[2017] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 1/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BERNARD BALLENTYNE v R

Christopher Dunkley and Hugh Wilson for the applicant

Miss Kelly-Ann Boyne for the Crown

1, 2 December 2015 and 16 June 2017

MCDONALD-BISHOP JA

[1] Following on a trial conducted between 10 and 25 October 2012 in the Manchester Circuit Court before Morrison J, sitting with a jury, the applicant, Bernard Ballentyne, was convicted on an indictment that charged him with the offence of murder. The particulars of the offence were that on 11 August 2010, he murdered Shannel Norris. On 2 November 2012, he was sentenced to life imprisonment with the

stipulation that he should serve a minimum period of 20 years' imprisonment before being eligible for parole.

[2] The applicant initially sought leave to appeal his conviction only. He set out as his original ground of appeal that the learned trial judge "did not deal adequately with [his] defence in particular with the DNA evidence eg that regarding the presence of at least one other DNA" (emphasis as in original). He, however, reserved the right to seek leave to file additional grounds on receipt of the transcript. On 30 October 2014, his application for leave to appeal was considered and refused by a single judge of this court. In refusing the application, the single judge opined that the main issues in the case were that of circumstantial evidence and credibility, and that the trial judge, having given adequate directions in relation to both, there was no reason to disturb the jury's verdict. Having been refused leave by the single judge, the applicant renewed his application before this court, seeking leave to appeal both conviction and sentence.

The case at trial

[3] The prosecution's case was largely based on circumstantial evidence and so for that reason, and in the light of the supplemental grounds of appeal advanced before this court, it is considered necessary to provide a detailed outline of the facts that were placed before the jury for consideration, beginning with the prosecution's case.

The prosecution's case

[4] Up to 11 August 2010, the applicant, then 47 years old, was a member of the Jamaica Defence Force's National Reserve and attached to the Charlie Company at the

Foster Barracks, located in Mandeville in the parish of Manchester. He was also a driving instructor.

[5] On 11 August 2010, at approximately 6:30 pm, Lance Corporal Everol Francis was exiting the Foster Barracks compound, when he saw the applicant entering the premises from the direction of Hart Road. Lance Corporal Francis described the applicant as looking frightened with what appeared to be bloodstains on his shirt and a bloodstained rag around his left hand. This prompted Lance Corporal Francis to enquire of the applicant whether something was wrong. The applicant, however, did not respond. The applicant having not responded, Lance Corporal Francis escorted him to the guardroom located on the compound and handed him over to Lance Corporal Jerry Butler.

[6] Lance Corporal Butler, who at the time was with six other persons, including Corporal Ricardo Cohen, described the applicant as appearing as though something was wrong and not the person he had known him to be. He stated that he had known the applicant for seven years prior to the incident and that the applicant was someone with whom he had a working relationship. Having observed the applicant's appearance of distress as well as the bloodstains on the front of his shirt and a rag on his left hand, Lance Corporal Butler enquired of him whether something was wrong. The applicant then explained to him that he had gone to Perth Road to collect something from someone and that he was attacked and stabbed by the person. The applicant informed him that subsequent to the attack on him, he had walked to the camp, leaving his

motorcar open on Perth Road. The applicant also told him that he had not contacted the police.

[7] Lance Corporal Butler testified that he went over to the applicant, who had been pacing up and down in the guardroom, and placed his hands on his shoulder in an attempt to relax him. Whilst doing this, the applicant attempted to grab a rifle from Lance Corporal Butler, which was on a sling on his right shoulder. Lance Corporal Butler pulled the rifle away from the applicant and gave it to Corporal Cohen. Lance Corporal Butler then attempted to send the applicant out of the guardroom so that he could speak to him alone. However, on reaching the entrance of the guardroom, the applicant pushed Lance Corporal Butler, pulled a bloodstained knife from his waist and proceeded to put it to his throat. Lance Corporal Butler held on to the applicant's hand and hit it against a rail, causing the knife to fall. On being restrained by Corporal Cohen and Lance Corporal Butler, the applicant said "somebody shoot mi". Thereafter, the applicant was escorted to the medical unit by Staff Sergeant Blunt and Lance Corporal Beckford.

[8] Lance Corporal Butler subsequently handed over the applicant's car keys to Sergeant Morrison. He had taken the keys from a table in the guardroom where the applicant had placed them. Sergeant Morrison, Corporal Cohen and Private Campbell subsequently left the compound.

[9] After being medically treated, the applicant was placed by Lance Corporal Butler in the rear of a standby vehicle that was on the compound. The applicant's look of

unease caused Lance Corporal Butler to remove the keys from the ignition. He did so out of fear of the applicant driving away the vehicle. Notwithstanding that action on the part of Lance Corporal Butler, the applicant jumped from the rear of the vehicle into the driver's seat and attempted to start the vehicle.

[10] Corporal Simpson, a member of the Jamaica Constabulary Force, later arrived on the compound. He spoke with the applicant. Corporal Simpson subsequently left the applicant, and together with Lance Corporal McKenzie and Lance Corporal Butler, went to Hart Road where they saw the applicant's car parked. The car was not on Perth Road as the applicant had initially indicated.

[11] Sergeant Morrison opened the car door with the key that was taken from the guardroom at Foster Barracks. Someone was observed in the front passenger seat of the applicant's car. The seat was reclined and the person's face was covered with a denim jacket. On removing the denim jacket, a female was observed with her throat cut. On 19 August 2010, the body was identified by Denise Bennett to be that of her daughter, Shannel Norris, a 23 year old third year social work student of the Northern Caribbean University ("NCU").

[12] Later that same day, the applicant was taken into custody at the Mandeville Police Station, where the investigating officer, Detective Sergeant Pat Wallace, cautioned him. Detective Sergeant Wallace then showed the applicant the knife that had been taken from the Foster Barracks compound as well as the bloodstained rag, whereupon the applicant responded saying:

> "Officer, a fi mi knife. Mi use it fi open a Fruit Cocktail fi Shannel Norris an a argument develop an me get cut on mi thumb an mi use the knife fi cut her throat."

The applicant also told Sergeant Wallace that he had used the rag to band his thumb.

[13] The post mortem examination conducted on 19 August 2010 by Dr Collette Hall, forensic pathologist, revealed that the deceased sustained 12 injuries, with two of them being fatal. The injuries included: a chop or sharp force fatal injury to the anterior neck, which completely transected the trachea and nicked the second and third cervical vertebra bodies; a fatal stab wound to the anterior neck; an incised wound to the left side of the forehead; and several incised wounds to the palm and some digits of the right hand, which were indicative of the deceased having tried to defend herself during the attack. Dr Hall opined that the injuries sustained by the deceased were consistent with them being inflicted by a sharp implement, such as a knife, and that the fatal wounds to the deceased's neck could have been caused by the knife that was in the possession of the applicant.

[14] The knife, the bloodstained rag, the applicant's and deceased's clothing, fingernail clippings taken from the deceased as well as a sample of her blood were sent to the forensic laboratory for analysis. The applicant did not provide a sample for DNA testing and there is nothing to say he was asked to do so. In fact, the forensic analyst, Ms Bydson, in her evidence, indicated that she did not ask for any sample from the applicant. The analysis established, among other things, and so far as is relevant, that there was human blood on all the articles of clothing taken from both the deceased and the applicant as well as on the knife and rag. It also revealed that components of the

DNA profile of the deceased were found on an area of the knife taken from the applicant and on his shirt. The finger nail clippings did not reveal anything of evidential significance.

The applicant's case

[15] The applicant gave evidence (on affirmation) and was vigorously cross-examined. His defence was one of complete denial of any culpability in the murder of the deceased. In summary, he testifed as follows: He knew the deceased since February 2009. Shortly after their first meeting, the deceased began residing with him at his apartment in Williamsfield Gardens in the parish of Manchester. In May 2010, he was reassigned to the Jamaica Defence Force's Headquarters at Up Park Camp, Kingston but would return to the apartment at nights when he was not on duty. The deceased, however, remained at the apartment and he continued to meet her housing, medical, food, phone cards and transportation expenses.

[16] Sometime in July 2010, the deceased told him that she needed some space in order to study and that she had found another place in Mandeville to live. He transported her to the new apartment to reside. He described feeling "a way" about her decision to move but stated that he was not "extremely upset".

[17] On 11 August 2010, two weeks after the deceased's decision to move out of the apartment in which they had lived together, they agreed to meet each other. On the day in question, he visited the deceased at approximately 5:30 pm. He described their relationship at the time as still being as friendly as when they initially met in 2009. On

arriving at the deceased's apartment, she was sitting downstairs with the landlord engaged in a conversation. He observed a light brown CRV outside the apartment. He indicated that on three or four previous occasions, he had seen the same vehicle both at his house and at NCU. He was aware that a man was the driver of that vehicle but he stated that he did not see the driver on that day at the deceased's apartment.

[18] After leaving the deceased's apartment, they travelled together in his car to two places. After those places, he parked on Hart Road at their "favourite spot", on the insistence of the deceased. When the car came to a stop, they both opened their car doors and the deceased reclined her seat. They began to talk and he took out a tin of fruit cocktail, opened it with a knife he had in the glove compartment and handed it to the deceased. When he was finished, he placed the knife in the region of the handbrake.

[19] While they were talking, he saw two men armed with knives approaching the vehicle. Both men "split on both sides of the car". The man who was standing at his side of the vehicle, opened the door a little bit more and said, "this [is] a hold up". He laughed because "it didn't seem real" and he "didn't take them serious".

[20] The assailants demanded their money and the man that was standing on the applicant’s side of the vehicle removed a knife from his pocket, said, "this is serious", and then pushed it twice across the applicant’s face. On the second jab of the knife across the applicant’s face, the deceased held onto the blade of the knife, whilst he grabbed onto the assailant's hand that held the knife. A struggle ensued between him,

the deceased and the man with the knife for approximately two to three minutes. During the struggle, the deceased eventually released the knife and he exited the vehicle. On exiting the vehicle, he and the assailant continued to struggle and he was eventually able to disarm the assailant. Following this, he ran to the camp site with the knife he had taken from the assailant in his hand. When he left the deceased in the car, she looked frightened but her throat was not cut.

[21] The applicant described being weak and frightened on arriving at the camp, but, he said he was able to speak to his colleagues about what had transpired. He testified that because of his condition he was not immediately able to request the assistance of his colleagues with respect to the deceased. He said he attempted to tell Lance Corporal Butler about the deceased but that he was interrupted by him saying, "Ballentyne, calm down and sit". He told his colleagues that he was attacked on Perth Road and not Hart Road, but that this was done due to him being "mixed up" with the names of the road.

[22] The applicant sought to respond to or explain away some matters that were raised on the prosecution's case, as follows:

a. His attempt to relieve Lance Corporal Butler of his rifle was done only in a bid to assist the deceased. He however had not communicated this intention to Lance Corporal Butler at the time.

b. He had no explanation for removing the knife from his waistband as Lance Corporal Butler led him to parade square. He however denied placing the knife at his throat and he could not recall asking a soldier to shoot him.

c. He denied that he attempted to drive the vehicle in which he was placed at the barracks. He, however, admitted to moving to the driver's seat and attempting to start the engine but said that he did so in an effort to get some fresh air.

d. He admitted that he told Corporal Cohen that he could not afford to go to jail but that he did so after the police had arrived and announced that they had discovered a body in his vehicle.

[23] The applicant vehemently denied cutting the deceased's throat or inflicting injuries on her. He stated further that he did not admit, upon being cautioned by the investigating officer, that there was an argument in the car and that he had used the knife that he used to open the fruit cocktail to cut the deceased's throat.

The appeal

[24] On 9 October 2015, the applicant filed three supplemental grounds of appeal. At the commencement of the hearing before us, counsel appearing for him, Mr Wilson,

was granted leave to argue the three supplemental grounds of appeal. The supplemental grounds of appeal are set out as follows:

> "1. The learned trial judge erred in law in failing to raise/leave the issue of provocation to the jury.
>
> 2. The learned trial judge erred in law in stipulating that the applicant should serve a minimum period of twenty years (20) before he would be eligible for parole which was manifestly excessive.
>
> 3. The learned trial judge failed to provide any or any sufficient guidance and assistance to the jury as to how they should approach and assess circumstantial evidence."

[25] Mr Wilson indicated that he would not be arguing the original ground of appeal and supplemental ground three but that he would not seek leave to abandon those grounds because he had no instructions to do so. He, however, indicated that his single request of the court is for the court to substitute the verdict of guilty of murder for one of guilty of manslaughter on the basis of provocation. The object of his arguments advanced on the application for leave to appeal, he said, is to demonstrate why a "manslaughter verdict is appropriate in the circumstances".

Given the thrust of the applicant's case on appeal and the refusal of his counsel to formally abandon any of the grounds of appeal, it seems more convenient and fitting to first dispose of the original ground of appeal and supplemental ground three, which were not actively argued before us but which have not been abandoned.

The original ground of appeal

The learned trial judge failed to adequately deal with the applicant's defence, in particular, the DNA evidence

[26] The applicant contends in his original ground of appeal that the trial judge did not deal adequately with his defence, in particular, the DNA evidence, which he said indicated the presence of the DNA of a third person. This ground has no merit. The applicant's defence was that he did not injure the deceased, causing her death. Her death, he said, was the consequence of the act of a third party who had attacked them both. The jury would have heard the evidence of the applicant. His case was comprehensively dealt with by the learned trial judge. The leaned trial judge fairly left it to the jury for their consideration, pointing out to them that the applicant had denied "everything which arose on the Crown's case".

[27] The learned trial judge also gave copious directions on the DNA evidence. He thoroughly reviewed the evidence of the expert witnesses in this regard, having given the jury proper directions on how to treat with expert evidence. The learned trial judge warned the jury on how they were to approach the evidence. At pages 579 - 581 of the transcript, he directed them in these terms:

> "Madam Foreman and your members, let me tell you this. If you accept the scientific evidence called by the Crown, this indicates that the source of profile number one came from a person with a rare profile. The defendant is one of them.
>
> If that is the position, then the decision you have to reach is whether or not that profile could have come from anyone else. That is to say, someone else who share [sic] it, is the same DNA characteristics. But I must warn you now Madam Foreman and your members, DNA evidence is not alone

> capable of proving the identity of the killer or killers, all you can do, depending on your judgment of the evidence of Miss Brydson in this case or the other expert in this case Judith Mowatt, is to narrow down some of what group of persons who could have left that material on the knife or on the other objects. But remember Madam Foreman and your members, DNA evidence does not stand alone. You have heard from the other witnesses on the Crown's case, the soldiers who saw him, the police officer who cautioned him and so DNA evidence has to be looked at in the context of all the other areas of evidence which I have gone through with you."

He further cautioned the jury thus:

> "Miss Brydson was careful to tell you that DNA evidence is not an exact science and that is why it has to be stated in probabilities and that is why it is not a stand alone evidence. It must be viewed in the context of other evidence in this case."

[28] The learned trial judge, after giving the directions on the DNA evidence, and having reviewed the applicant's evidence in detail, then reminded the jury that even if they rejected his evidence, they could not convict him because it did not mean that the prosecution had proven the case. He instructed them to go back to examine the prosecution's case to see whether or not they were satisfied so that they felt sure of the applicant's guilt. He reminded them once again where the burden of proof lay and the standard of proof that the evidence must reach and said, "[t]hey [the prosecution] must satisfy you so that you feel sure that Shannel Norris died and that she died at the hand of Mr Bernard Ballentyne" (page 604 of the transcript).

[29] The learned trial judge had properly discharged his duty to fully and fairly leave the applicant's defence and the issue of the DNA evidence for the jury's consideration. There is thus no proper basis for the complaint in the original ground of appeal.

Supplemental ground three

The learned trial judge failed to provide any or any sufficient guidance and assistance to the jury as to how they should approach and assess circumstantial evidence

[30] The applicant's complaint in ground three is also without merit. Although the learned trial judge gave the direction on circumstantial evidence along the lines of the rule in **R v Hodge** (1838) 2 Lewin 227 ("**Hodge's case**"), the overall directions were adequate and in keeping with the law as proclaimed in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, which has been adopted and followed in our jurisdiction. See, for example, **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004; **Wayne Ricketts v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 61/2006, judgment delivered 3 October 2008; **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 and **Dalton Reid v R** [2014] JMCA Crim 35, all cited by the Crown.

[31] In **Melody Baugh-Pellinen v R**, Morrison JA (as he then was) stated at paragraph [39] of the judgment:

> "As regards the proper directions to a jury on the subject of circumstantial evidence, **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in such cases

by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused.

Delivering the leading judgment of a unanimous House of Lords, Lord Morris of Borth-Y-Gest said this (at page 510):

> 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt'."

[32] The learned trial judge properly directed the jury on how to assess the evidence in order that they may be satisfied beyond a reasonable doubt of the guilt of the applicant. In so doing, he instructed them of their entitlement to draw reasonable inferences and he explained what inferences are, while telling them that they must not

speculate. He gave all these instructions, against the background of his directions on the burden and standard of proof, and upon a thorough review of the evidence of both the prosecution and the defence.

[33] Furthermore, this was not a case in which the prosecution was relying purely on circumstantial evidence. The narrow issue before the jury was whether the applicant who, undisputedly, was present with the deceased at the material time, was the one who had inflicted the fatal injuries on her. Apart from the surrounding circumstances on which the prosecution was relying to establish this fact, there was the evidence from Detective Sergeant Wallace, the investigating officer, that the applicant had admitted to him that he had cut the deceased's throat with the knife he had in his possession. That was evidence before the jury, which, once they accepted it as being credible and reliable, would have amounted to an admission by the applicant that he was the person who inflicted the fatal injuries on the deceased. It was not, at all, a complex matter for the jury. There was therefore, nothing more that the learned trial judge could have done in assisting them with their assessment of the evidence.

[34] We therefore conclude that the learned trial judge properly directed the jury on the issues concerning circumstantial evidence and gave them the necessary assistance they required in their approach to the treatment of the evidence. Accordingly, supplemental ground three cannot avail the applicant. We will now proceed to consider supplemental grounds one and two that were strongly argued before us.

Supplemental ground one

The learned trial judge erred in not leaving the issue of provocation to the jury

[35] The applicant's major contention is that the issue of provocation arose on the prosecution's case and, accordingly, the defence of provocation ought to have been left to the jury for their consideration. The statutory basis for the defence of provocation is section 6 of The Offences Against the Person Act ("the OAPA"), which 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 both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[36] Mr Wilson, in making his submissions on behalf of the applicant, posited that the section provides two distinct conditions as it relates to provocation, one subjective and the other, objective. Counsel contended that "the subjective condition relates to anything said or done that would cause a person to lose his self-control", whereas "the objective condition relates to the question as to whether the provoking conduct was sufficient to make a reasonable man do as the defendant did" (**Dwight Wright v R** [2010] JMCA Crim 17).

[37] Counsel contended that on a proper construction of the section, the following principles of law are apparent:

a. In a trial for murder, even if the issue of provocation is not raised by the defence for tactical or strategic reasons, the trial judge must leave the issue of provocation to the jury to decide if there is evidence which suggests that the accused may have been provoked and this is so even in situations where the evidence of provocation is slight or tenuous (**Regina v Rupert Johnson** (1997) 34 JLR 656; **David John Cambridge** (1994) 99 Cr App R 142).

b. The circumstances of the killing, biological evidence and the post mortem report may amount to sufficient evidence from which the judge could have inferred that the deceased's killing by the applicant was done when he was in a state of uncontrollable rage and anger (**Ethel Amelia Rossiter** (1992) 95 Cr App R 326; **Benjamin James Stewart** [1996] 1 Cr App R 229).

c. If the learned trial judge found that there is some evidence of provocative conduct, whether such evidence arises on the prosecution and/or defence's case, the issue of provocation must be left to the jury

for consideration (**Regina v Acott** [1977] 2 Cr App R 94).

[38] Counsel submitted further that the learned trial judge, in saying that the applicant had "lost his mind", when the deceased told him she wanted a separation, had concluded that the issue of provocation arose on the case. Moreover, he argued, the nature and extent of the deceased's injury as well as the circumstances of the killing were indicative of a frenzied attack and so it would have been open to the jury to draw the inference that the killing occurred in circumstances where the applicant was in a state of uncontrollable rage. According to Mr Wilson, this was a borderline case of provocation.

[39] For the Crown, Miss Boyne submitted that the issue of provocation did not arise on either the case for the prosecution or the defence and as such there was no obligation on the learned trial judge to have given any directions in this regard and/or for him to have left the issue to the jury for consideration. She submitted that while she is in agreement that section 6 of the OAPA contains the two tests indicated by Mr Wilson, the learned trial judge, however, would have been concerned with the subjective test at the point of the summation.

[40] In relying on a passage in **Archbold**, **Pleading**, **Evidence & Practice in Criminal Cases**, 53rd edition, 2005 at paragraph 19-53, Miss Boyne submitted that at the point of summation, it is the duty of a trial judge to determine first whether there is any evidence of specific provoking words and/or conduct and second whether there is

any evidence that the provocation caused the defendant to lose his self control (the subjective test). Should the answer to these questions be in the affirmative, she submitted, the issue must then be left to the jury for them to determine whether the provocation was such that a reasonable man would have acted in the manner the defendant did (the objective test).

[41] In the light of the applicable law, Miss Boyne argued that on a review of the evidence that was before the jury, there was a stark absence of any words and/or conduct which gave rise to the issue of provocation and so leaving the defence to the jury for consideration would have been a "direct and impermissible invitation to [the jury] to speculate on what those provoking words or provoking conduct might have been".

[42] We do agree with the submissions of both counsel that, on a proper construction of section 6 of the OAPA, in order for provocation to be left to the jury for consideration, two conditions must be met: the subjective condition of whether anything said or done (or both said and done) caused or may have caused the applicant to lose his self control; and the objective condition of whether those things said or done (or both said and done) would have caused a reasonable man to have reacted as the applicant did (see **Dwight Wright v R**).

[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 or

both said and 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. Once there is some evidence of provocation, even if the provocative act was slight, the learned trial judge would have been obliged to raise the issue for the jury's consideration, although the applicant did not rely on the defence. This guiding principle was enunciated by Lord Justice Stuart-Smith in **Benjamin James Stewart**, at page 236C, in these terms:

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

[44] The jury could not determine the subjective condition without some evidence establishing the fact and nature of some form of provocative word and/or conduct towards the applicant at the material time. The need to satisfy this requirement was usefully addressed by Lord Steyn in **R v Acott**, where at page 102, he stated:

> "A loss of self-control caused by fear, panic, sheer bad temper or circumstances (e.g. 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."

His Lordship further stated:

> "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. In such a case there is simply no triable issue of provocation."

[45] In **David John Cambridge**, Lord Taylor CJ, in speaking to the nature of the evidence that would give rise to a duty on the part of a trial judge to leave the issue of provocation to the jury, had this to say at page 145:

> "But what sort of evidence gives rise to the duty? Clearly, it is not for the judge to conjure up a speculative possibility of a defence which is not relied on and is unrealistic. (See *Fazal Mohammed v. The State* [1990] 2 A.C. 320, at 332.) There must be some evidence, but of what strength? In *Bullard* , the phrase used was: 'any evidence...fit to be left to a jury'. It is true that in *Camplin,* Lord Diplock used the phrase 'however slight', but he used it to describe the measure of the provocative acts or words, not the strength of the evidence that such acts or words in fact occurred and caused the defendant to lose his self-control. Likewise in *Rossiter* , when Russell L.J. referred to 'material capable of amounting to provocation, however tenuous it may be', the word 'tenuous' described the provocative acts and words, not the evidence of their existence."

[46] The question that now arises for consideration as an appropriate starting point is: what is the evidence on which the applicant is relying to ground his contention that provocation should have been left to the jury for consideration? Mr Wilson had put forward for the court's consideration the suggestion that was made by prosecuting counsel to the applicant during the course of his cross-examination that the applicant was angry because the deceased had left him to pursue a relationship with someone

else. The evidence, in part, was recorded at pages 453 - 455 of the transcript in these terms:

"[CROWN COUNSEL]:	"...[Y]ou weren't pleased with Shannel about the fact that you and her were now apart. I am suggesting to you?
[APPLICANT]:	I wasn't pleased with her.
[CROWN COUNSEL]:	You were not happy with Shannel anymore Mr. Ballentyne, because her decision now caused the two of you to be separated?
[APPLICANT]:	Her decision was to get some time to study, that's what she says.
[CROWN COUNSEL]:	Suggesting to you Mr. Ballentyne, that on that evening when you and Shannel were together in your car an argument developed between the two of you.
[APPLICANT]:	No it didn't. We didn't have an argument.
[CROWN COUNSEL]:	Isn't it true Mr. Ballentyne, that you believed that Shannel really wanted space from the relationship with you, so that she could pursue a relationship with somebody else?
[APPLICANT]	I don't know of that.
[CROWN COUNSEL]:	Is that what you believe?
[APPLICANT]:	No ma'am.
[CROWN COUNSEL]:	I'm suggesting to you Mr. Ballentyne, that you couldn't bear

	the thought of not being in a relationship with Shannel?
[APPLICANT]:	That I could not...
...	
[CROWN COUNSEL]:	Mr. Ballentyne, I am suggesting to you, that you were angry with Shannel when you and her were together in your car on the evening of the 11th of August, 2010?
[APPLICANT]:	No, I wasn't.
[CROWN COUNSEL]:	You weren't angry with her? And I am suggestion to you Mr. Ballentyne, that bruise [sic], you were angry with her, that is the reason why you cut her throat?
[APPLICANT]:	No, I did not."

[47] It is quite clear that the applicant rejected all suggestions made to him during cross-examination that he was upset with the deceased because she had left him to pursue a relationship with someone else. He also denied that at the time she was killed, they were engaged in an argument. In fact, the applicant, as already noted, had maintained in his examination in chief that at the material time, both he and the deceased enjoyed a friendly relationship, which was similar to the relationship that had existed between them in 2009. He therefore rejected any proposition that the deceased's decision to leave him was the motive for killing her.

[48] The applicant, having not accepted the suggestions that were put to him, there was no evidence of anything said to him or done to him by the deceased at the time

they were in the car or, indeed, at any time, that would have led him to lose his self control and to act towards her in the way alleged by the prosecution. In other words, the cross-examination had unearthed no evidence of any provocative word or act or both on the part of the deceased (or anyone else) towards the applicant. As was stated by Lord Steyn in **R v Acott** at page 101:

> "Suggestions in cross-examination cannot by themselves raise an issue of provocation where the evidence, on the most favourable view for the defendant, reveals no issue."

[49] Mr Wilson's argument that the suggestions of prosecuting counsel to the applicant as to his motive for killing the deceased provided a basis for provocation to have been left to the jury must, inevitably, be rejected.

[50] Mr Wilson also sought to place before this court, as material evidence going to the issue of provocation, the following facts that he contended arose on the evidence: (i) the applicant was "intensely committed" to the relationship; (ii) the appearance of the "mysterious" CRV on at least two occasions; (iii) the applicant's provisions for the deceased's welfare; and (iv) the applicant's statement under caution to the investigating officer that there was an argument, which would suggest that there was some "specific provoking conduct that she was going to leave him". According to Mr Wilson, "the entire evidence and tenor of the evidence adduced from both the applicant and on the prosecution's case would tend to suggest that the applicant killed the deceased due to some provocative conduct".

[51] We found these bits of evidence, whether taken singularly or cumulatively, to be wholly insufficient to give rise to the issue of provocation. The applicant gave no evidence that would establish, either inferentially or directly, a causal nexus between those facts being relied on by Mr Wilson and the applicant's conduct towards the deceased at the material time. Also, there is no evidence of such a nexus arising on the prosecution's case. Mr Wilson's submissions in this regard cannot be accepted as they, at their highest, amount to nothing more than mere speculation. As Miss Boyne so attractively put it: for provocation to have been left to the jury on such a basis as contended by counsel for the applicant, would have been "an artificial superimposition of evidence, on evidence that existed in the case, which would then push the jury in the forbidden terrain of speculation".

[52] Counsel for the applicant also contended that the circumstances of the killing and the evidence of the pathologist who conducted the post mortem examination serve to establish that the deceased died as a result of a sustained attack at the hand of someone that was in a state of uncontrollable rage and anger, thus confirming that the applicant was provoked. Counsel relied heavily on the case of **Ethel Amelia Rossiter**, in advancing this argument.

[53] The facts of that case, in summary, were as follows: The appellant, after 18 "turbulent" years of marriage, stabbed her husband twice in the chest with a knife and inflicted on him four other significant wounds, 17 other superficial wounds and "defence wounds" to his hands and wrists. She was charged with the offence of murder. There was evidence at the trial that the appellant had called the police and told them that she

had stabbed her husband and that before she stabbed him, he was attacking her. During the course of interviews conducted with her by the police, the general tenor of her version of events was that on the day of the killing, she was exposed to verbal abuse as well as a measure of physical violence at the hands of her husband. She also sustained injuries consistent with what she told the police. For instance, she had told the police that shortly before the killing, her husband had hit her on her arm with a rolling pin, when she warded off a blow from him that was aimed at her face. There was bruising to her arm that was consistent with a blow from a hard object. She later contended at her trial that at the time of the killing she had been subjected to verbal abuse by her husband and that he was acting in a manner towards her that caused her to fear that he was going to attack her. According to her, it was in those circumstances that she took up a knife to defend herself and made two short jabs with it. She said: "I could see he intended to kill me and I recall jabbing him on the left side near the nipple, only a slight touch, the knife did not enter his body".

[54] As the court noted, at no stage did the appellant concede that she had deliberately inflicted the injury upon her husband. Her case was that the death of her husband at her hands was a "ghastly accident". Alternatively, the appellant suggested during the course of the hearing, that she was defending herself, even though there was no evidence that she was defending herself when she was striking the fatal blows. Given the absence of any concession by the appellant to a deliberate stabbing of her husband, provocation was not advanced by her legal representatives for the

consideration of the jury. As such, the learned trial judge gave directions only in relation to self defence.

[55] On appeal, it was successfully contended on the appellant's behalf that the learned trial judge erred by failing to leave the issue of provocation for the consideration of the jury. The court accepted the argument that there was some evidence in support of the defence of provocation. As the court observed, there was the appellant's version of events which had to be left to the jury in relation to the provocation to which she was subjected. The court also noted that although there was no direct evidence that the appellant had lost her self control, based on the circumstances of the killing and the number of wounds inflicted on her husband, however, it would have been open to the jury to draw the inference that the killing was done while the applicant was "under great stress and had gone virtually berserk" ("50 odd wounds being inflicted"). The subjective test would have been satisfied on the evidence and so whether the objective test was satisfied would then fall for the consideration of the jury.

[56] The facts of the instant case are clearly distinguishable from those of **Ethel Amelia Rossiter**. In the instant case, the applicant had maintained, throughout the trial, that both he and the deceased were friendly and that he had not been upset with the deceased at the critical time. So there was no history of animosity or evidence of a turbulent relationship between them. He testified that on the day in question, they did not have an argument. So he gave no evidence of anything said to him or done to him by the deceased that could have led him to do anything to her. Indeed, his case was

that he inflicted no injuries on the deceased and that the deceased was attacked by someone else. No issue that could have properly given rise to the issue of provocation arose on his version of events. So, even if the inference could be drawn from the nature and extent of the injuries that he had lost his self control, there is no evidence adduced on his case of any provoking word, act or conduct that could have caused him to do so, which is an important ingredient in the defence of provocation.

[57] The only evidence pointing to the possibility of there being an argument between the deceased and the applicant on the day in question was the evidence of Detective Sergeant Wallace, which would have been on the case for the prosecution. The evidence of the officer was that after he cautioned the applicant, the applicant told him that an argument developed in the car after he used a knife to open a fruit cocktail for the deceased. It should be noted, however, that the applicant denied having any such conversation with the investigating officer. In, any event, even if it is accepted that the applicant had told the investigating officer that there was an argument, there is nothing indicating what the argument was about; the words, if any, that were uttered by the deceased (or anyone else) during the argument; or what the deceased (or anyone else) may have done to the applicant, if anything, during the course of the argument, which could go towards satisfying the subjective condition for provocation to arise. According to Detective Sergeant Wallace, the applicant also told him that at the time of the argument, he sustained a cut on his thumb. There is, however, no evidence how the injury was received. It cannot be said then, in the face of the paucity of evidence, that the issue of provocation arose on the prosecution's case.

[58] In **Benjamin James Stewart**, it was argued on the appellant's behalf that the circumstances of the killing itself, rather than the appellant's own evidence as to what happened, amounted to sufficient evidence so that it was incumbent on the trial judge to have left provocation to the jury. Counsel in that case, like counsel for the applicant in this case, relied on the pathologist's evidence, which would suggest loss of self-control causing a frenzied attack. The court, however stated that:

> "But while there is evidence that the appellant in fact may have lost his self-control, the jury can look only at what the appellant said the deceased did or said as provoking such loss of control, since there is no other testimony which bears on this vital time before the killing. In other words, it is not open to the jury to speculate that the deceased may have done or said something else, simply because she had a predisposition to anger or provocative behaviour as a result of her disease."

[59] In the instant case, even if it were accepted that the applicant had lost his self control, that would not have been a sufficient basis for provocation to be left to the jury. There must be some evidence, either on the case for the prosecution or on the case for the defence, of some word or conduct on the part of the deceased (or someone else) towards the applicant, at the relevant time, that could go to establish the subjective condition that is required to be fulfilled for provocation to be left for the consideration of the jury under section 6 of the OAPA. Regrettably, there is no such evidence in the case. Accordingly, the case of **Ethel Amelia Rossiter** is of no assistance to the applicant, despite counsel's (especially Mr Dunkley's) indefatigable effort to persuade the court to the contrary.

[60] Finally, the submission made on behalf of the applicant that the learned trial judge accepted that provocation was in issue in the case when he stated that the applicant must have lost his mind, when the deceased told him that the relationship between them was over, is unsustainable. It is of importance to highlight that this statement by the learned trial judge was at the stage of sentencing the applicant and, as such, was not evidence before the jury for their consideration. In fact, the learned trial judge did not refer to the applicant having lost his self control at the time of the killing but at the time the deceased told him she needed her space, which was about two weeks before the incident. This utterance by the learned trial judge was of no evidential value to give rise to the issue of provocation.

[61] Having looked at the evidence being relied on by the applicant as giving rise to the issue of provocation, it must be said that it has failed to satisfy the first limb of the test laid down in section 6 of the OAPA. That is to say, there is no evidence that the applicant was, in fact, provoked or may have been provoked to lose his self control by things said or done or both, by the deceased, or anyone else at the material time. With the subjective condition having not been established, then it follows logically that the objective condition could not have been satisfied. In the light of this evidential deficiency, it would have been improper for the learned trial judge to have left provocation for the jury's consideration. Supplemental ground one is, therefore, without merit.

Supplemental ground two

The sentence is manifestly excessive

[62] The applicant's complaint in supplemental ground two is that the sentence imposed on him is manifestly excessive. The relevant sections of the OAPA, which prescribe the sentence to be imposed on the applicant read:

> "2.-(2) Subject to subsection (3), every person convicted of murder other than a person -
>
> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3 (1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b).
>
> …
>
> 3.-(1) Every person who is convicted of murder falling within -
>
> (a) ...
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years.
>
> …
>
> (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a)...
>
> (b) where, pursuant to subsection (1)(b), a court imposes-

(i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or

(ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years,

which that person should serve before becoming eligible for parole."

[63] Mr Wilson contended that the learned trial judge erroneously increased the minimum statutory period by five years on the basis that the applicant did not demonstrate any remorse. In doing this, counsel argued, the learned trial judge applied the wrong test and not that as outlined in **Maurice Lawrence v R** [2014] JMCA Crim 16. This, he contended, resulted in the trial judge failing to appropriately balance the aggravating and mitigating factors in arriving at the sentence he did.

[64] Mr Wilson argued further that the learned trial judge should have taken into account the fact that the killing occurred in circumstances where the applicant lost his self control due to some form of provocative words, particularly, in light of the learned trial judge's acknowledgment that the applicant "lost… his mind". This, counsel argued, was a mitigating factor as there was no pre-meditation in the commission of the offence. He maintained too that given that the applicant had no previous convictions, the good community report and his age, the sentence should be reduced. He suggested a period of 16 years.

[65] We are unable to accept counsel's submissions that the learned trial judge erred by failing to balance the aggravating and mitigating factors. The learned trial judge had the option to fix a term of imprisonment, being not less than 15 years with eligibility for parole being no less than 10 years, or to impose a sentence of life imprisonment, with a stipulated minimum period for eligibility for parole being 15 years. He exercised the latter option and fixed a period of 20 years as the pre-parole period of imprisonment. Before pronouncing the sentence, the learned trial judge stated (pages 620-622 of the transcript):

> "...I will begin by noting the very high esteem by which you are held by members of your community...I note also, that you have a very good work ethic, not only have you served your Country with distinction, you assisted various members of the wider community to acquire the skills of driving. I note during the interview of personal [sic], during the dialogue, [the Applicant] mentioned that while they were together, the deceased was often visited by someone from her University and at some time she had mentioned that this person was seeking a relationship with her. I have gone there because it is my view that you lost your mind when your girlfriend said that she needed some space, it seems that you had invested too much time and money in her for her to suddenly break off this relationship to let someone else enjoy the fruits of your labour. A life has been irrevocably lost, cant come back. Cannot come back. What bothers me is the attitude of some men in this country who when they are involved in relationships and when there is some intimation or inclination that it is at an end, the first recourse is violence. It cannot be condoned. What message would I be sending to a wider society, were I not to utilize the law in sentencing you. The law and [sic] sentencing says that I should have regard to other members of the society, should also treat with the principle of reformation, deterrence and retribution. I don't join to the principle of retribution but I do subscribe to the principle of deterrence.

> I do subscribe that I should be able to protect other members of this society."

He then continued:

> "So, in as much as your report is good, and taking all into consideration including your age, 49 years of age, the sentence for non-capital murder is one for which you must serve a minimum period before you can come [sic] eligible for parole. So it is simply a matter of whether or not I start at fifteen years or I escalate it. I cannot help but notice that you do not appear to be repentant at all, I need to see for you to show me some signs of remorse. I am no psychologist, I am a layman with a bit of experience, I can't detect any. So whereas I was minded to start at fifteen, a life has been lost, a young life, a product of the Caribbean -- Northern Caribbean University, we do not know what potential was in that life – could have been another Prime Minister, could have been somebody making a significant contribution to the society of ours and to the world at large, but that life has gone, cannot be recalled."

[66] The learned trial judge clearly took into account the relevant matters that were in the applicants favour, such as his age; his favourable antecedent report; his contribution to society as well as the favourable views of the members of the community. He also took into account the principles of sentencing in examining the circumstances before him.

[67] He, of course, observed (as it was open to him to do) that the applicant seemed unrepentant. That observation does not seem to be far-fetched however, as the applicant did not accept responsibility for the killing, even after he was found guilty, as is evident from the social enquiry report. Furthermore, the learned trial judge had the advantage of observing the applicant throughout the trial and at the time of sentencing that this court does not enjoy. We, therefore, must defer to his views about the

applicant's demeanour. The absence of remorse can be indicative of a risk of a defendant reoffending and so may be a relevant consideration in determining an appropriate sentence, especially when a judge is considering a pre-parole period of imprisonment.

[68] However, the use of the absence of remorse as an aggravating factor should be approached with some caution. In **Regina v The Parole Board and The Secretary Of State For The Home Department, Ex parte Owen John Oyston** [2000] EWCA Crim 3552, a case concerning the question of the release of a prisoner on parole and his reluctance to show remorse, Pill LJ cited with approval the dicta of Stuart-Smith LJ in **R v The Secretary of State for Home Department, Ex parte Zulfikar** (The Times 26 July 1995), that:

> "Where a prisoner either pleads guilty or after conviction later accepts his guilt, it is plain that he is in a position to address his offending in the sense that he can examine his underlying motivation, unreasonable reactions to stress or provocation and anger management and suchlike matters.
>
> But there may be a variety of reasons why a prisoner will not accept his guilt. He may genuinely have been wrongly convicted. Although inwardly he may know he is guilty, he may be unwilling to accept that he has lied in the past or confront loss of face in accepting what he has hitherto denied. Where, for example, the offence is one of specific intent, he may genuinely have persuaded himself that he did not have the necessary intent. Such a man may in all other respects be a model prisoner. He may have behaved impeccably in prison, occupied his time constructively and shown himself trustworthy and reliable with a settled background to which to return.
>
> Should he be denied parole solely because of his attitude to the offence? In the majority of cases I think plainly not.

> Each case will depend upon its own circumstances and this Court should avoid trying to lay down principles which may well not be universally applicable. While I have no doubt that paragraph 1.3(b) should be taken into account in all cases, the weight to be attached to it will vary greatly. At one end of the scale is the persistent offender, in particular the persistent sex offender, who refuses to accept his guilt in the face of clear evidence and is unable to accept that he has a propensity to such conduct which needs to be tackled if he is not to offend again.
>
> In such a case it may well be a determinative consideration. At the other end of the scale is the first offender, where the motivation for the offence is clear and does not point to a likelihood of re-offending. In the majority of cases it is unlikely to be more than one of many factors to which undue weight should not be given."

[69] Although the principles in the case cited above would have emanated from a situation where release on parole was being considered they, nevertheless, prove useful in illustrating how the issue of remorse should be addressed during the course of sentencing, when a minimum period of parole is being contemplated. The principles do offer some insight into other reasons that may cause a defendant not to show remorse other than him being unrepentant. It seems right to say, therefore, that while absence of remorse is a factor to be considered in appropriate circumstances, it must be approached with caution as it is not a conclusive indicator that the defendant is beyond rehabilitation and thus likely to reoffend, therefore justifying a longer period of incarceration. The extent to which it should serve as an aggravating factor in sentencing, therefore, must depend on the circumstances of each case and it should only be one of many factors to be considered without undue weight given to it.

[70] It does seem, in the instant case, that the learned trial judge may have based his upward adjustment in the sentence on his observation that the applicant did not show remorse. It cannot fairly be said that in the circumstances as they were, the learned trial judge would have acted properly in increasing the minimum period for parole by five years merely on the basis of what he perceived to have been the apparent lack of remorse on the part of the applicant. He would have erred in principle had he done so on that basis alone. It seems, however, that the learned trial judge, in moving away from the minimum sentence, had paid specific regard also to the age of the victim and her specific circumstances as a university student at the time of her death. It cannot be said that those were not legitimate considerations.

[71] What is noted too is that the learned trial judge did not expressly refer to having taken into account the nature and manner of the killing as an aggravating factor, which he was entitled to do. The 12 injuries to the body of the deceased and the nature of the fatal injuries (partially severing her throat) was a significant factor that would justifiably move the case from the minimum starting point. The nature and extent of the injuries, the circumstances surrounding the killing, the age and circumstances of the victim, and the objects to be achieved in sentencing (as discussed by the learned trial judge) would have justified a five year upward adjustment to the minimum sentence, even without any consideration given to absence of remorse. So, even if the learned trial judge had placed undue weight on the apparent absence of remorse, it would not have rendered the sentence manifestly excessive, particularly, within a context where there was no guilty plea. In **Maurice Lawrence**, the case cited on behalf of the applicant, this court

reduced a pre-parole term of imprisonment from 20 years to 15 years, after paying due regard to such matters as the age of the offender, the fact that he had no previous conviction and his plea of guilty, which were disregarded by the sentencing judge. There was no such error on the part of the learned trial judge in this case that would justify a reduction in the sentence on the basis contended by Mr Wilson.

[72] Furthermore, we cannot accept counsel's submissions that the fact that the learned trial judge had commented that the applicant was led to lose his self control, when the deceased told him she wanted her space, ought to have been taken into account as a mitigating factor. As already indicated, this comment of the learned trial judge, in sentencing the applicant, did not give rise to the issue of provocation and so there was no basis for him to have treated, as a mitigating factor, what he had merely said in passing. Provocation did not arise and so the applicant was to be sentenced for murder - an inexcusable, unjustifiable and unprovoked killing - and nothing else.

[73] The learned trial judge cannot be faulted in imposing the sentence he did in the circumstances of this case. Accordingly, supplemental ground two cannot succeed as a proper basis on which to allow the application for leave to appeal sentence.

Conclusion

[74] The applicant has failed to persuade this court to the view that the learned trial judge erred: (a) in his directions to the jury in relation to the DNA evidence, the defence of the applicant and circumstantial evidence; and (b) by failing to leave the

issue of provocation for the jury's consideration. We conclude that the learned trial judge's summation is unassailable and so there is no basis to disturb the jury's verdict.

[75] We find also that the sentence imposed on the applicant is unimpeachable and so there is no basis in law to disturb it.

[76] Accordingly, the order of the court is as follows:

(1) The application for leave to appeal conviction and sentence is refused.

(2) The sentence is to be reckoned as having commenced on 2 November 2012.