**[2017] JMCA Crim 24**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 77/2011**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MISS JUSTICE EDWARDS JA (AG)**

**VINCE EDWARDS v R**

**Mrs Valerie Neita-Robertson QC and Ms Kymberli Whittaker for the applicant**

**Mrs Lisa Palmer-Hamilton for the Crown**

**12, 13, 14 July 2016 and 23 June 2017**

**BROOKS JA**

[1] This is an application made by Mr Vince Edwards for leave to appeal against his conviction and sentence. He was convicted on 13 April 2011, in the Home Circuit Court, for murdering Mr Tyrone Powell. Mr Edwards was sentenced to 15 years' imprisonment. At the time of the killing, he was a corporal in the Island Special Constabulary Force.

[2] His first application for leave to appeal was refused by a single judge of this court. He has therefore renewed it before the court. A number of grounds of appeal has been advanced on his behalf by counsel. These will be addressed in turn, but it is first necessary to provide an outline of the evidence that was placed before the jury at the trial in the court below.

**The prosecution's case**

[3] The essence of the evidence that was adduced by the prosecution, in its case against Mr Edwards, was that on 10 August 2009, an altercation took place between Mr Powell and another man along the roadway at Bob Marley Boulevard, Cooreville Gardens, in the parish of Saint Andrew. This was at about 11:00 pm. The two became engaged in a tussle, but Mr Powell was called away by his two friends, who were with him at the time. The trio prepared to drive away from the scene when the man, with whom Mr Powell had been wrestling, was seen as if beckoning to someone. Gunshots then rang out. Mr Powell got into the vehicle with his friends, but while he was reversing the vehicle in order to leave, he received gunshot wounds, including wounds to the head. The vehicle crashed. It was Mr Edwards who had fired those shots.

[4] The other two men exited the vehicle and ran. They went to a nearby main road, hailed a police vehicle and returned with the police to the scene of the shooting. The police took Mr Powell to the hospital, but he died as a result of his injuries.

[5] Mr Edwards was charged with murder arising from that death.

**The case for the defence**

[6] Mr Edwards made an unsworn statement at the trial. He said that he was acting in self-defence at the time of the incident. He said that he lived in Cooreville Gardens and while standing in the area that night, he saw three men involved in a physical altercation. He said one of the three men was being attacked by the other two. One of the attackers had a knife.

[7] Mr Edwards said that he also saw a fourth man, standing near to the three men. That fourth man had a gun and appeared to be looking at the three. In the face of a continued attack, the victim of the attack ran in Mr Edwards' direction.

[8] Mr Edwards said that he heard gunshots. He felt afraid, but despite his fear, he challenged the men, identifying himself as a police officer. He then saw the man with the gun fire at him. He returned the fire from his police issued firearm. The men went into a vehicle and the vehicle drove off, but shots were fired from it at the same time. He returned the fire. The vehicle crashed, and two of the men ran away. He approached the vehicle and saw the remaining man in the vehicle. The man had a wound to his head and there was a knife in one of his hands. A police vehicle came on the scene thereafter and took the injured man away.

[9] The man, who, on Mr Edwards' account, was the victim of the attack, was later identified to be Mr Ajani Willoughby, also a member of the Island Special Constabulary Force. Mr Willoughby gave evidence at the trial in support of Mr Edwards' case. Witnesses were also called by Mr Edwards to give evidence as to his good character.

**The proposed grounds of appeal**

[10] Mrs Neita-Robertson QC, on behalf of Mr Edwards, sought and received permission to abandon the grounds of appeal that were originally filed on Mr Edwards' behalf. She was authorised, by the court, to argue in favour of a number of supplemental grounds of appeal in support of Mr Edwards' application.

[11] The proposed grounds were as follows:

1. "That the Learned Trial Judge's treatment of the Unsworn Statement of [Mr Edwards] was incorrect in law and was couched in terms designed to wipe from the jury's mind any inclination they may have had to give it what weight they thought fit."

2. "That the Learned Trial Judge erred in failing to leave to the jury the Constitutional Defence available to [Mr Edwards] under Section 14(2)(b) of the Constitution of Jamaica. This non-direction amounts to a misdirection in law."

3. "That the Learned Trial Judge's directions on **self-defence** were confusing, disjointed and deficient so as to deny the jury the clarity required to assess the **issue of Self-defence** in the context of this case."

4. "That the Learned Trial Judge's directions on good Character are incomplete in law."

5. "That the Learned Trial Judge failed to deal adequately with the issues of inconsistencies and discrepancies."

6. "The Learned Trial Judge erred in admitting evidence that [Mr Edwards] failed to answer any questions in a Question & Answer (Q&A) session in contrast to that of the witness Willoughby; and in doing so [Mr Edwards] was prejudiced." (Emphasis as in original)

The proposed grounds will be addressed in turn.

**Ground one – the summation in respect of the unsworn statement**

[12] This ground concerns the learned trial judge's directions to the jury concerning Mr Edwards' unsworn statement. It is at page 928 that the transcript records the learned trial judge's directions in this regard. He said:

> "The accused man gave his statement from the dock, and **I must tell you that the statement from the dock is not evidence, Mr. Foreman and your members, which could have been tested by cross-examination**. **An accused** [sic] **absence from the witness box cannot**

> **provide evidence to** [sic] **anything**, but when assessing the quality of the evidence given by the prosecution, **you must take into account the fact that it was uncontradicted by any evidence coming from the accused**. You take into consideration the fact that the witnesses he called, witness who gave evidence. **Nevertheless, you may take into account what he has said, what the accused man has said and give it such weight as you think fit, in coming to your conclusion as to whether or not he is guilty of this indictment** [sic]." (Emphasis supplied)

[13] Mrs Neita-Robertson argued that the learned trial judge's summation to the jury, concerning the effect of Mr Edwards' unsworn statement, was misleading and had the effect of inviting the jury to disregard what Mr Edwards had said. She argued that in telling the jury that Mr Edwards' statement was not evidence, the learned trial judge erased any credibility that the statement could have had with the jury. Learned Queen's Counsel submitted that that direction left Mr Edwards without a defence and rendered the trial unfair. She relied on, for support, the cases of **R v Cedric Gordon** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 109/1989, judgment delivered 15 November 1990, **Alvin Dennison v R** [2014] JMCA Crim 7, **R v Lobell** [1957] 1 QB 547, **R v Michael Salmon** (1992) 29 JLR 32 and **Director of Public Prosecutions v Leary Walker** (1974) 12 JLR 1369.

[14] Mrs Palmer-Hamilton, for the Crown, submitted that the learned trial judge's direction was correct in law. She argued that the learned trial judge did not only give that direction, but he juxtaposed the relevant elements of the unsworn statement against the issues raised by the prosecution in its effort to prove the matters required

to constitute the offence. Learned counsel submitted that the learned trial judge gave his direction in a clear and concise manner and the jury would have been in no confusion in respect of the effect of the unsworn statement. Mrs Palmer-Hamilton submitted that the learned trial judge was fair to Mr Edwards in this regard. She relied, in support of her submissions, on the cases of **R v Frost and Hale** (1964) 48 Cr App Rep 284 and **DPP v Leary Walker**.

[15] The issue raised by this ground of appeal has been the subject of much judicial comment at the appellate level. Section 9(h) of the Evidence Act expressly recognises the right of a person charged with an offence "to make a statement without being sworn". Although all the judicial opinions on the issue accept that an unsworn statement does not constitute evidence, there have been varied views as to the proper way in which the principle may be communicated to the jury. The predominant view emanating from the judgments of this court is that juries should not be told that the unsworn statement is not evidence.

[16] Those varying stances have not provided sufficient clarity to trial judges, as several continue to direct their respective juries that the unsworn statement is not evidence. It is unnecessary to review all the authorities dealing with the point because, fortunately, the law in this area was the subject of an admirable assessment in a magisterial judgment by Morrison JA (as he then was) in **Alvin Dennison v R**.

[17] In **Alvin Dennison v R** the trial judge described the accused's statement as "some words". She pointed out that the unsworn statement "has less weight than evidence" and again, "that it carries less weight than if he had sworn on the Bible".

[18] This court held that the directions contravened the approach required by this court. The defence in that case was self-defence, and self-defence was raised on the prosecution's case. The honesty of the accused's assertion that he believed that he was under attack was, therefore, an important factor for the jury to consider. Morrison JA said, at paragraph [56], that:

> "...contrary to the proscription in all of the authorities, **the learned judge was plainly substituting her own opinion of the weight to be attached to the applicant's unsworn statement for that of the jury**.... However, it appears to us that the judge's repeated qualification of the value and weight of the applicant's unsworn statement, which was his chosen vehicle for the purpose of conveying his defence to the jury, resulted in the defence not being fairly and adequately left to the jury. Had this not occurred, given the fact that the cases for the Crown and the defence were not far removed from each other on the evidence, it seems to us that the applicant might have stood a fair chance of an acquittal at his trial...." (Emphasis supplied)

This court quashed the conviction as a result of its view of the directions in the context of the case.

[19] In the course of his judgment, Morrison JA analysed the various judicial pronouncements in respect of this area of the law and provided a detailed synopsis for future guidance. At the risk of doing injustice to his conclusions in respect of the law, it

may be said that the relevant principles to be derived from that judgment, particularly at paragraphs [49] through [52], are as follows:

1. The directions in **DPP v Walker** and **R v Frost and Hale** still provide authoritative guidance in this area. The trial judge is to inform the jury of the defendant's right to elect to make an unsworn statement. The trial judge is not to dilute that statement.

2. "**It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence**. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it." (Emphasis supplied)

3. "[I]n considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt,

and in considering their verdict, [the jury] should bear the unsworn statement in mind, again giving it such weight as they think it deserves."

4. "[T]he judge could quite properly go on to say to the jury that they may perhaps be wondering ... whether there was anything behind the defendant's election to make an unsworn statement, such as a reluctance to put his evidence to the test of cross-examination. But at the end of the day ... the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment."

5. "**[A] failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence**." (Emphasis supplied)

6. "The rule is no different in cases in which the defendant relies on self-defence. Lord Griffiths'

> observations in **Solomon Beckford v R** [[1987] 3 All ER 425], do not require that such a defendant must, in order to show honest belief, give evidence on oath."

[20] In order to avoid grounds of appeal on this issue, trial judges should abide by those clear directions.

[21] McDonald-Bishop JA, in delivering the judgment of this court in **Delroy Laing v R** [2016] JMCA Crim 11, adopted the stance taken in **Alvin Dennison v R**. The trial judge in **Delroy Laing v R** told the jury that the "unsworn statement is inferior in quality to sworn testimony". He went on to say that the jury could, "nonetheless…take it into account and give it what weight [they thought] it deserves" and that "in deciding the weight, [they should] look at the internal logic of the statement to see if it makes sense". Those statements were quoted by McDonald-Bishop JA at paragraph [35] of her judgment.

[22] The learned judge of appeal, in reviewing these directions, found that they constituted "at best, an unintentional usurpation of the jury's function" (paragraph [43]). She held that the trial judge had "crossed the line of demarcation between the role of the judge of the law and the role of the judges of fact". The conviction was quashed, in part, for that transgression.

[23] It must be pointed out, however, that the Privy Council gave further guidance on this point in its recent ruling in **Leslie McLeod v R** [2017] UKPC 1. In that case, the

defence was an alibi, supported by an assertion of good character. The accused gave an unsworn statement. The issue before their Lordships was whether the case for the defence would have been any stronger, had the accused given sworn testimony. Their Lordships, in commenting on the trial judge's direction on the unsworn statement, said in part, that the trial judge "also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been".

[24] Although their Lordships were not specifically addressing a complaint that the direction in respect of the unsworn statement was wrong, they did address the issue of the weight of the unsworn statement. In considering, in that context, the directions given to the jury by the learned judge at first instance, their Lordships said, at paragraph 16 of their judgment:

> "...But as against this disputed evidence of [the sole prosecution eye-witness] Reid, the jury had only an unsworn statement. The judge gave the conventional direction. She made it clear that the conflict had to be resolved, and that the burden lay on the Crown, so **that if what the appellant had said in court put the jury in doubt, acquittal must follow**. **That was correctly to state the test, and to give some value to the unsworn statement for assessment against the evidence of Reid**. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. **But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been**. She said this:
>
> > 'Now, Mr Foreman and members of the jury, the prosecution closed its case and at the close of its case the defendant, accused man … had three choices. He could stay there and say nothing at all, he could say, well, the prosecution has brought me here, let them

> prove me guilty; or, he could go up in the witness box and give evidence on oath and be cross-examined like any other witness or he could stay where he is and give a statement from the dock which is what he did. That is his right in law. So, he gave you a statement from the dock. **But you remember you are going to give it what weight you see fit. It is not evidence that has been tested under cross-examination. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath**.'
>
> Unless one is to assume that the jury would disregard **this (accurate) judicial direction that the unsworn statement was of less value than a sworn one would have been**, it is simply not possible to conclude that the absence of sworn evidence must inevitably have made no difference. It is no more than speculation, and moreover speculation which ignores the direction." (Emphasis supplied)

Their Lordships clearly had no reservations about the jury being told that the unsworn statement has less weight than sworn testimony.

[25] In attempting to reconcile their Lordships view against the views expressed in the various decisions of this court, it would seem appropriate to say that the correctness of a trial judge's direction on the value of an unsworn statement will be a matter of degree. It would be wrong to say to a jury that the unsworn statement was just "some words", implying that it had no value, but that there is no error in directing, without any further detraction, that it was not sworn evidence, that it had less weight than sworn testimony, but that the jury should give it such weight as it thought fit.

[26] Nonetheless, compliance with the guidance in **Alvin Dennison v R** would not contradict their Lordships' direction. The direction in **Alvin Dennison v R**, including the recommendation that the jury should not be told that the unsworn statement is not evidence, is, once again, strongly urged.

[27] The issue to be decided at this stage, is whether the learned trial judge's directions in the instant case, on the issue of the unsworn statement, taken as a whole, had the effect of withdrawing "from the jury a full and fair consideration of the issues raised in the defence" (as said by Kerr JA in **R v Alfred Hart** (1978) 16 JLR 165 at page 169H).

[28] In assessing the learned trial judge's directions, against the learning that has been set out above, it may be said that he cannot be faulted for having instructed the jury that the unsworn statement was "not evidence ... which could have been tested by cross-examination". Those are words, which, despite falling afoul of the repeated guidance of this court, have been sanctioned by their Lordships in **R v Frost and Hale**, where Parker LCJ said, at pages 290-291, that the unsworn statement "is clearly not evidence in the sense of sworn evidence that can be cross-examined to". It is to be noted, however, that Parker LCJ went on to say at page 291, "on the other hand, [the unsworn statement] is evidence in the sense that the jury can give it such weight as they think fit".

[29] There are other aspects of the learned trial judge's directions in this area which are unexceptionable. Firstly, the learned trial judge fully set out the contents of Mr

Edwards' unsworn statement. It may also be said, in favour of the learned trial judge's approach, and as Mrs Palmer-Hamilton has carefully pointed out, that he outlined the contents of the unsworn statement in contrast to the relevant portions of the prosecution's case. It is also true, that the learned trial judge directed the jury to give the unsworn statement such weight as they thought it deserved.

[30] Unfortunately, however, based on the previous directions from this court, the learned trial judge told the jury that the prosecution's case "was uncontradicted by any evidence coming from the accused". That latter statement is in contravention of the spirit of the principles set out in **Alvin Dennison v R**. It may have been technically correct, but it was potentially confusing. Firstly, it required the jury to particularly note that the learned trial judge was speaking about evidence in its technical sense. Secondly, it required the jury to recognise that the learned trial judge was focussing on what had come from Mr Edwards' lips, as opposed to what constituted Mr Edwards' defence. It must be remembered that Mr Willoughby gave evidence on behalf of Mr Edwards. The learned trial judge's direction carried the risk that the jury would believe that they had to accept the prosecution's evidence as being unchallenged, rather than considering whether they accepted Mr Edwards' case or it caused them to doubt the prosecution's case.

[31] On a balance, and despite the uncertainty created by the lack of symmetry in the various stances at the appellate level, it must be held that the learned trial judge issued confusing directions to the jury concerning the appropriate weight and effect to be

given to Mr Edwards' unsworn statement. The consequence was that the presentation of the defence was compromised. Ground one should, therefore, succeed.

**Ground two – the summation in respect of Mr Edwards' duties as a constable**

[32] The issues for determination under this ground are whether the learned trial judge was under a duty to instruct the jury that section 14(2)(b) of the Constitution, as it read at the time of the Mr Powell's death, provided a possible defence for Mr Edwards and that if the answer to that question is in the affirmative, whether the summation of the learned trial judge, when taken in its totality, was sufficient to cover that defence. If the latter question is answered in the negative, the next question would be whether the non-direction would amount to misdirection, and be fatal to the conviction.

[33] In arguing this ground, Mrs Neita-Robertson asked the court to be cognizant of the fact that this case arose from an incident in 2009 and so the provisions of the Constitution, prior to 7 April 2011 (the date of the promulgation of the Charter of Fundamental Rights and Freedoms), are applicable. She submitted that section 14(2)(b) of the Constitution, as it existed before the Charter was promulgated, affords a police officer in the execution of his duty a defence where life is lost, as the police officer attempts to apprehend and arrest. The police officer is entitled to this defence, she argued, even where he did not specifically state that he was attempting to effect a detention or arrest. She further argued that the defence under the Constitution is separate and apart from the common law defence of self-defence.

[34] Learned Queen's Counsel submitted that Mr Edwards, in his unsworn statement, stated that he was a police officer and that at the time that the first shot was fired by the man that he saw, he asserted his authority as a police officer, by yelling "police", before discharging his own firearm, in return, to protect against the imminent threat to his life and that of Mr Willoughby. Accordingly, she submitted, Mr Edwards was entitled to the defence afforded under section 14(2)(b), notwithstanding that he did not indicate that he was seeking to apprehend a felon.

[35] She submitted further, in reliance on **Glenroy McDermott v Regina** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 38/2006 judgment delivered 14 March 2008, that the Constitutional defence having been raised, although it was not relied on by Mr Edwards, the learned trial judge had a duty to direct the jury on Mr Edwards' entitlement to that defence. The failure by the learned trial judge, she argued, constitutes a non-direction, which would have deprived Mr Edwards of the protection afforded to him by section 14(2)(b) of the Constitution.

[36] It was also learned Queen's Counsel's complaint that the learned trial judge failed to give adequate directions to the jury in respect of section 13 of the Constabulary Force Act and that the directions that he did give, were not clear and concise. She argued that the learned trial judge, having outlined Mr Edwards' duties as a police officer, ought to have directed the jury to examine whether, in executing those duties, he acted reasonably in the light of the evidence.

[37] She submitted that the evidence, on both the case for the Crown and for the defence, showed that Mr Willoughby was attacked. This could be seen, learned Queen's Counsel stated, from the evidence of the prosecution witness, Ms Marsha Thomas, who gave evidence of seeing a fight and hearing the shots. Ms Thomas' evidence was that, after the shooting, she had seen the injured Mr Powell with a knife, while he was still inside the car. Mrs Neita-Robertson submitted that another prosecution witness, Constable Tyrone Smith, also gave evidence that he observed the knife inside the car.

[38] Furthermore, Mrs Neita-Robertson argued, inferences could have been drawn from the post mortem report of Mr Powell's injuries, that another firearm was present on the scene of the incident apart from Mr Edwards'. The inference could be drawn, she submitted, that that firearm was fired from Mr Powell's left and the bullet from that firearm struck him on the left side of his head. Mr Willoughby's evidence, for the defence, she argued, was that he was attacked by three men, one of whom was armed with a knife and another with a gun.

[39] It was Mrs Neita-Robertson's further submission that her interpretation of section 14(2)(b) of the Constitution and section 13 of the Constabulary Force Act is supported by an extract from paragraph 2527 of Archbold, Criminal Pleading and Practice, 35th edition, which deals with a killing by a police officer in the execution of his duties.

[40] Mrs Palmer-Hamilton, in making her submissions on this ground, argued that the learned trial judge was not obliged to direct the jury on both section 13 of the Constabulary Force Act and section 14(2)(b) of the Constitution. The spirit of the

direction under the former section is similar to that of the latter, she submitted, and the learned trial judge, in a concise and clear manner, directed the jury on section 13 of the Constabulary Force Act. Accordingly, she submitted, the absence of a reference to section 14(2)(b) of the Constitution, in the summing up, would not amount to a misdirection, and even if the direction had been given, the jury's verdict would not have been altered. The omission by the learned trial judge should, therefore, not be fatal to the conviction.

[41] Learned counsel also submitted that **Glenroy McDermott v R** was distinguishable on the facts. She submitted that in that case the sole eyewitness for the Crown was a 10 year old, while in the instant case there were three eyewitnesses. Also, in **Glenroy McDermott v R**, the policemen were on actual duty and were responding to a call about a robbery, while in this case, Mr Edwards was off duty and not in uniform. Additionally, she submitted, the deceased in **Glenroy McDermott v R**, had unexecuted warrants against him for a number of offences and was known to the police. The police were, therefore, obliged to take him into custody.

[42] Mrs Neita-Robertson is correct in stating that, once a relevant defence arises during the trial, even where that defence has not been expressly raised by the accused, it is the duty of the trial judge to place it before the jury for consideration. In **Glenroy McDermott v Regina**, Harrison JA stated, at paragraph 24 of his judgment that, "[t]he authorities have established...that it is the duty of a trial judge to deal with and to direct the jury on any defence warranted by the evidence adduced at the trial even

though it was not relied on by an accused person". The learned judge of appeal cited with approval the statement of Lord Morris of Borth-y-Guest, speaking for the Privy Council, in **Palmer v R** (1971) 16 WIR 499, wherein his Lordship said:

> "It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."

It is undoubtedly the case that Mr Edwards did raise the issue that his actions were, in part, directed by his duties as a police officer.

[43] In analysing the respective submissions of learned counsel, it should be noted, as Mrs Neita-Robertson pointed out, that prior to the amendment of the Constitution, which came into effect on 7 April 2011, section 14, as it read at the time, provided thus:

> "(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, **a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case** —
>
> a. for the defence of any person from violence or for the defence of property;
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c. ...
> d. in order lawfully to prevent the commission by that person of a criminal offence,
>
> or if he dies as a result of a lawful act of war." (Emphasis supplied)

The section was a part of the then chapter III of the Constitution dealing with the fundamental rights and freedoms of every person in Jamaica.

[44] Section 13 of the Constabulary Force Act provides that:

> "The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence..."

[45] An analysis of the issues raised by Mrs Neita-Robertson does not, however, lead to the conclusion, in law, which she urges. Section 14(2) of the Constitution may afford a police officer, and through him, the State, a defence to civil proceedings, in which it is alleged that a person's constitutional right to life has been breached. It does not, however, provide a defence, in criminal proceedings, where a police officer asserts (whether explicitly or not) that a killing by him was done in the execution of his duty.

[46] An examination of the section shows that it does not confer any right on a police officer. Nor does it, unlike section 13 of the Constabulary Force Act, impose an obligation on a police officer. What section 14(2) does is to state that if a killing is done in specific circumstances, that killing does not amount to a breach of the victim's constitutional right to life. It is true that inherent in that set of circumstances is that the killing would have been justified, and thus constitute a defence to murder, but it is not the section of the Constitution that raises the defence.

[47] It is the common law and statutory law that determine whether there is any criminal liability for such a killing. The common law aspect is, in part, dealt with in the

law concerning self-defence. The statutory dimension is addressed, in circumstances such as these, by section 13 of the Constabulary Force Act. Where both the defences of self-defence and the execution of duties as a police officer, arise during a case, it is the trial judge's obligation to give full directions in respect of both.

[48] **Glenroy McDermott v R** does not expressly run contrary to that interpretation. It is true that the arguments raised by Mrs Neita-Robertson, on this point, are similar to those raised in **Glenroy McDermott v R** (it was she who raised them in that case), but a close examination of the judgment in **Glenroy McDermott v R** does not reveal an acceptance of those submissions. The decision was not based on a constitutional issue but more on a common law consideration.

[49] After outlining the respective submissions in that case, the court identified the essence of the complaint by Mr McDermott to be that the directions of the trial judge were inadequate to deal with a killing by a police officer in the execution of his duty. In that case the trial judge had stated:

> "…The Crown is asking you to accept that, Mr McDermott, being in Taylor Land, killed Michael Dorset and that at that moment when he pulled the trigger, he Mr. McDermott, was not acting in lawful self-defence.
>
> If you believe Mr. McDermott was on duty doing his job when he killed Mr. Dorset, that does not mean that he cannot commit murder, he can still be guilty of murder.
>
> He is to do his job as a policeman and at the same time, obey the laws of the land. It is against the law to commit murder …."

This court identified that the gravamen of the complaint against the judge's directions, at paragraphs 2 and 3 of the extract, was that they were "inadequate and could only have served to confuse the jury as to what the appellant could do in order to apprehend persons who had committed offences in his presence" (paragraph 27 of the judgment).

[50] Having identified the gravamen of the complaint, the court held that there was merit in the submissions on behalf of Mr McDermott. K Harrison JA, on behalf of the court, went on, at paragraph 28 of the judgment, to find support, not in the Constitution, but in the common law, as set out in the extract from Archbold, that was cited by Mrs Neita-Robertson, and mentioned above. He stated:

> "We are of the view that there is merit in … [the] submissions [on behalf of Mr McDermott]. Support for this view is contained at paragraph 2527 of Archbold Criminal Pleading & Practice, 35th Edition, where the learned authors state inter alia:
>
> > '...Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if in doing so, he kills the party resisting him, it is justifiable homicide; and this is in civil as well as in criminal cases...And this is not merely on the principle of self-defence (for the officer or private person is not bound to retreat, as in the case of homicide...) but upon that principle, and the necessity of executing the duty the law imposed upon him, jointly...Still there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased...or if there were no reasonable necessity for the violence used upon the part of the officer..., the killing would be manslaughter at least..."

[51] The essence of that decision is not that a trial judge, in circumstances such as in this case, must give a direction in respect of a constitutional defence, but that the judge must give directions concerning the duties of the police officer in the context of the killing, which is said to be in the execution of those duties. Harrison JA, at paragraph 29 of the judgment, set out the duty of the trial judge:

> "We are further of the view that in order to assist the jury in discharging its responsibility, the trial judge is required to explain the relevant law along the lines set out [in the extract from Archbold], review the facts and accurately and fairly apply the law to those facts. The jury will then be left to resolve conflicts and to draw inferences from the facts which they find proved…."

[52] The extract mentioned above was taken from an edition of Archbold that was published in 1962. The relevant law in England changed in 1967 with the advent of the Criminal Law Act 1967. Section 3(1) of that Act addressed the matter of killing in lawful arrest or in prevention of a crime. The section states:

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[53] The learned editors of Blackstone's Criminal Practice 2017 opined that there was now little difference between the directions to be given in respect of self-defence as opposed to the prevention of crime. They state at paragraph A3.57:

> "…Even though the courts have not always formulated the test for self-defence in the exact words used in the CLA 1967, s. 3, for prevention of crime, there is no evidence from any of the cases that any such differences are matters of substance. Indeed in *Beckford v The Queen* [1988] AC

> 130, Lord Griffiths said (at p. 145) that: 'the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another'. **Whilst his lordship was primarily concerned with the question of mistaken belief in this case, his dictum closely echoes s. 3 and supports the view that the common-law rules governing the use of force in self-defence and the rules applicable to prevention of crime are now identical** (see also *Clegg* [1995] 1 AC 482)...." (Emphasis supplied)

[54] **Beckford v R** [1988] AC 130; [1987] 3 All ER 425, mentioned in that extract, was a case decided by the Privy Council on appeal from a decision of this court. The appellant Beckford was also a police officer who had killed a man in controversial circumstances. He asserted that he had acted in self-defence. The issue for their Lordships' determination was the proper direction to be given concerning the subjective belief of a person, who asserts that he acted in self-defence. The issue of the execution of his duties as a police officer did not arise in that judgment.

[55] In the present case, the learned trial judge did not run afoul of this court's direction. Unlike the trial judge in **Glenroy McDermott v R**, the learned trial judge in this case dealt with the issues of the duties of a police officer. He did so immediately after giving the jury directions in respect of self-defence:

> "You have heard and it has been right through the case that the accused is a police officer. And you have also heard that he is under a duty to take certain steps, you know, to see that the law is not breached. And there are statutory -- there are laws, statutes, which for example, places those sorts of duties and you have also heard that the police officer and I think it was quoted, section 13 of the Constabulary Force Act:

> '**The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons committing any offence or who they may reasonably suspect of having committed any offence...**'
>
> The argument that was raised was that yes police officers are always on duty although they may not be officially on the job and if they see an offence being executed, something being done, criminal offence taking place, they have a duty, in those circumstances, to act. And where an officer of justice is resisted in his legal [exercise] of his duty he may repel force by force. But, of course, you have to look whether this is a legal execution of his duty. You have to go back to the circumstances to say was there justification for his actions? If there was no reasonable necessity for the violence used upon the officer, then he could not be deemed to be acting in legal justification. So you look at the circumstances and you bear in mind the fact he has a duty.... You have to ascertain whether, in fact, he was acting, as he says he saw these men with a firearm, whether the men shot -- if you believe that that happened -- shot at Mr. Adjauni Willowby [sic] and [sic] neighbour and colleague in the Special Constabulary Force. You may think that an officer who sees something like that is duty bound to act, is duty bound to act, if you find that those circumstances did in fact exist." (Pages 16-17 of the adjusted transcript, replacing pages 806-808 of the original transcript) (Emphasis as in adjusted transcript)

[56] There is no doubt from the passage reproduced above, that the learned trial judge impressed upon the jury their duty to consider that Mr Edwards, as a police officer, had a statutory duty to act if he had witnessed an offence taking place. The learned trial judge also directed the jury that a police officer, in the legal exercise of his duty, was entitled to repel force by force. He further emphasised that the jury should examine the circumstances to determine whether Mr Edwards' use of force was legally

justified and that if it was not reasonably necessary, he could not be deemed to have acted with lawful justification.

[57] Later in his summation, the learned trial judge, in reviewing Mr Edwards' unsworn statement, spoke of Mr Edwards' outline of his duties as a police officer. Mr Edwards said in part, the learned trial judge reported, that his duty, "also entails the pursuit and apprehension of wanted men as also to confiscate as well as to seize illegal firearm [sic], ammunition and dangerous drugs" (page 929 of the transcript).

[58] In examining the present case, it is clear that Mr Edwards' primary defence was that of self-defence and that he had not specifically raised the issue that the killing of Mr Powell was in the process of carrying out the duties of a police officer. However, in the light of the law as cited above, on the evidence adduced, Mr Edwards was entitled to the benefit of a direction to the jury on both issues.

[59] Mrs Palmer-Hamilton is not on good ground with her submission that **Glenroy McDermott v R** is distinguishable on its facts. The principle identified by Harrison JA was not restricted to the peculiar facts of that case. Learned counsel is, however, correct in saying that in this case, the learned trial judge did address the issue of the defence that Mr Edwards had available to him as a police officer.

[60] What the learned trial judge did not do, is to direct the jury as to the way in which they should apply their finding in arriving at a decision on that issue. He repeatedly told the jury that the essence of the issue in the case was whether Mr Edwards had acted in self-defence. He told them, at page 803 of the transcript, that it

was "the nub of this case". The learned trial judge went on to state that if they accepted that Mr Edwards was acting in self-defence then they should find him not guilty. The learned trial judge did not, however, explain what should be done with findings concerning the execution of the duties of a police officer.

[61] It is true that he told the jury to decide if there was justification for Mr Edwards' action. He did not, however, speak to a killing in the lawful execution of the duty of a police officer, as being justification. In giving those directions, he restricted the excusable reason for killing to the exercise of self-defence. In doing so, he was in error.

[62] It is repeatedly said that jurors are "intelligent and enlightened" and that "appellate courts must not seem ready to erode that approach (**Boodram and Ramiah v The State** (1997) 55 WIR 304 at page 334). That approach, however, cannot excuse a trial judge from giving the jury the appropriate directions in law. If the trial judge fails to give those directions expressly, it will have to be determined whether, on the totality of the summation, the import of the required directions would have been effectively communicated.

[63] In **Sophia Spencer v R** (1985) 22 JLR 238, Carey JA, on behalf of the court, helpfully stated the general purpose of a summation. At page 244, he stated thus:

> "A summing up, if it is to fulfil its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them."

[64] Notwithstanding the learned trial judge's error, it is necessary to examine the totality of the summation to see whether, as Mrs Palmer-Hamilton submitted, the direction to the jury in relation to section 13 of the Constabulary Force Act would be sufficient to include the defence afforded by that section. Unfortunately, the learned trial judge did not, at any other point of his summation, deal with the issue of Mr Edwards' execution of his duty as a police officer, as capable of leading to an acquittal.

[65] Based on that analysis, although the learned trial judge's direction properly addressed the essentials of section 13 of the Constabulary Force Act, it was inadequate not to have instructed the jury on the application of their findings on that issue. The learned trial judge was required to direct the jury that if upon their examination of the case as a whole, they found that Mr Edwards acted in accordance with his duties as a police officer, which resulted in the death of the deceased man, and that the force used was reasonably justifiable, then the killing is justified not merely by virtue of the law of self-defence, but because of the duty imposed upon him by statute, and thus they ought to acquit Mr Edwards of murder. Further, it was incumbent on the learned trial judge to have directed the jury that there was no duty on Mr Edwards to retreat (see **R v Simmonds** (1965) 9 WIR 95 at pages 99-100). This is because it is Mr Edwards' statutory duty "to keep watch by day and by night, to preserve the peace, to detect crime, [and to] apprehend" and so a section 13 defence is afforded to him where a person's death resulted from the use of reasonably justifiable force, in the legal execution of his duty.

[66] The learned trial judge's directions were inadequate to convey those directions. Although the ground, as formulated, fails, it will have to be decided if the conviction must be set aside as a result of that inadequacy in the summation.

**Ground three – the summation in respect of self-defence**

[67] It was Mrs Neita-Robertson's submission that the learned trial judge's directions on self-defence, especially the portion of the summation dealing with what constitutes self-defence, were "incomprehensible...disjointed and deficient". She complained that the learned trial judge failed to direct the jury in a clear and comprehensible manner on the following areas:

(i) defence of a third party (Mr Willoughby);

(ii) honest belief;

(iii) that a person under attack is not expected to weigh the nicety of the exact measure of his defensive actions;

(iv) the burden is on the prosecution to negative self-defence;

(v) the imminence of a threatened attack;

(vi) Mr Edwards' mistaken belief of a threatened attack;

(vii) honest belief that force used was reasonable; and

(viii) the use of force and the application of the principle.

She relied on the following cases in support of her complaints: **R v Rose** (1884) 15 Cox CC 540; **Palmer v R** [1971] AC 814; **R v Scarlett** [1994] Crim LR 288; **Beckford v R**; **R v Gladstone Williams** (1984) 78 Cr App R 276.

[68] Learned Queen's Counsel submitted that the learned trial judge merely recited the evidence, without relating the facts to the law so as to assist the jury in their understanding of how the law of self-defence relates to the facts. Hence, the summation was inadequate and was neither helpful nor fair to Mr Edwards in the circumstances. She relied on **Fuller v The State** (1995) 52 WIR 424, 433 and **Sophia Spencer v R**.

[69] It was Mrs Palmer-Hamilton's submission that the learned trial judge, in his summation to the jury, dealt with the issue of self-defence fairly and adequately, in the light of the opinion of the Privy Council that a direction to the jury on self-defence is a straightforward conception, which requires no set of words by way of explanation, and only common sense is needed in its understanding. She relied on **Leslie Moodie v R** [2015] JMCA Crim 16 and **Spencer v Director of Public Prosecutions** [2014] 5 LRC 613. **Spencer** is a case from the Eastern Caribbean Supreme Court, which cited **Palmer v R** with approval.

[70] Mrs Palmer-Hamilton also submitted that the learned judge would be in the most strategic position to assess the jury so as to adopt a form and style that would be fair and reasonable when summing up to them. She submitted the learned judge directed the jury on (i) the essential elements of self-defence, (ii) honest belief, (iii) reasonable

force, (iv) the onus on prosecution to negative self-defence and (v) section 13 of the Constabulary Force Act.

[71] Lord Morris of Borth-y-Gest in **Palmer v R**, in delivering the opinion of the Privy Council, indicated what is required to be said by a trial judge in summing-up to the jury on the issue of self-defence. He said that self-defence was a straightforward concept that required no special formulation of words for it to be communicated to the jury in order to be understood. He said at page 510:

> "In their Lordship's [sic] view **the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary**. But everything will depend upon the particular facts and circumstances. … Of all these matters the good sense of a jury will be the arbiter. **There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence.** If there has been no attack then clearly there will have been no need for defence. **If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonably defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will**

> **only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence.** ..." (Emphasis supplied)

[72] As was mentioned above, the learned trial judge made several references to Mr Edwards' defence being self-defence. Accordingly, after he summarised the case for the prosecution and that of the defence "in a nutshell", he said as follows, at page 784 of the transcript:

> "Those are the two versions. The issue that is joined in this matter is … was the accused as he contends acting in lawful self-defence? Was there a shoot out? Did any member of the party of three young men who [sic] of whom you saw, did any of those men have a firearm that night? That is the central issue, was the accused acting in lawful self-defence?"

[73] Thereafter, in outlining what constitutes the offence of murder, the learned judge directed the jury that "[a] deliberate or intentional killing done in defence of ones [sic] self or of another is in law no offence" (page 794). He again reminded them, at page 794, that the issue in the case was "whether, in fact, the accused was acting in self-defence at the time when the injuries were inflicted on the deceased". The learned trial judge proceeded to tell the jury what are the essential elements of the offence of murder that must be proved by the prosecution and again, he then posed the question:

> "Was it unlawful [sic], self-defence circumstances that the accused inflicted those injuries on the deceased?" (Page 798)

[74] At pages 803-805 of the transcript, the learned trial judge directed the jury thus:

> "The next thing that the prosecution must prove, which is the nub of the case is, was death done in lawful self-defence? I

think that is the issue, it's not what or if the man is dead, this is what the issue is, was the accused man - because he said he fired, he discharged his gun. Was he, at the time, acting in lawful self-defence?

What constitutes self-defence...? **A person who is attacked or who believes that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the case, he is acting in lawful self-defence and is entitled to be found not guilty. It is for the prosecution to make you sure that the defendant was not acting in lawful self-defence, not for him to prove he was.** A person not only acts in lawful self-defence if in all the circumstances he believes that it is necessary for him to defend himself, and if the amount of force which he uses in doing so is reasonable, so there are two questions for you to answer. **Firstly, did the defendant honestly believe or may he honestly have believed that it was necessary to defend himself?...**A person who is the aggressor or who is taking revenge knows that there is no need to resolve [sic] to violence and does not act in lawful self-defence...**if you are sure that the defendant did not honestly believe that it was necessary to defend himself, then self-defence does not arise in this case and he is guilty; but if you decide he was acting or he may have been acting in that belief, you must consider the second question and that is, when you look at all the circumstances that you hear and the danger that the defendant honestly believed himself to be in, was that amount of force which was used reasonable? Force used in self-defence is unnecessary if it is out of proportion to the nature of the attack or is in excess of what is really required of the defendant to defend himself.**"

He continued at page 806 (as corrected by page 15 of the amended transcript):

"When deciding whether or not the force used by this defendant was reasonable, questions such as these are helpful: What was the nature of the attack upon him? Was a weapon used by the attacker? If so, what sort was it and how was it used? Was the attacker on his own or was the defendant being attacked [or in] fear of being attacked by two or more person[s]? Remember that a person who is

> defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action if it is necessary.
>
> **If you conclude…that the defendant did no more than he honestly and distinctly thought was necessary to defend himself, you may think that would be strong evidence that the amount of force used by him was reasonable.**
>
> **However…if you are sure that the force used by the defendant was unreasonable he cannot have been acting in lawful self-defence and he is guilty, but if the force used was or may have been reasonable then he is not guilty**." (Emphasis supplied)

[75] In recounting the evidence of Mr Pete Gayle (one of the men who was with Mr Powell) to the jury, the learned trial judge reminded them to be mindful of what he told them constituted self-defence and how to look at that evidence surrounding the discharge of Mr Edwards' firearm. He then juxtaposed the evidence of Mr Courtney Nelson (the other man with Mr Powell) against that of Mr Willoughby and told the jury, at page 811:

> "…If it is that you accept [the evidence of Mr Nelson that Mr Edwards fired shots after an altercation between Mr Willoughby and the deceased] as being true, you have to say now, you have to go back, remember what I told you about self-defence, and say whether, in fact, this constitutes lawful self-defence, because what Mr. Ajani Willoughby had said and that the accused man had said that when the men got in the vehicle that shots were fired from the vehicle."

[76] While still reviewing Mr Gayle's evidence, the learned trial judge instructed the jury as follows:

> "…although a gun, the gun has been made out to be the main feature that would give ground and substance to the defence, self-defence that is raised, **if somebody comes to you with a knife and is attacking you with a knife, you heard that Adjauni was being attacked with a knife, in that particular circumstance, within those circumstances you may well think** [that] **somebody who acts to save somebody who is being attacked but by a man with a knife in those circumstances, would avail himself with such a defence. So it's not only the gun that you look at, look at both instruments that the defence is saying that those men had amongst themselves, the gun and the knife, to say whether, in fact, the force that was used was justified in the circumstances**…." (Page 813 of the transcript as adjusted by page 19 of the amended transcript)(Emphasis supplied)

[77] The learned trial judge, as he recounted Mr Nelson's evidence, directed the jury to the statement of Mr Edwards:

> "...you recall in his unsworn statement that the fleeing Willowby [sic] was fired on as he made good his escape and that is how having seen Willowby [sic] jeopardized, in danger in immediate and urgent danger that is when he was forced to act.
>
> So, you look at the evidence of Mr. Nelson carefully...do you believe him that he never had any gun that day?" (Page 830 as amended by page 27 of the amended transcript)

[78] He also directed the jury, on an aspect of the forensic evidence that suggested that Mr Powell could have been struck by a bullet from a second firearm. The learned trial judge dealt with the evidence of the consultant pathologist concerning one of the injuries seen on Mr Powell's head. Regrettably, aspects of the directions are unclear. He said at page 882 of the transcript:

> "...what is the primary issue in the matter, being the matter of self-defence and what causes that to be the primary issue is because it is being contended that somebody named Courtney Nelson had a firearm and one of the means [sic], although let me make it clear to you, the defence - the accused hasn't got to prove anything. I told you that the burden is on the prosecution right throughout the case, from the start to the end, so it is the defence who has issue of self-defence. But bearing all that in mind, what the defence has said is that what caused the second injury, the star-shaped thing, is a different firearm from what caused the other two injuries and is only one firearm the Crown says was there. So if you have injuries on this man with two different firearms causing it that would support the allegation, what the contention rather of the defence, so you have to look at it very carefully and see what it is the expert has said about this injury and whether, in fact, he has been charged and bearing in mind what I told you about the evidence in that regard."

[79] The above analysis shows that the learned trial judge's summation on the defence of self-defence was detailed and comprehensive. His directions on the aspect of the injuries, which suggested the presence of a second firearm, were not, however, as clear. He also did not link to the defence, the fact that there was gunshot residue (GSR) at trace levels on Mr Powell's hands. This was significant as there was testimony that GSR could have been deposited on Mr Powell's hands if a firearm was discharged in the vehicle while he was in it.

[80] Accordingly, there is some merit to this ground.

**Ground 4 - No direction on the credibility limb of the good character direction**

[81] On this ground, learned Queen's Counsel argued that although the learned trial judge directed the jury on the propensity limb of the good character direction, he was

silent on the credibility limb, which is necessary for a good character direction. She submitted that the two limbs are "together integral and complementary parts of the approach to character evidence" and fairness dictates that the judge direct the jury on good character because "it is evidence of probative significance". She relied on **R v Newton Clacher** (unreported) Supreme Court Criminal Appeal No 50/2002, judgment delivered on 29 September 2003 and **R v Aziz** [1995] 3 WLR 53 for support.

[82] She argued that although Mr Edwards gave an unsworn statement, he called character witnesses, Senior Superintendent Newton Amos and Miss Audrey Bailey, who gave sworn testimony. As a result, learned Queen's Counsel submitted, Mr Edwards, in addition to a direction on the propensity limb, was also entitled to a direction to the jury on the credibility limb of the good character direction. Mrs Neita-Robertson submitted that Miss Bailey in her evidence said that Mr Edwards has been a "truthful and committed person" and so Mr Edwards' credibility would have been raised, thereby triggering a direction on the credibility limb of the good character direction. A person of good character, Mrs Neita-Robertson submitted, the jury should have been directed, would not lie.

[83] Mrs Palmer-Hamilton, in reply on this ground, submitted that the learned trial judge gave complete directions on good character. She submitted that Mr Edwards having made an unsworn statement was not entitled to a direction on both limbs of the good character direction. It was her submission that when an appellant gives an unsworn statement, if he does not make any pre-trial statement or answers, even

though he may call a witness to speak to his good character, unless he speaks of his good character from his own mouth, he is not entitled to a direction on the credibility limb of the good character direction. She relied on **R v Syreena Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 95/2004, judgment delivered on 29 July 2005 and **R v Aziz** in support of her submission.

[84] Mrs Palmer-Hamilton also submitted that even if the learned trial judge had given a direction in respect of the credibility limb of the good character direction, it would not have affected the jury's decision in the light of the fact that the evidence of the prosecution witnesses was so overwhelming. A direction on the credibility limb, she submitted, would have had no greater effect on the jury than did the propensity limb direction, which was given and so, she submitted the ground should fail. She relied on **Leslie Moodie v R** in support of her submission.

[85] In the light of those submissions, the issue for this court's determination is whether Mr Edwards, who made an unsworn statement from the dock and called a witness, who spoke to him being a "truthful and committed person", was entitled to good character direction on both the credibility and propensity limbs of that direction. The consequential issue is that if he was so entitled, whether the absence of such direction was fatal to the conviction.

[86] In **Horace Kirby v R** [2012] JMCA Crim 10, this court was faced with the complaint that Mr Kirby who had made an unsworn statement, in which he stated "I

have no previous conviction", was entitled to a good character direction. The issue was whether the trial judge's failure to give such a direction deprived Mr Kirby of a fair trial.

[87] This court, in addressing the issue, found, at paragraph [11] of the judgment, that one of the principles gleaned from **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, was that "where an accused does not give sworn testimony or make any pre-trial statements or answers which raise the issue of his good character, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction". The court went further to observe that, "the accused was still entitled, however, to the benefit of a good character direction as to the relevance of his good character as it affects the issue of propensity". Morrison JA (as he then was) in **Michael Reid**, at pages 26-27 of the judgment of this court, said thus:

> "(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged (**Muirhead v R**, paragraphs 26 and 35)."

[88] The court in **Horace Kirby v R**, after having distilled the various principles applicable to that case found, at paragraph [21], that Mr Kirby was entitled to a good character direction on the propensity limb, and such a direction "could have assisted the

applicant in the thrust of his defence that he would only have made the fatal stroke in self-defence".

[89] In **Leslie Moodie v R**, the appellant gave an unsworn statement and called five witnesses. Major Rowe was one of the five witnesses. He testified that the appellant "was of exemplary character, very jovial and would take part in any activities that the unit had arranged, he liked to get involved in all activities, very mannerable [sic], he is a social person" (see paragraph [41] of the judgment). The trial judge gave what was clearly a propensity direction, but failed to give a direction on the credibility limb of the good character direction. Thus, this court was tasked with having to determine the issue of "whether a defendant who…makes an unsworn statement from the dock is entitled to [a good character] direction [in respect of credibility limb]"**.**

[90] In that case, Morrison JA (as he then was) on behalf of the court, stated thus at paragraph [127]:

> "The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in **R v Vye, R v Wise**, **R v Stephenson** [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant 'does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required' (per Lord Taylor CJ, at page 245)."

[91] At paragraphs [128]-[130], Morrison JA commented on the applicability and import of the foundation of the modern law where the right of a defendant to make an

unsworn statement from the dock remains in effect (by virtue of section 9(h) of the Evidence Act). He opined:

> "[128] For the obvious reason that the right of a defendant to make an unsworn statement from the dock had long been abolished in England [by section 72 of the Criminal Justice Act 1982] by the time **R v Vye** was decided, the court did not consider the position of such a defendant at all in that case. Nevertheless, in **R v Syreena Taylor** SCCA No 95/2004, judgment delivered 29 July 2005, at page 12, this court, basing itself on **Vye**, did observe that the trial judge was under 'no obligation' to give directions as to the credibility of a defendant who made an unsworn statement. As far as we are aware, the Privy Council has yet to put the matter as categorically as this and it may well be that, at an appropriate time, this could be a question for further exploration.
>
> [129] But be that as it may, even on the assumption that a defendant who makes an unsworn statement may be entitled to the direction, the Privy Council has on several occasions in appeals from this court expressed strong reservations as to the value of a credibility direction in such circumstances. Thus, in **Muirhead v The Queen** [2008] UKPC 40, Lord Hoffmann observed (at para. 26) that, '[a]s the appellant did not give evidence on oath, the value of the [credibility] direction may be doubtful'; and, in their separate concurring opinion, Lords Carswell and Mance added (at para. 35) that, if the defendant "has not given evidence, but has merely made an unsworn statement, the importance of the [credibility direction] is reduced". Then, in **Stewart v The Queen** [2011] UKPC 11, para. 15, Lord Brown said that 'the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pretrial statements) than when he has given sworn evidence'. Next, in **France and Vassell v The Queen** [2012] UKPC 28, para. 48, Lord Kerr emphasised (at para. 46) that '[w]here, as in this case, a defendant who complains about not having had a good character direction has not given evidence, the force of the argument that the credibility limb of the good character direction rendered the conviction unsafe is greatly

> diminished'. And, most recently, in **Lawrence v The Queen** [2014] UKPC 2, Lord Hodge reiterated (at para. 23) that, since the appellant did not give evidence on oath, a direction on the relevance of good character to his credibility 'would therefore have been of less significance than if he had'.
>
> [130] So it is plainly open to doubt whether, even assuming that the appellant was entitled to a credibility direction, it would have been of any value at all to him, since the learned trial judge would have been equally entitled in those circumstances to remind the jury that, by opting to give an unsworn statement, the appellant had not exposed himself to cross-examination (see **Lawrence v The Queen**, para. 23 and **Stewart v The Queen**, para. 16). Added to this, there is the consideration urged on us by Mrs Palmer-Hamilton [for the Crown], which also finds clear support in the authorities, that there may be cases in which 'the sheer force of the evidence against the defendant was so overwhelming…that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict' (per Lord Kerr in **France and Vassell v The Queen**, para. 46). In our view, this was a case in which the evidence implicating the appellant— the compelling eyewitness accounts of Messrs Carr and Green and Miss McLaren, as well as the expert ballistic and forensic evidence of Superintendent Porteous and Miss Dunbar — was so overwhelming that a credibility direction would have had no greater effect on the jury than did, as appears from their verdict, the propensity direction which they were given."

[92] In **Teeluck (Mark) and John (Jason) v The State** [2005] UKPC 14; (2005) 66 WIR 319, an appeal from the Court of Appeal of Trinidad and Tobago, their Lordships specifically commented at paragraph [33], in outlining the principles regarding good character,

> "…**The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of**

> **prosecution witnesses**; *Barrow v The State* (1998) 52 WIR 493, [1998] AC 846 at 852, following *Thompson v R* (1998) 52 WIR 203, [1998] AC 811 at 844. It is a necessary part of counsel's duty to his client to ensure that a 'good character' direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself; *Thompson v R.*" (Emphasis mine)

[93] Their Lordships in that case also stated at paragraph [37]:

> "In the first place, it had been made clear in *Barrow v The State* (1998) 52 WIR 493, decided over two years before the trial, that the practice in Trinidad should follow the practice approved by the House of Lords in *R v Aziz* [1996] AC 41, that a 'good character' direction is essential for a fair trial, certainly where the credibility of the defendant is a central question."

[94] In analysing the cases set out above, it is prudent to observe that Trinidad and Tobago, like England, has abolished the right of a defendant to make an unsworn statement from the dock, by virtue of section 13B(1) of the Evidence Act Chapter 7:02. The section provides:

> "Subject to subsections (2) and (3), where a person is charged on indictment, he shall not be entitled to make a statement without being sworn, and accordingly if he gives evidence he shall do so on oath and be liable to cross-examination."

Subsections (2) and (3) are not relevant for these purposes.

[95] Similarly, other Caribbean jurisdictions, such as the Bahamas, St Kitts and Nevis and St Vincent have also, by their respective Criminal Procedure Codes, abolished the right of a defendant to make an unsworn statement from the dock.

[96] In the light of the foregoing, it would be correct to say that the law of this jurisdiction, as enunciated by **R v Syreena Taylor** and **Horace Kirby v R**, is that the trial judge was under 'no obligation' to give directions as to the credibility, in the context of good character, for an accused who has made an unsworn statement.

[97] The principle in **Teeluck (Mark) and John (Jason) v The State** that a defendant was entitled to a good character direction on both limbs where his good character had been "distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses" would not be applicable in this case. The case is distinguishable on this point for the following reasons:

(i) the Board in **Teeluck (Mark) and John (Jason) v The State** did not contemplate a situation where the defendant made an unsworn statement, which is the issue for this court's determination in the matter before it;

(ii) the defendant's right to make an unsworn statement was abolished in Trinidad and Tobago, at the time that case was determined, whereas the right still subsists in Jamaica, by virtue of section 9(h) of the Evidence Act; and

(iii) the appellants in **Teeluck (Mark) and John (Jason) v The State** had given sworn evidence,

> whereas Mr Edwards in the case at bar made an unsworn statement.

[98] However, as Morrison JA opined in **Leslie Moodie v R**, in his examination of the cases cited therein, even if it assumed that a defendant who makes an unsworn statement and called good character witness as to his good character may be entitled to the direction, the Privy Council has, on several occasions in appeals from this court, expressed strong reservations as to the value of a credibility direction in such circumstances. The Board, the learned judge of appeal said, had opined in **France and Vassell v The Queen** and **Lawrence v The Queen** that "the force of the argument that the credibility limb of the good character direction rendered the conviction unsafe is greatly diminished" and is of less significance where the defendant makes an unsworn statement than if he had given sworn evidence.

[99] Based on all of the above, the absence of a direction on the credibility limb of the good character direction, as Mrs Palmer-Hamilton has submitted, would not be fatal to the conviction. In the present case, Mr Edwards did not give sworn testimony and there is no evidence emanating from the prosecutions' case as to his good character and no evidence of his having made pre-trial statements to that effect. Accordingly, he would only be entitled to a direction on good character in respect of the propensity limb. Such a direction would be consistent with the law as stated in **Horace Kirby v R**.

[100] Accordingly, it would follow that the learned trial judge in the instant case was under no obligation to give a good character direction on the credibility limb. This ground fails.

**Ground 5 – inadequate treatment of inconsistencies and discrepancies**

[101] In respect of this ground, Mrs Neita-Robertson complained that the learned trial judge's summing-up to the jury on inconsistencies and discrepancies was inadequate and resulted in Mr Edwards not having received a fair trial. It was not sufficient for the learned trial judge, she submitted, to have read the evidence of significance and to direct the jury that it was for them to decide what evidence to accept or reject.

[102] The learned trial judge, she submitted, failed to relate the several important inconsistencies and discrepancies to the issue of self-defence and credibility, which impacted on Mr Edwards' case. Mrs Neita-Robertson argued that he failed to adequately and meaningfully assist the jury in analysing and determining the crucial issue of self-defence. She submitted that he did not direct the jury's attention to features of the evidence that made Mr Edwards' defence of self-defence more or less probable. Consequently, she argued, the learned trial judge failed to adequately and fairly leave Mr Edwards' case to the jury. Learned Queen's Counsel argued that the failure was exacerbated when, although reminded by defence counsel that he ought to have dealt with the issues more fully, the learned trial judge gave a general direction, which did not rectify the defect in the summation.

[103] Mrs Neita-Robertson sought to support her submissions by highlighting some instances of discrepancies and inconsistencies on the evidence of Ms Thomas, Mr Gayle and Mr Nelson. Those discrepancies and inconsistencies relate to the issue as to (i) the persons who were involved in what was described as a "tussling", wrestling, or fighting; (ii) the presence of the knife; and (iii) the presence of gunshot residue on Mr Powell's hands, albeit, at trace levels.

[104] Mrs Palmer-Hamilton submitted that the learned trial judge gave sufficient directions to the jury on inconsistencies and discrepancies. She relied on **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 and **R v Peter Senior and Clayton Bryan** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 133/2003 judgment delivered 11 March 2005, in submitting that the learned trial judge was not required to poll the evidence for all the inconsistencies and discrepancies, but he was only expected to give some examples of the same, which is what he did.

[105] She also argued that the weaknesses in the evidence of a witness is a matter for the jury's determination in the light of the facts before them, even where the trial judge may be of the view that a conviction cannot be supported in the light of the discrepancies and inconsistencies. She relied on **Steven Grant v R** [2010] JMCA Crim 77.

[106] Learned counsel also relied on **Bayne Simms v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 109/2006 judgment delivered 24

April 2009, in support of her submission. In that case, this court accepted, having looked at how the summation dealt with discrepancies and inconsistencies, that the directions by the trial judge was adequate, even where no examples as to discrepancies were given.

[107] In considering the issue raised by the submissions, regard should be had to the guidance given in this court in **Steven Grant v R**. In that case, Harrison JA stated at paragraph [69] that:

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

[108] Carey JA, in delivering the judgment of the court, in **R v Fray Diedrick**, which was referred to in **Kirk Mitchell v R** [2011] JMCA Crim 1 and was adopted in **Vastney Harvey v R** [2014] JMCA Crim 58, said at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[109] The learned trial judge in this case implored the members of the jury, as the sole arbiters of the facts, to employ their common sense and experience when considering

the evidence that would assist them in coming to their verdict (see pages 786-787 of the transcript). He reminded them that they would have seen and heard the witnesses as they gave evidence, as well as observed their reaction under cross-examination, and so it was for them to decide whether or not they accepted them as being credible (pages 787-789). At the start of the review of Mr Nelson's evidence, the learned trial judge reiterated to the jury thus, at page 822 of the transcript:

> "...you bear in mind the relationship [of] the witnesses; their level of intelligence, the way they answered the questions, how frank they were in their answers, you bear those things in mind when you assess their evidence...."

[110] At pages 24-25 of the amended transcript (pages 824-825 of the original transcript), the learned trial judge directed the jury to the disparity in the evidence of Mr Nelson and that of Ms Thomas in respect of the words that were uttered by Mr Willoughby immediately before the shooting:

> "...Mr. Nelson said he noticed that the other man [Mr Willoughby] had a knife, had taken a knife from his waist, and he says, 'I ran towards them. Tyrone [Powell] pushed the man off.' That is when he heard the man started shouting to someone, 'Come over here soh, come over here soh.' That is what he said he heard. You will recall that Miss Thomas said something different. She is saying that what she heard is somebody saying, 'Vince, Vince.' I will tell you how to deal with those conflicts. Those inconsistencies and discrepancies in the evidence that is produced...."

[111] The learned trial judge, as he continued to outline the evidence of Mr Nelson, in respect of how Mr Gayle came to have sustained an injury to his abdomen, directed the

jury on the discrepancy on Mr Nelson's evidence, at pages 27-28 of the amended transcript (pages 830-831 of the original transcript) as follows:

> "…He wasn't able to say how Pete [Gayle] got his injury. Does that give you an insight in to how his credit. Because what is said is that you should be very wary of witnesses when they come and their stories fit very closely it's mark [sic] of a concert. But, of course, on cross-examination the discrepancies will also dispose whether it's a cruel intention, is a wicked intention [sic] that the witness is coming with when sometimes you hear them contradicting each other and not getting close to the evidence, you may think that they are inventing it, it's not true because of the discrepancy between both, so you bear that in mind, bear those two things in mind.

The learned trial judge gave another example of inconsistency in Mr Nelson's testimony. This is recorded at pages 833-834 of the original transcript.

> "He was cross-examined and he was asked questions again about security and he said he was just running, he didn't know where he was running to … and it was put to him that in his statement, he had indicated that 'Rooku' [Mr Gayle] had got a cut when he climbed through the vehicle. He says he does not remember saying anything like that. He doesn't recall saying that but it was in his statement and that statement, he said he never wrote it but it was read over to him, I think he said, 'I agree that I read over the statement, I signed it as being true and correct.' So you bear in mind, wouldn't he have seen that? And if he had seen it, why would he not correct it? It is a matter for you."

[112] Although the learned trial judge did not specifically draw the attention to the discrepancy on the evidence in respect of the knife in Mr Powell's hand, he did, at page 848 of the transcript, after he had recounted the evidence of Ms Thomas, alert the jury to "look at her evidence closely because she put a knife in the hand of Tyrone

[Powell]". He again reminded them at page 865, that the only person Ms Thomas saw with a knife on the night of the incident was Mr Powell.

[113] At pages 946-948, the learned trial judge gave comprehensive instructions to the jury as to how they should treat with discrepancies and inconsistencies, as follows:

> "There are certain instances when witnesses were, it was put to them that on a previous occasion they had said certain things and in certain instances one witness said one thing as, for example, you will recall in respect of Marsha Thomas, she had said … she didn't see him [Mr Gayle] with an injury although she saw him exit the car; but there was Mr. Gayle who told you he came through the window, he was set upon, fell and then he was cut.
>
> Now, if you find that something was said on a previous occasion which conflicts with what was said before you then you will have to decide now what is true. You will have to decide how does it affect the credibility of the witness. If you find that what was said previously or what was said today is in conflict with each other, bear in mind that when you come to deal with that type of conflict what you are dealing with. What you are talking about are discrepancies and discrepancies can either be serious or trivial. If you find that there [are] discrepancies on the evidence, because it is you who will find whether or not there are discrepancies, you have to determine first of all, is the discrepancy serious, meaning is it of such a nature that it destroys the very fabric of the witness' testimony and therefore make you feel unable to accept and act upon the testimony of the witness? If that is the state of mind in which the discrepancy leaves you in relation to any particular witness in this case then you will disregard the testimony of that witness. If you look at the discrepancy and you say it is not serious it does not, in your view, destroy completely the credibility of the witnesses and if you are satisfied, notwithstanding that discrepancy, the witnesses have spoken truthfully in other areas, then in the area which you find that this witness has not spoken truthfully you can reject that portion of the testimony but in other areas, if you find that this witness has spoken truthfully, you can accept

> and act upon those portions of the witness' testimony. Put another way, you can reject all of that witness' testimony or you can accept all of it or you can reject it in part and accept it in part."

[114] Immediately after the issuance of those directions to the jury, the learned trial judge enquired of counsel, whether there was anything that he may not have addressed and counsel for Mr Edwards indicated that the judge could perhaps bring to the jury's attention the inconsistency in the evidence of Mr Gayle concerning whether he saw the face of Mr Edwards or not. The learned trial judge obliged counsel and directed the jury, at pages 950-951, thus:

> "...I told you from the outset that you are supreme judges of the facts in this case. If there is any area in my summation that I did not highlight, I did not mention that you think is worthy of your attention, the fact that I didn't mention it does not preclude you from considering it. You are the supreme judges of the facts so you will decide what is important and what is not, I won't attempt to go over every bit of evidence. I must tell you I did not mention all the discrepancies, the conflicts and inconsistencies that arose but that is also a matter for you to say whether there are inconsistencies or discrepancies.
>
> Counsel has brought to my attention the fact that the witness Gayle had said in his statement, in his written statement, he had not seen the accused man's face good, he had not seen it good and in his testimony he said he was able to see his face, it is for you to say whether that is, in fact, an inconsistency and if so, having so decide [sic] - if you so decide if it is an inconsistency whether it is serious, so that you cannot believe the witness on that point or it is trivial and immaterial."

[115] It appears from the highlighted passages, and when the summation of case is looked at as a whole, that the learned trial judge gave sufficient directions to the jury

that would have assisted them in their assessment and treatment of the evidence in respect of inconsistencies and discrepancies. The learned trial judge was not required to comb through all the inconsistencies and discrepancies in the case; he was expected to highlight some, which he did. This ground fails.

**Ground 6 – admission of evidence that Mr Edwards failed to respond to an invitation to attend a question and answer session, without any direction on his right to silence**

[116] Under this ground, Mrs Neita-Robertson complained that the learned trial judge erred when he allowed the evidence of Detective Sergeant Kevon Chambers to the effect that he conducted a question and answer with Mr Willoughby, who answered 18 of his 50 questions, but "got no response from [Mr Edwards] or his legal representative". She argued that that evidence was of no probative value and could only be prejudicial as it had the effect of making Mr Edwards appear uncooperative as compared to Mr Willoughby, and/or fearful of answering questions, and/or that he was hiding something.

[117] Learned Queen's Counsel submitted the learned trial judge was required, but failed, in such a situation, to instruct the jury on Mr Edwards' right to remain silent and warn them to disregard Detective Sergeant Chambers' evidence and not use it in any way prejudicial to Mr Edwards. She relied on **R v Raymond Gilbert** (1978) 66 Crim App R 237, page 243, in support of her submission.

[118] Mrs Palmer-Hamilton submitted that the learned trial judge was not required to direct the jury on Mr Edwards' right to remain silent in the circumstance, given that Mr

Edwards did not attend a question and answer session. She argued that the evidence of the officer was unchallenged and there was no prejudice emanating from what was a fair comment by him on what he did in the course of his investigation.

[119] The evidence for this ground emerged during the examination in chief of Detective Sergeant Chambers. He was asked about the steps that he had taken in the course of his investigation of the fatal shooting of Mr Powell. The relevant portion is set out at page 569 of the transcript:

> "A. …I arranged for a question and answer session with Special Corporal Vince Edwards, and a Constable Adjauny [sic] Willoughby. On the 27th of October I did a question and answer session with Constable Willoughby at my office.
>
> Q. Yes?
>
> A. In which he answered eighteen of fifty questions. However, in regards to Special Corporal Edwards I got no response from him or his legal representative."

[120] In **R v Gilbert**, cited by Mrs Neita-Robertson, the accused, who had been charged with murder, claimed at his trial, that he had acted in self-defence. He, however, had not claimed self-defence in a police statement taken under caution. In addressing the jury, the trial judge said, "that no adverse inference was to be drawn against Gilbert on account of his refusal to answer the questions put to him by the police officer", given his entitlement to maintain his silence. Having so directed the jury, the trial judge, read the statement made by Mr Gilbert and reminded them he was perfectly entitled to keep silent, but if he does elect to make a statement, they were entitled to look at the statement to see if it assisted in the performance of their

functions as fact finders. Subsequently, the trial judge drew the jury's attention to the fact that the accused did not raise the defence of self-defence in his unsworn statement.

[121] On appeal, Viscount Dilhorne commented, at page 243 that, "[a]s the law now stands, although it may appear obvious to the jury in the exercise of their common sense that an innocent man would speak and not be silent, they must be told that they must not draw the inference of guilt from his silence". He also stated at page 244:

> "It is in our opinion now clearly established by decisions of the Court of Appeal and of the Court of Criminal Appeal that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection..."

Accordingly, Viscount Dilhorne found, at page 245, that "the judge in asking the jury to consider whether it was remarkable that, when making his statement, the accused said nothing about self-defence, fell into error and misdirected them". He reasoned that this was because the direction could give rise to the inference that the jury was being invited to disregard the defence advanced because the accused exercised his right to silence.

[122] There is no doubt that Viscount Dilhorne's pronouncement on the law is, with respect, correct. Nonetheless, the facts in **R v Gilbert** are distinguishable from those in the instant case. Mr Gilbert gave a statement to the police but omitted to mention his defence, as well as refused to answer questions put to him. The trial judge invited the jury to contemplate whether they found the omission "remarkable". However, in this

case, Mr Edwards did not appear for the question and answer session and so he was not subjected to any questions by Detective Sergeant Chambers. There was no challenge at the trial to the detective sergeant's evidence in this regard. In addition, the learned trial judge did not invite the jury to draw any adverse inference from the evidence of the detective sergeant. In fact, the learned judge did not make any comment on the matter. He merely recounted, at page 927 of the transcript, the evidence of Detective Sergeant Chambers.

[123] Despite the factual differences between **R v Gilbert** and the present case, and although there was no objection at the trial to the evidence, the learned trial judge should have made it clear to the jury that Mr Edwards had a right to silence, which he was entitled to exercise. The absence of that direction could have left the jury, as Mrs Neita-Robertson has submitted, with the impression that Mr Edwards was being less than co-operative with the police, because of some culpability on his part.

[124] Accordingly, this ground should also succeed.

**Should the proviso be applied?**

[125] The successes that Mr Edwards has had in this application is that he has demonstrated that the learned trial judge did not give adequate directions in respect of several areas, particularly with respect to Mr Edwards' defence concerning his acting in accordance with his duties as a police officer. That failure, especially, resulted in Mr Edwards being deprived of the jury's consideration of an important part of a defence that was open to him.

[126] As this is not a case of a deficiency in the evidence presented by the prosecution, but rather error by the trial judge, the results on the successful grounds raise the issue of whether or not to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. The relevant part of the section states:

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

[134] The test of whether or not to apply the proviso is whether a jury properly directed would have arrived at the same conclusion upon a review of all the evidence. This test was approved by their Lordships of the Privy Council in **Stafford and Carter v The State (Trinidad and Tobago)** [1998] UKPC 35; (1998) 53 WIR 417. In the course of the judgment delivered by Lord Hope of Craighead, he said:

> "9. The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v. Director of Public Prosecutions* [1935] AC 462, per Lord Sankey L.C. at p. 482. In *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 at p. 321 Lord Simon said that the provision assumed "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt

convict". As he explained later on the same page, where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence.

10. It was suggested by Mr. McLinden for [the appellant] Giselle in the course of his argument that the proviso should be applied only to evidence which is not in dispute or is indisputable. That however is too high a test. In a criminal trial, where the defendant has pled not guilty, all the evidence which points to his guilt is, in one sense, disputed evidence. **What is required is a fair evaluation of the evidence on both sides. But the jury's verdict may show that they must have rejected the defendant's evidence. In such a case his version may properly be left out of account. The application of the proviso will then depend upon the strength of the evidence against the defendant in the prosecution case.**" (Emphasis supplied)

[135] The application of the proviso was considered in **Jason Lawrence v The Queen** [2014] UKPC 2. In that case, their Lordships of the Privy Council relied on a test of inevitability of the conviction, even if the correct course had been taken in respect of dock identification. They said at paragraph 30:

"The Board considers that it is not appropriate to classify as minor the errors in relation to dock identification and the presentation of the defence case in relation to the alleged confession. **The Board is not satisfied that the jury would inevitably have returned a verdict of guilty if those errors had not been made**." (Emphasis supplied)

[136] This court, in **Mervin Jarrett v R** [2017] JMCA Crim 18, considered the application of the proviso. Morrison P, who delivered the judgment of the court, considered **Stafford and Carter** and a later decision by the Privy Council in **Dookran and Another v The State (Trinidad and Tobago)** [2007] UKPC 15. Morrison P noted that, in **Dookran**, their Lordships explained that the test for applying the proviso was whether the jury would "inevitably" have convicted the appellant. At paragraph 14 of **Dookran**, their Lordships stated the test thus:

> "...the Court of Appeal were entitled to apply the proviso and uphold [the appellant's] conviction only if they could be satisfied that, without that evidence, a reasonable jury would *inevitably* have convicted her.

[137] The relevant portion of **Dookran** dealt with improperly admitted evidence. It seems however, that whether the appeal complains about improperly admitted evidence or a defect in the directions to the jury, the test is still whether a reasonably jury would have inevitably convicted. In **Haddy v R** [1944] KB 422; (1944) 29 Crim App Rep 182, the English Court of Appeal, in considering the application of legislation, which was worded in identical terms to the proviso in section 14, held that the test that "on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty" (page 190 of the latter report) was the proper test to be applied in order to apply the proviso.

[138] In the present case, it cannot be said that the jury would inevitably have convicted Mr Edwards if the errors had not been made. The proviso should, therefore, not be applied.

**Should there be a retrial?**

[139] The failures that have been identified in the assessment of the various grounds show that Mr Edwards being deprived of the jury's consideration of important parts of the defences that were open to him. The points are sufficiently important to warrant the conviction being overturned.

[140] As this is not a case of a deficiency in the evidence presented by the prosecution, but rather errors by the learned trial judge, the next issue to be determined is whether a retrial should be ordered.

[141] Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, "if the interests of justice so require". **Dennis Reid v R** (1978) 16 JLR 246 provides guidance in assessing this issue. The Privy Council, in that case, ruled 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" (see the headnote). Based on that judgment, some of the considerations that should be taken into account in deciding whether or not to order a new trial are:

a. the strength of the prosecution's case;

b. the seriousness or otherwise of the offence;

c. the time and expense that a new trial would demand;

d. the effect of a new trial on the accused;

e. the length of time that would have elapsed between the event leading to the charges, and the new trial;

f. the evidence that would be available at the new trial;

g. the public impact that the case could have.

That is not an exhaustive list of the relevant factors, and each case will depend on its peculiar facts.

[142] The fact that this is a killing by a police officer is sufficiently important to warrant an inclination to order a new trial. It resonates with the issues of the seriousness of the case and the public impact that it would have. The length of time that has elapsed since the incident (exacerbated by the delay in delivering this judgment) is a factor which weighs against ordering a new trial. A long lapse of time since the incident occurred is, however, not definitive of the point (see **R v John Mitchell** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 74/1996 judgment delivered 31 January 2000.

[143] Based on all the matters to be taken into account, a new trial should be ordered.

**Summary and conclusion**

[144] An assessment of the proposed grounds advanced by learned counsel on behalf of Mr Edwards demonstrates that the learned trial judge made a number of errors in his direction to the jury. The major ones concerned the treatment of the issues of the unsworn statement, self defence and the defence open to Mr Edwards as a police officer in the lawful execution of his duty.

[145] Based on those errors, it is necessary to overturn the conviction. The circumstances of the case require, however, that there be a re-trial.

[146] The delay in the delivery of this judgment is sincerely regretted.

[147] These are the orders of the court:-

(1) The application for leave to appeal is granted.

(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal is allowed.

(4) The conviction is quashed and the sentence set aside.

(5) The case is remitted to the Circuit Court for retrial.