" with an outline of the defence narrative. Mr Fletcher submitted that for defence counsel to stop his suggestions at "You were not there" did not put any defence forward.

[41] Counsel further submitted that although the prosecution failed to elicit the actual central incident from Miss Henry, defence counsel should still have put the defence case to her.

[42] Mr Fletcher commented on defence counsel's response to the appellant's affidavit. He noted defence counsel's response that he put forward the case of self-defence through the agreed statement of Constable Fraser. Counsel submitted, however, that Constable

Fraser did not have evidence in his statement as to what led to the appellant's injuries, and, while the medical report referred to the appellant's injuries, it did not prove how the injuries occurred. He argued that while it is correct that self-defence was hinted at in the prosecution's case, this did not amount to putting self-defence to the witnesses. Mr Fletcher emphasised that counsel must always put the defendant's case to the opposing witnesses for the jury's assessment.

[43] Counsel referred to and relied on **Troy Barrett v R** [2022] JMCA Crim 24, **Kenyatha Brown v R** [2018] JMCA Crim 24, **Bethel (Christopher) v The State (No 2**) (1998) 55 WIR 394, **Sankar v The State of Trinidad and Tobago** [1995] 1 ALL ER 236, **Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15 and **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court, Criminal Appeal No 113/2007 delivered 3 April 2009, for the principles that counsel may not disregard his client's instructions and conduct the case that he feels best, and must adequately put the defendant's case to the jury.

[44] Mr Fletcher submitted that the courts have always considered the effect that the failure to put the defendant's case has on the fairness and ultimate verdict in the case. Counsel highlighted the several occasions when the learned trial judge commented on the fact that the core of the case for the defence, that the deceased had attacked the appellant, was never put to the two witnesses for the Crown. Mr Fletcher submitted that the learned trial judge was "overwhelmed by the omission" to put the defence case to the witnesses for the prosecution, and it was clear that this failure weighed significantly on the learned trial judge's consideration of the defence case and the case as a whole. The terminal impact of the omission, he argued, was that the learned trial judge heard the defence case for the first time in the unsworn statement and evidence of Mr Grey. It led the learned trial judge, in a case that turned significantly on the credibility of the witnesses, to consider the defence a trick, as insincere and deceptive. Counsel submitted that, ultimately, defence counsel's failure to put the case of self-defence to the prosecution witnesses made the trial fundamentally unfair and was fatal to the appellant's chances of acquittal.

[45] However, counsel's criticisms did not focus solely on the conduct of defence counsel. Relying on **R v Crosdale** [1995] 2 ALL ER 500 and **R v Feeny** 94 Cr App Rep 1, Mr Fletcher argued that the stark difference between the prosecution's case and the defence's case, by the time all the evidence was in, should have prompted the learned trial judge to invite counsel to comment on the issue if she deemed it significant. Mr Fletcher argued that the learned trial judge ought to have taken note that the evidence on the prosecution's case established self-defence. He referred to the medical certificate, admitted into evidence by agreement. He contended that the certificate indicated injuries on the face of the appellant on the same day as the incident, which were consistent with being inflicted by a blunt object. Counsel also referenced the agreed statement of Constable Fraser, who stated that he saw the appellant covering his mouth, which appeared to be bleeding.

[46] Additionally, counsel submitted that certain photographic exhibits showed pieces of a broken green bottle, and it was a reasonable inference that these images were taken as part of the "visible scene of crime". He further highlighted the learned trial judge's emphasis on counsel's failure to present the appellant's case of self-defence to the prosecution's witnesses, and argued that there could be many reasons why an accused's case is not properly presented. Counsel submitted, however, that the learned trial judge should remember that it is not defence counsel who is on trial. Counsel contended that the learned trial judge is presumed to know that fairness would be compromised if the defendant's case is not fairly presented to the jury. He urged that a fair and balanced approach requires the judge to look beyond the counsel's failure to the substance of what the defendant and his witnesses said, and to consider their evidence holistically in the context of the entire case. He cited **Mears v R** [1993] 1 LRC 853 to support this.

[47] Turning to what he contended that the learned trial judge ought to have done, Mr Fletcher submitted that she ought to have invited defence counsel to comment on the stark contrast between what was put to the prosecution witnesses and what was led in the case for the defence. Counsel submitted that while it was not a common situation, there is case authority on the point. He referred to **Crosdale v R** (1995) 46 WIR 278.

[48] Mr Fletcher referred to four possibilities if counsel was invited to comment on the situation:

i. Counsel could have indicated that he had instructions about self-defence;

ii. Counsel could have explained his approach and why he did not put the defence to Mr Walters whom the appellant said that he had not seen;

iii. Counsel could have highlighted self-defence pointers in the prosecution's case; and

iv. The learned trial judge could have asked counsel whether he wished to recall any of the witnesses to put the appellant's case to them.

[49] Mr Fletcher noted that, in her written submissions, counsel for the Crown agreed that the learned trial judge ought to have engaged counsel in the circumstances.

<u>On behalf of the Crown</u>

[50] Miss Robinson, on behalf of the Crown, conceded that there was merit in the appellant's complaint that defence counsel ought to have put the appellant's case to the prosecution witnesses, as both Miss Henry and Mr Walters testified that they witnessed the incident between the deceased and the appellant. Both witnesses corroborated each other's accounts of being present at the time of the incident. Counsel submitted that defence counsel should have challenged these witnesses about the deceased having a broken Heineken bottle, attacking the appellant, and thereby injuring him, as the appellant asserted in his unsworn statement. This would have allowed them to respond to the issue. Counsel referred to defence counsel's position that he did not put the appellant's case to Mr Walters, as his instructions were that Mr Walters was not there. Counsel submitted that perhaps the appellant did not make a distinction between his not

seeing Mr Walters as against Mr Walters not having been at the incident at all. Agreeing with Mr Fletcher's submissions, in her written submissions, counsel for the Crown submitted that defence counsel should have gone further than suggesting that Mr Walters was not there and ought to have challenged his account of the incident as being untrue "because he was not there". In oral submissions, however, Miss Robinson submitted that defence counsel might have believed that it was contradictory to put self-defence to Mr Walters in the circumstances.

[51] Despite this concession, Miss Robinson submitted that putting the appellant's case to these prosecution witnesses would not have made a difference as, based on the tenor of their evidence, they were unlikely to have adopted any of the suggestions. Counsel also submitted that even if defence counsel had put the appellant's case to these witnesses, the appellant would still have been found guilty due to the quality of the evidence that the prosecution presented, in particular, from Mr Walters. Counsel emphasised that the learned trial judge did consider self-defence, however, there was a material discrepancy on the appellant's case that resulted in the outcome of the case. Counsel opined that defence counsel's failure to put the appellant's case to the prosecution witnesses did not erode the credibility of the appellant's case, and, as a result, the conviction was safe.

[52] Miss Robinson made a further concession that the learned trial judge ought to have engaged counsel based on the evidence of the prosecution witnesses on the one hand and the defence case on the other, as well as defence counsel's failure to put the issue of self-defence to the prosecution witnesses. Counsel submitted that the learned trial judge ought to have weighed the evidence on the prosecution's case regarding the appellant's injury, the evidence of Mr Anderson retrieving broken bottles from the cordoned-off area, along with the appellant's unsworn statement that the deceased had a broken bottle in his hand. In addition, the learned trial judge ought to have considered the lack of explanation for the appellant's injury on the prosecution's case. Counsel conceded that the learned trial judge, sitting as judge and jury, ought to have engaged counsel before the start of her summation when she appreciated the issues that arose

for her determination. Such an enquiry from the bench would have afforded defence counsel the opportunity to respond to the significant issue that operated on the learned trial judge's mind. Counsel also submitted that in the interests of justice and fairness to the appellant, defence counsel could have made a request for these prosecution witnesses to be recalled for further cross-examination on the issue of self-defence.

[53] Counsel nevertheless submitted that the learned trial judge's omission did not render the verdict unsafe, having regard to the totality of the evidence presented to the court.

[54] Furthermore, despite the above concessions, Miss Robinson submitted that the learned trial judge could not be faulted when she, on a number of occasions, referred to the absence of self-defence being put to the prosecution witnesses, as defence counsel's failure in this regard was significant.

Discussion

Incompetence of counsel

[55] The first issue we will address is the appellant's ground touching and concerning how defence counsel conducted his defence at the trial. I gratefully adopt a summary of principles regarding the matter of incompetence of counsel, helpfully outlined by Brown Beckford JA (Ag) in **Troy Barrett v R** at para. [40] of the judgment, where she stated:

> "(i) the misconduct of counsel will not be a basis to interfere with the decision unless there is a denial of due process to the accused;
> (ii) defence counsel is given a discretion to conduct the case in the way they believe is in the best interest of their client;
> (iii) new counsel should be generally wary of criticizing the steps taken by the former counsel in advancing the case; and
> (iv) in examining this issue, the court ought not to focus on the alleged incompetence of counsel but rather the impact which it may have had on the case of the accused."

[56] In **Kenyatha Brown v R**, during the trial of a rape charge, defence counsel did not put to the complainant the specific instructions that he had received that the complainant had requested money from the defendant.

[57] The defendant's case was explicitly placed before the jury for the first time when he gave evidence. This allowed the prosecution to challenge his credibility and suggest to the jury that it was a recent concoction. Phillips JA wrote at para. [35]:

> "[35] …So, the question must be, 'could the above exchange [regarding the complainant's request for money] have affected the outcome of the trial?' Was the failure of counsel to specifically treat with this particular and important aspect of the appellant's case by not putting the same to the complainant, such an extreme error as to result in a denial of due process? In our view, it was."

Phillips JA went on to comment that the court's position was underscored by the trial judge's comments in the summation on the fact that the conversation about money was never put to the complainant.

[58] In continuing to comment on the impact of defence counsel's failure to properly put the defendant's case to the complainant, Phillips JA wrote at para. [36]:

> "[36] ...It is difficult therefore to see, how, in those circumstances, the appellant would have received a fair trial, when a large part of the case turned on who the jury believed, the appellant or the complainant. We cannot say that the result of the case would have been the same, if the appellant's case as instructed had been put to the complainant. In our view, this process was unfair to him, as, instead of his case being put to the complainant, adverse comments were being made with regard to him, due to counsel's omission. The case was not just one, as counsel for the appellant submitted, about a denial of rape. Whether counsel was pursuing a particular strategy, or management of the appellant's defence as he saw fit, it was wrong, and the ineptitude in the handling of the appellant's defence resulted in a negative consideration of his case. On this basis alone the conviction would not be safe."

[59] Importantly, at para. [39] of the judgment, Phillips JA wrote:

> "[39] …As indicated, one is not really concerned as to the degree of ineptitude of the conduct of counsel, **the court is really concerned with the impact of that ineptitude on the appellant's defence, and as a consequence on the fairness of the trial process**." (Emphasis supplied)

[60] In **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ), it was held by a majority, at paras. [11]-[13], that in resolving the issue regarding the incompetence of counsel:

> "[11] …the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather this Court is guided by the principles of fairness and due process…**This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial.** In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court might yet consider…that the ineptitude or misconduct may have become so extreme as to result in a denial of due process…the conviction will be quashed regardless of the guilt or innocence of the accused…
>
> [12] Thus all counsel… are entitled to the utmost latitude in matters such as strategy… Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence.
>
> [13] **A conviction can only be set aside on appeal if, in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial**…" (Emphasis supplied)

[61] We agreed with the submissions made by counsel for the appellant on this issue. Defence counsel acknowledged that he understood the appellant's version of events and

defence. These were outlined in the statement the appellant provided to INDECOM, which he also received.

[62] It appears that defence counsel erred in his assessment of the evidence of Miss Henry, the deceased's intimate partner. Defence counsel stated that he could not have put the appellant's defence of self-defence to her in cross-examination, as she had stated that she was not present at the time of the incident. However, we have not seen this reflected in the transcript.

[63] Concerning the other eyewitness for the prosecution, defence counsel indicated that the appellant had firmly instructed him that Mr Walters was not present at the time of the incident and, therefore, could not have witnessed it. However, upon a review of the appellant's unsworn statement, he said that he **had not seen** Mr Walters at the event. This could also have been interpreted as it being possible that Mr Walters was there, but the appellant had not seen him. Mr Walters testified that he was there and the incident occurred "at [his] foot" (see page 148 of the transcript). We agreed with Mr Fletcher's submissions that in such a scenario, even if counsel was instructed that Mr Walters was not there, it was still essential to put the appellant's version of events to Mr Walters that, had he been there, this is what he would have seen.

[64] It was not enough, as defence counsel did, to rely solely on aspects of the agreed statements. It is correct that, according to the agreed statement of Constable Fraser, after the incident, the appellant told him he had been attacked, and Constable Fraser observed the appellant covering his mouth with his hand, with it appearing that his mouth was bleeding. It is also correct that Dr Mighty's medical report confirmed that the appellant had injuries to his mouth that night. From the agreed statement of Mr Anderson, INDECOM's forensic examiner, there was evidence of broken pieces of a Heineken bottle found at the scene. All of these details suggested self-defence, yet the appellant's version of how he became injured was never put to the prosecution witnesses. This was a deliberate strategy by defence counsel, but it was a serious mistake. What was the effect

of this strategy? The impact is seen in several comments made by the learned trial judge during her summation.

[65] Commenting on the case for the defence, the learned trial judge stated at page 474 of the transcript:

> "I observed and listened keenly to the statement made by the accused and do [sic] the same as his witness, Mr Gray, [sic] testified. Having considered the statement of the accused and the evidence of his eye witness, Mr Gray [sic], I accept neither as truthful. I find that I can attach very little weight to the statement given by the accused. I found that his unsworn statement which was carefully crafted and recited lack [sic] sincerity. **He struck me as insincere and deceptive**." (Emphasis supplied)

[66] In assessing the appellant's statement that the deceased attacked him, the trial learned judge noted, at page 476 of the transcript:

> "**I note that it was never put to any of the Crown's witnesses that the deceased attacked him by hitting him to the face, or any at all. Nor was it put to any of the Crown's witnesses that the deceased had a broken bottle**." (Emphasis supplied)

[67] In a recurring theme, the learned trial judge stated on pages 480-481 of the transcript:

> "**It is surprising that this crucial aspect of the case of the defence was not put to the Crown's witnesses. There is no mention of an attack or of an attack with a bottle by Mr Pearson.** The evidence of the officer who was at the party, who took the gun from this accused, in his discourse with the accused was not **told of an attack with a bottle**…" (Emphasis supplied)

[68] At pages 484-485 of the transcript, the learned trial judge made the following findings:

> "I find further that Mr Pearson had nothing in his hand and, in particular, a Heineken bottle. I am not unduly bothered by

> the absence of the fingerprint result given that this was not something that took the defence by surprise, **given that this issue of the deceased being armed with a bottle was never put to the Crown's witnesses** and given by [sic] assessment of the overall strength of the evidence of Mr Walters for the Crown, and his evidence that the deceased had nothing in his hand.
>
> I do not find that the injury of the accused was caused by a hit to the face by the deceased, or from a blow from the Heineken bottle inflicted by the deceased. I reject this as untruth." (Emphasis supplied)

[69] The learned trial judge stated that she did not believe that the appellant was under attack or that he himself believed he was under attack. As a result, his actions were not justified.

[70] In the instant case, the learned trial judge heard the appellant's version of events for the first time when he made his unsworn statement and called an eyewitness. Defence counsel's failure to put the appellant's case of self-defence to the prosecution witnesses eroded the credibility of the appellant's case and, as demonstrated above, the impact was reflected in the learned trial judge's comments in the course of her summation.

[71] As Mr Fletcher submitted, in a case that turned significantly on credibility, the learned trial judge concluded that the defence case was insincere.

[72] Miss Robinson, with admirable frankness, conceded that defence counsel erred when he did not put the defence case to the witnesses for the prosecution. We did not, however, accept her submission that putting the appellant's case to the witnesses for the prosecution would not have made a difference. The issue in question was whether the appellant had a fair trial. It was not for this court to surmise as to what would have happened if the appellant's defence had been properly put. He was entitled to due process, and this included having his defence properly presented during the trial.

[73] We agreed that the failure to put the appellant's version of events to the prosecution witnesses ultimately made the trial unfair and denied the appellant the chance of an acquittal.

The role of the learned trial judge

[74] We also agreed with Mr Fletcher's submissions that the learned trial judge erred in her approach to the failure of defence counsel to put the appellant's version of events to the prosecution witnesses. In our respectful view, the learned trial judge erred when she did not, before her summation, engage defence counsel about the stark difference in what was put to the prosecution witnesses in contrast with the defence case.

[75] There is case law on such an issue. In **Crosdale v R**, Crosdale was charged with murder. Prosecution witnesses testified that there had been an altercation involving the deceased's girlfriend and Crosdale stabbed the deceased. Crosdale gave evidence that the fight was between the deceased and his girlfriend, he did not have a knife and he did not stab the deceased. The judge in her summation commented on discrepancies between the way in which Crosdale's counsel put his case in cross-examination and his evidence. For example, in cross-examination, Crosdale's counsel suggested that there had been ill feeling between Crosdale and other tenants. In his evidence, Mr Crosdale denied that that existed. One important discrepancy was that defence counsel suggested to witnesses that the deceased had a knife, but Crosdale did not say that in his evidence. The judge commented, at pages 282-283 of the report:

> "Here again is another suggestion, because here is Patricia being told by counsel for the defence that John had a knife that morning. Now, [Crosdale] never told you that he saw John with any knife that morning. Here again is another suggestion to the witness for the prosecution that John had a knife. Now, there is nothing from [Crosdale] to say that John had any knife, so you must ask yourselves the question, why is the defence so insincere, putting one thing to the prosecution and you don't hear anything about it again in the case? ... So, you use your common sense as members of the jury and say where you find the truth lies. Because here is a

suggestion to the witness Patricia Cooper that John had a knife that morning and there is nowhere else in this case that anything has come out that John had a knife that morning."

[76] Their Lordships' comments on this issue are directly applicable to the instant case and will be quoted at some length, at pages 287-288 of the report, they stated:

> "*The judge's comment on the conduct of the defence.*
> On two occasions the judge explicitly described the defence case as lacking in sincerity. It is upon the likely effect of those observations on the jury that their lordships must concentrate. In doing so, their lordships accept the submission of counsel that the most striking comment would have been the judge's comment that Crosdale did not testify, as envisaged by his counsel, that John Roberts had a knife. And it seems to their lordships that the comment would probably have been understood by the jury not as a criticism of counsel but as a criticism of the veracity of Crosdale. Prima facie the judge would have been entitled to consider it unlikely that counsel would have misunderstood her instructions on such an important point. **Nevertheless, given the forcefulness of the judge's intended criticism, their lordships consider that the judge should have invited the comments of counsel in the absence of the jury before he summed up the case.**
>
> Unfortunately, the record of the proceedings is incomplete. In particular that part of the record which contained the cross-examination of Crosdale is missing. It seems probable, however, that the point concerning the knife was never put to Crosdale by prosecuting counsel or the judge. If the point had been put to Crosdale, one would have expected the Court of Appeal to have been informed accordingly when the matter was raised on appeal. It was an important point. It was an issue which had not been actively canvassed at the trial. In *R v Cristini* [1987] Crim LR 504 Watkins LJ observed that (at page 507):
>
> > **'... judges, if they are to introduce an issue into the summing-up which has not been actively canvassed in the course of the trial, should at least give ample warning of their intention so to do to counsel in the absence of the jury before addresses are**

> **begun, so that there can be discussion between the judge and counsel as to the rightness of the course to be adopted by the judge and an opportunity given to counsel to deal with the issue in their addresses to the jury.'**
>
> **This principle of fairness reinforces the view previously expressed by their lordships that the point ought to have been raised by the judge with counsel in the absence of the jury before his summing-up.**
> That leads their lordships to an examination of the position that would have arisen if the judge had invited counsel's comments. Counsel explained to the Court of Appeal that Crosdale had not instructed her that John Roberts had a knife. She shouldered the blame. This was a confession to a surprising lapse on her part. On the other hand, there is no reason to doubt the genuineness of her explanation. What is, however, difficult to understand is that she failed at the end of the summing-up to draw the attention of the judge, in the absence of the jury, to her real instructions. If she had done so, the judge would have had an opportunity to inform the jury of the true position.
>
> In the result something went seriously wrong at the trial which caused the Crosdale's case to be described by the judge in his summing-up as lacking in sincerity in an important respect." (Italics as in the original) (Emphasis supplied)

[77] It is a similar position in the case at bar. While the learned trial judge did not expressly state that she found the appellant's case to be insincere, she said the appellant struck her as insincere and deceptive, which was the clear tenor of her comments in respect of the defence case. With respect, we agreed with counsel on both sides of the bar that the learned trial judge ought to have engaged counsel on the issue before the close of the defence case and closing arguments, prior to commenting so unfavourably in her summation. As Mr Fletcher submitted, had the learned trial judge engaged counsel on the issue, a range of possibilities could have materialised. For example, counsel could have indicated what his instructions were and explained why he did not put the defence to the witnesses for the prosecution, counsel could have emphasised pointers to self-defence in the prosecution's case, and the learned trial judge could have given counsel

the opportunity to recall any witness needed so that he could put the defence case to them. As Mr Fletcher submitted, the important point was to ensure that the appellant had a fair trial, even if his counsel was taking an erroneous approach.

[78] Miss Robinson conceded that the appellant's complaints in this area were valid. We also agreed with Miss Robinson's submissions that the learned trial judge ought to have weighed the evidence on the prosecution's case regarding the appellant's injury, the broken bottle found in the cordoned area at the scene, and the lack of explanation for the appellant's injury in the prosecution's case. Striking a somewhat discordant note, Miss Robinson nevertheless insisted that the learned trial judge could not be faulted in the circumstances when she commented on several occasions on defence counsel's failure to put the appellant's version of events to the witnesses for the prosecution. Counsel also urged that the learned trial judge's omission to discuss the difference between the defence case and what was put to the prosecution's witnesses did not render the verdict unsafe due to the strength of the evidence presented to the court. We saw these submissions as contradictory and, in any event, wrong in light of the law on the issue.

[79] In the circumstances at bar, the appellant did not receive a fair trial, and we concluded that his conviction had to be quashed.

[80] The question that then arose was whether this court should order a retrial in all the circumstances.

Should there be a retrial?

[81] Section 14(2) of the Judicature (Appellate Jurisdiction) Act provides:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[82] For many years, the guidance from the Privy Council's decision of **Dennis Reid v The Queen** (1978) 16 JLR 246 took precedence when our courts were considering whether to order a retrial. The guidance included the following considerations that are outlined in the headnote of the case:

> 1. "…what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case";
>
> 2. that "[a] distinction must be made between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder"; and
>
> 3. that where "…the verdict has been set aside because of the inadequacy of the prosecution's evidence…to order a new trial would…give the prosecution a second chance to make good the evidential deficiencies in its case and this amounted to an error of principle."

[83] Lord Diplock, who wrote on behalf of the Board, outlined the factors to be considered in determining whether to order a retrial, at pages 250-251 of **Dennis Reid v The Queen**. These factors include:

i. the seriousness or otherwise of the offence;

ii. the prevalence of the offence;

iii. the expense and the length of time for a fresh hearing;

iv. the ordeal of a new trial suffered by the accused;

v. the length of time that would have elapsed between the offence and the new trial;

vi. the availability of evidence at the new trial;

vii. the strength of the prosecutor's case at the previous trial; and

viii. the public impact that the case could have.

In giving this guidance, Lord Diplock cautioned that this list was not exhaustive and underscored that "the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances".

[84] In **Shawn Campbell and Others v R** [2024] JMCA Crim 30 ('**Campbell & Ors**'), this court refused to order a retrial after the Privy Council quashed the appellants' convictions and remitted the matters to this court for a determination as to whether the appellants ought to be retried. After reviewing many cases, this court adopted and expanded on the factors outlined in **Dennis Reid v The Queen**. The factors that the court considered in **Campbell & Ors** were listed at para. [41] of the judgment:

> "(1) the seriousness and prevalence of the offence committed;
> (2) the strength of the prosecution's case;
> (3) the availability of the prosecution's witnesses and exhibits;
> (4) the availability of witnesses and evidence which tended to support the defence at the first trial;
> (5) the time, financial costs and expense of a new trial;
> (6) the ordeal to be faced by the appellants;
> (7) the impact of prejudicial pre-trial publicity on the fairness of a new trial;
> (8) whether the new trial would give the prosecution an unfair advantage;
> (9) fault or error on the part of the prosecution;
> (10) legislative changes in the Jury Act and the potential legislative changes to the Offences Against the Person Act to increase the sentence for murder;
> (11) The possibility of prejudice arising from the mandatory minimum sentence and minimum term before eligibility for parole;
> (12) delay and whether a new trial can be facilitated within a reasonable time; and
> (13) breaches and likely breaches of the appellants' constitutional rights."

[85] The nature of each case will impact the factors that are relevant for consideration. The court is usually assisted by evidence to assess the factors that come into play.

The affidavit evidence

[86] The court ordered the Crown to file and serve written submissions and affidavits regarding the availability of witnesses and exhibits on or before 2 April 2025.

[87] The appellant was ordered to file submissions and affidavits, where relevant, on or before 9 April 2025. The appellant filed submissions, but no affidavits.

[88] The Crown relied on the affidavit of Deputy Superintendent of Police ('DSP') Glendale Murdock, the investigating officer in the case. DSP Murdock deposed that in conducting the original investigation, he recorded or caused statements to be recorded from: Ms Carolyn Proudlove, Miss Nicolette Henry, "Ms [sic] Leroy Walters", Corporal Wayne Bartley, Constable Fraser and Mr Phillip Anderson.

[89] He further deposed that on Wednesday, 26 March 2025, he was informed that the appellant's case was being heard in this court, and he was asked to locate the witnesses who testified at the trial. He obtained telephone numbers for and contacted Ms Proudlove and Mr Walters, both of whom were available for the trial. Miss Robinson informed him that she had made checks and Corporal Bartley was still a serving member of the JCF.

[90] His checks revealed that Constable Fraser had resigned from the JCF, had migrated, and was not available. It was a similar position for Mr Anderson, who had also resigned and migrated. Miss Robinson also informed him that she had made checks as recently as 1 April 2025, and Mr Anderson was not available for trial. DSP Murdock stated that he had not been able to locate Miss Henry but was still trying to do so.

Submissions on behalf of the Crown

[91] Miss Robinson submitted that the interests of justice would be served if this court ordered a retrial. Counsel submitted that the appellant has indicated that he acted in self-defence, while Mr Walters indicated that this was not so. It would be a matter for the tribunal of fact to assess both narratives after receiving the necessary directions from the tribunal of law.

[92] In relation to the various factors to be balanced, counsel submitted:

a. Murder was a serious offence that had become 'distressingly commonplace' in our society;
b. The prosecution has sufficient evidence upon which the appellant can be called to answer. Although self-defence is a live issue, there is at least one prosecution witness who does not support the contention that self-defence arose. It will be a matter for the tribunal of fact to accept or reject the appellant's defence of self-defence;
c. The appeal was not concerned with a deficiency in the evidence led by the prosecution and is not due to the fault of the prosecution.
d. The trial was not complex, it took 10 working days and can be resolved within a reasonable time.

[93] Counsel acknowledged that the appellant has a constitutional right to a trial within a reasonable time. She noted that the incident in question took place on 7 May 2017 and was tried four years later in July 2021. Up to the time of the hearing of the appeal, seven years and 10 months had elapsed since the incident. Counsel referred to the case of **Radcliffe Levy v R** [2019] JMCA Crim 46, in which almost 12 years had elapsed between the date of the incident and the hearing of the appeal, but this court ordered a new trial. Counsel acknowledged that in the **Radcliffe Levy v R** case, the appellant was on bail until the trial of the matter. In contrast, the appellant in the case at bar had been in custody for three years and four months before being sentenced. In sentencing the appellant, the learned trial judge had opined that life imprisonment with 24 years' pre-parole was appropriate, but she took into account the appellant's pre-sentence custody and imposed a pre-parole period of 20 years and eight months.

[94] Counsel submitted that if a new trial were ordered, the matter would be accorded priority status in the then-upcoming next sitting of the Saint Mary Circuit Court, which was scheduled to commence on 7 July 2025. Counsel noted that the trial would take place

in the Saint Mary circuit and not the Home Circuit court, unlike the position in the **Campbell & Ors** case.

[95] Counsel highlighted the evidence as to which witnesses were still available, including the investigating officer, DSP Murdock, who conducted investigations on the whereabouts of the witnesses. In oral submissions, counsel indicated that although Mr Anderson had resigned, he was still in contact with INDECOM and could be reached.

[96] In submissions, with no supporting evidence, counsel stated that the exhibits had not been located but could be located ahead of the proposed trial date of 7 July 2025.

[97] In conclusion, counsel submitted that the prosecution's case against the appellant should be properly determined by a tribunal of fact and it should not be disposed of on a mere technicality.

Submissions on behalf of the appellant

[98] Counsel for the appellant submitted that there ought not to be a retrial in light of the state of the evidence that was adduced. Counsel highlighted that self-defence arose on the prosecution's case and the prosecution's main eyewitness' credibility was impugned. This should have led to a not guilty verdict on the prosecution's case. Such a verdict was further supported by the defence put forward by the appellant. Counsel emphasised that on the state of the evidence considered by the learned trial judge as trier of fact and law, the appellant was entitled to an acquittal, therefore, this was not a case involving a technical blunder such as was the case in **Campbell & Ors** and case law establishes that this is the primary factor to be considered. Counsel urged that the prosecution should not be allowed a second chance to cure evidential deficiencies in the case.

[99] Counsel submitted that in light of the evidential deficiency, in this appeal, there was no need to consider the other factors usually assessed. Nevertheless, in assessing some of the factors that arose, counsel submitted that although a crime may be prevalent and serious, the evidence against the accused may be so weak that the matter ought not

to be retried. It was submitted that such was the case at bar, in which evidence adduced by the prosecution confirmed that the appellant was injured and supported the appellant's defence of self-defence. Counsel also submitted that the credibility of the "sole eyewitness" was impugned.

[100] Insofar as the availability of prosecution witnesses, exhibits and potential exhibits are concerned, counsel noted that Constable Fraser and Mr Anderson would not be available in the event of a retrial. Constable Fraser's absence would "remove from the trial record an important piece of evidence supporting the defence of self-defence and or provocation" and "would rob the appellant of a fair opportunity to interrogate the evidence being put forward by the prosecution".

[101] On the consideration of fault or error of the prosecution or other arm of the State, the appellant submitted that the unavailability of Mr Anderson also impacted this issue, as in the trial, there was a gap in the evidence relative to the fingerprints extracted from the Heineken broken bottles found in the cordoned off area. This would lead to a breach of the appellant's right to a fair trial and due process. Counsel also highlighted that the Crown indicated that the exhibits admitted in the trial were not yet located.

[102] Moving to the question as to whether a new trial could be facilitated within a reasonable time, counsel submitted that to be kept in custody for some seven years with a serious charge hanging over your head is an ordeal and there was no guarantee that if a retrial is ordered, the trial date can be accelerated.

Analysis of the issue of retrial

[103] Our reasoning on the question of ordering a retrial is outlined below.

A. The seriousness and prevalence of the offence committed

[104] The offence of murder is serious and prevalent. This is a factor in favour of a retrial.

B. The strength of the prosecution's case

[105] It is correct, as counsel for the appellant submitted, that the issue of self-defence arises on the case for the prosecution. We, however, agreed with the submissions of counsel for the Crown that there is one available eyewitness for the prosecution who disputes that the appellant acted in self-defence. It will be a question of who the jury, or if trial by judge alone, the judge, believes. While counsel for the appellant referred to an evidential deficiency on the prosecution's case, we did not see this. We noted defence counsel's submissions that the credibility of the prosecution's eyewitness, Mr Walters, was impugned during the trial. We did not see this on the transcript. It will remain to be seen whether that will be the experience in a new trial. We regarded this element as a factor in favour of a retrial.

C. The availability of the prosecution's witnesses and exhibits

[106] Miss Henry and the exhibits from the trial had not been located at the time of the appeal hearing. We noted that the most important witness for the prosecution was still available. Constable Fraser and Mr Anderson had resigned. In oral submissions, counsel for the Crown stated that Mr Anderson was still in contact with INDECOM and could be reached. The investigating officer and Corporal Wayne Bartley were available.

[107] During the trial, the following statements were admitted into evidence by agreement: Carolyn Proudlove (mother of deceased), Constable Fraser, Corporal Wayne Bartley, Phillip Anderson (INDECOM forensic examiner), Detective Sergeant Glendale Murdock (investigating officer) and Detective Sergeant Garrett Smith (who arrested and charged the appellant).

[108] Other exhibits that were entered into evidence were: the post-mortem report, the ballistic certificate, and the medical certificate of the appellant. The content of these exhibits is reflected in the trial transcript, and we assumed both the defence and prosecution would have copies. There were also scenes of crime photographs. It is these that would be the greatest issue. We believed, however, that the matter can be retried without the photographs and the focus will have to be on the oral testimony. This was

not a case heavily dependent on forensic and photographic evidence. We regarded this element as a factor in favour of retrial.

D. The availability of witnesses and evidence which tended to support the defence at the first trial

[109] The appellant did not file any affidavit evidence concerning the unavailability of any witnesses that he would call. He only referred to evidence on the prosecution's case that he said would have assisted him, particularly that of Mr Anderson and Constable Fraser. While Constable Fraser and Mr Anderson may or will not be available for a retrial, it was our view that their statements could again be admitted into evidence by agreement and still assist the defence. Counsel for the appellant complained that Mr Fraser would be absent. However, it must be recalled that he was not an eyewitness to the incident, and so it is not clear how much more assistance he could provide to the appellant if he were available in person.

[110] We noted counsel for the appellant's submissions regarding a 'gap' in the evidence relative to the fingerprints extracted from the pieces of broken Heineken bottle found in the cordoned area at the scene of the incident. The fingerprints lifted from the Heineken bottle were not available at the trial, and it is unclear whether they can be found. In our view, this did not weigh against a retrial being held. It was our view that the matter could be determined without this evidence.

[111] We found that the issues raised by the appellant on this element did not weigh against a retrial.

E. The time, financial costs and expense of a new trial

[112] The trial and sentencing occurred over 10 days and the trial was not complex. This issue did not weigh against a retrial.

F. The ordeal to be faced by the appellant

[113] It will always be an ordeal for an appellant to experience a retrial. In this instance, the matter moved fairly speedily through the courts, considering that the incident

occurred in May 2017. Trial was completed in November 2021, the court received the transcript in August 2023, the single judge ruling was issued in September 2023, case management orders were made in November 2023, various affidavits and documents including supplementary grounds of appeal were filed in September 2024 in light of the incompetence of counsel ground of appeal, and the matter came on for the appeal hearing in March 2025. This ordeal had to be balanced against the other factors.

G. Delay and whether a new trial can be facilitated within a reasonable time

[114] The prosecution indicated that the matter could be facilitated in July 2025 in the Saint Mary Circuit Court. We set the trial for mention in July on the basis of these statements. This was a factor in favour of a retrial.

Overall assessment

[115] When we weighed the various factors, we concluded that a retrial ought to be held.

[116] It was for all of the above reasons that we made the orders at para. [4] above.