[2018] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

HUEY GOWDIE v R

Delano Harrison QC instructed by K Churchill Neita and Company for the applicant

Miss Natallie Malcolm for the Crown

30, 31 January and 4 May 2018

P WILLIAMS JA

[1] On 12 July 2012, in the hills of Saint Andrew, Mr Huey Gowdie, the applicant, shot Mr Shango Jackson, the deceased, three times. Mr Jackson died as a result of one of those gunshot wounds. The applicant was subsequently charged for murder. His trial took place in the Home Circuit Court before Evan Brown J and a jury over several days commencing on 30 May 2016. On 13 June 2016, the applicant was convicted for manslaughter. On 22 July 2016, he was sentenced to 10 years imprisonment at hard labour.

[2] Consequently, the applicant applied for leave to appeal his conviction and sentence. A single judge of this court refused his application. Having had his application refused, the applicant has renewed his application before us, as is his right.

The prosecution's case

[3] In July 2012, the applicant and the deceased lived at the same premises at 50 Shenstone Drive, Beverly Hills in the parish of Saint Andrew. There are two houses on the property. The deceased, his girlfriend and their family along with his brother, Mr Kwame Jackson, resided in the house to the front of the property. The applicant lived in the house to the rear with his girlfriend and her family. The applicant's girlfriend, Mrs Annette Carrington-Jackson, happened to be the ex-wife of the deceased.

[4] Mr Kwame Jackson testified that on 12 July 2012, sometime between 6:00 pm and 6:10 pm, he was in his bedroom on the top floor of the house he shared with the deceased when he heard voices outside. He looked out and saw Mrs Carrington-Jackson and her daughter Lori-Ann Grant. He heard his brother's voice coming from the parking area to the front of that house. It sounded to him as if they were arguing.

[5] He heard a vehicle engine start and he then saw Mrs Carrington-Jackson and Lori-Ann enter Mrs Carrington-Jackson's vehicle, a Toyota Vitz and they proceeded to drive down the driveway. Mr Jackson went to another section of the balcony where he saw his brother exiting his vehicle, a Toyota Tacoma, which was now parked at the bottom of the driveway. This was the single driveway that provided entrance and exit to the premises.

[6] Mrs Carrington-Jackson stopped her vehicle about 3 to 4 feet away from the Toyota Tacoma. Mr Jackson saw his brother proceed to walk up the driveway towards his house. At that point, a third vehicle, a Mitsubishi Pajero, pulled up behind the Toyota Tacoma. At this time, the Toyota Tacoma could neither be moved forward or backwards. The Mitsubishi Pajero could not enter the premises neither could Mrs Carrington-Jackson exit in her vehicle.

[7] The applicant was the driver of the Mitsubishi Pajero. Mr Jackson saw him exit this vehicle and walk up the driveway. He saw the applicant pull a firearm from his waist and moved quickly to get closer to the deceased. The applicant crossed between the Toyota Tacoma and the Toyota Vitz and approached the deceased from behind.

[8] Mr Jackson next saw when the applicant "stomped" the deceased in the lower back. The deceased turned to face the applicant and appeared as though he was throwing a punch at the applicant. The punch did not make contact. Mr Jackson watched as the applicant took a step or two back, away from the deceased and raised the firearm which he had up to then been holding downwards in his right hand.

[9] The deceased was turning away from the applicant and his left side was now facing the applicant who fired the gun in the direction of the deceased's legs. Mr Jackson saw his brother turn to his left and face the applicant again who then raised the gun once more and fired in the direction of the deceased’s midsection. The deceased looked at his arms and his legs then turned his back to the applicant and

proceeded up the drive. He took a few steps away from the applicant who stepped towards him and stomped him in his back a second time.

[10] The deceased turn to his left and as he turned, the applicant raised his gun in the direction of the upper region of the deceased's body. The applicant fired a third time. The deceased screamed and fell to the ground.

[11] Mr Jackson described how he immediately rushed to where his bother had fallen. As he rushed to his brother, he passed Mrs Carrington-Jackson walking up the driveway. He asked her, "what is happening and why did this have to happen". She responded, "[h]e attacked him".

[12] Upon reaching his brother, he observed a small amount of blood on his shirt. He turned to the applicant, who was standing nearby and asked, "Why? Why did it have to come to this?". The applicant did not respond. Mr Jackson asked him, "Where did you shoot Shango?". This time the applicant responded, "I don't know".

[13] Mr Jackson got assistance and took his brother to the hospital. Subsequently, he was shown his brother's dead body.

[14] Under cross-examination, Mr Jackson testified that his brother weighed over 200 pounds but would not agree that he was 6 feet 4 inches tall. He however agreed that his brother was big. He accepted that he and his brother has had several fights. However, when he was asked about fights his brother may have had with several persons, he denied knowledge of those incidents. He was also questioned about

abusive incidents between his brother and Mrs Carrington-Jackson. Mr Jackson maintained that there were altercations, the specifics of which he did not know since he had never seen anything himself.

[15] Only one other witness for the Crown purported to speak about what had transpired there that evening. He was Errol Dunkley. He however had testified that he was speaking to Mr Kwame Jackson at the time the first shot as heard. He then heard a second gunshot after which he heard the deceased call out his name. Mr Dunkley explained how he immediately ran off in the direction from which he had heard the deceased calling him. He then heard a third gunshot.

[16] Mr Dunkley said after the first gunshot, he didn't know what became of Mr Jackson. However, by the time he ran to the front of the house, after the third shot was fired, he saw Mr Jackson also running to the front of the house. The two of them then ran down to the driveway where the deceased had fallen. He ran past Mrs Carrington-Jackson. He noted the positioning of the vehicles which he described as "Annette car like was like at the front, Shango van in the middle" and the applicant's "van was at the back".

[17] Mr Dunkley described how both he and Mr Jackson shook the deceased. He testified that he heard Mr Jackson asking the applicant where he had shot the deceased. He heard the applicant respond that he didn't know. Mr Dunkley was the one who assisted Mr Jackson to place the deceased in the back of the Toyota Tacoma and

travelled to the hospital with them. He acknowledged that he had seen the applicant with a gun in his hand whereas the deceased did not have anything in his.

[18] Mr Dunkley was also cross-examined about various acts of violence allegedly committed by the deceased. He denied knowledge of any of them.

[19] There were two other civilian witnesses called by the Crown. The first, Miss Francine Bingham, was the common-law spouse of the deceased who identified his body for the purpose of a post-mortem examination. The second was Dr Pradeep Rohan Ruwanpura who performed that examination.

[20] Dr Ruwanpura testified that the post-mortem examination revealed that the deceased had received three gunshot wounds in total to his body. The wounds were to the outer aspect of his left shoulder, upper outer aspect of his left thigh and the upper outer aspect of his left lower leg in the area of his calf. Death which would have been immediate was due to haemopneumothorax and aortic laceration caused from the damage done to internal organs from the bullet that had penetrated the body from the entry wound on the left shoulder.

[21] Three police officers testified as to the various roles they played in the investigations in this matter. Corporal Alesa Brown, who at the time of the incident was a Police Constable, was one of the first officers who arrived on the scene. She had been dispatched there as a result of a report which had been made to the police control. She saw and spoke with the applicant who admitted doing the shooting. She cautioned him and collected his firearm from him. She escorted him to the Matilda's Corner Police

Station where he was handed over to the station officer and the firearm handed over to Detective Sergeant Dewayne Jonas, who was a Detective Corporal of Police at the time.

[22] Detective Corporal Milton Henry was the forensic crime scene investigator who visited the scene that afternoon. He took photographs of the scene, some of which were admitted into evidence and used when Mr Jackson was testifying to point out the areas of the premises of which Mr Jackson spoke. Detective Corporal Henry also photographed the body of the deceased and the pictures of the wounds to the leg and calf of the deceased were also admitted into evidence.

[23] Detective Sergeant Dewayne Jonas, who described himself as the initial investigator, upon receiving the firearm and initial report from Corporal Brown, testified that he spoke to the applicant. He cautioned the applicant and asked him why he shot the deceased. He said the applicant replied, "boss, him was blocking [my] drive way". Detective Sergeant Jonas testified that the applicant further stated: "I asked [the deceased] to remove his car, an argument developed and he was advancing towards me because he is bigger in built. I had to brandish my firearm, my licensed firearm and shoot him to protect myself". Detective Sergeant Jonas later handed the firearm to Detective Sergeant Levy.

[24] Under cross-examination, Detective Sergeant Jonas acknowledged that he had written a statement in the matter on 26 May 2016, one week before the trial. He also admitted, in response to a question from the bench, that the statement was written just from memory.

[25] Detective Sergeant Shauna Campbell was the investigating officer in the matter. Her deposition taken at the preliminary examination was read in evidence. She had instructed Detective Corporal Henry to process the scene. She had seen Detective Sergeant Levy hand over the weapon to Detective Corporal Henry. She had cautioned the applicant upon being initially introduced to him and again after he was arrested and charged and he had made no statement.

The case for the defence

[26] The case for the defence was presented to the jury when counsel, then appearing for the applicant, Mr Robert Fletcher, exercised the seldom used right to open the case. In this opening counsel told the jury that this is a case of self-defence and gave them a definition of self-defence. He invited them to consider questions which he described as "really really critical". The first, he said, was "do you think [the applicant] had an honest belief that he was being attacked or that...anyone [sic] life was in danger?".

[27] Counsel told the jury that they would have heard and would hear more information about the deceased and about domestic violence which he explained would be important in determining the question of honest belief. Ultimately, he asked them to bear in mind the following questions: "Whether there is a reasonable basis for the fear? Whether there is a reasonable basis for the honest belief in the capacity of the person attacking you to kill you?".

[28] The applicant gave evidence and six witnesses were called in support of his case. Only one of them spoke to the events of that fateful afternoon. The applicant explained that he was at work, at about 5:54 pm, when he received a call from Mrs Carrington-Jackson. He said she told him that the deceased was blocking the driveway and preventing her daughter's boyfriend from leaving. She also told him that the deceased was quarrelling with her daughter and was behaving boisterously. The applicant said he called and made a report to the Matilda's Corner Police Station and then proceeded to his home.

[29] He arrived at the scene in time to see the deceased's Toyota Tacoma racing in reverse down the driveway. He also saw Mrs Carrington-Jackson driving down facing the Toyota Tacoma. He saw the deceased exit his vehicle and walked towards Mrs Carrington-Jackson seated in her vehicle.

[30] The applicant explained how he then pressed his horn to alert the deceased of his presence and stopped his van to the back of the Toyota Tacoma. When he exited his vehicle, he was not able to see the deceased so he ran up to the driveway, crossing in between the Toyota Tacoma and his vehicle. He now could see the deceased who turned and walked towards him saying, "Pussy, weh yuh nuh come offa mi place before mi murder the whole lot a uno". He responded, "Shango, why yuh nuh grow up and stop the foolishness".

[31] The applicant described how it was like "something snapped inside" of the deceased who then grabbed him and starting thumping him. He tried to deflect the

punches with his hands and was stepping away from the deceased. He told the deceased to stop but to no avail. The deceased grabbed unto his shirt and he knocked the deceased's hand off.

[32] The deceased then reached in to grab the applicant's gun which was in the applicant's pant waist. The applicant knocked the deceased's hand downward. The applicant said he then pulled the firearm from his waistband and squeezed the trigger. He explained that he pulled the firearm at the time because the deceased "is a big giant of a man compared to [him]" and "[he] couldn't mek him tek [his] gun from [him]". He said that he squeezed the trigger out of "absolute fear". He was fearful of the deceased doing him harm, or killing Mrs Carrington-Jackson, her daughter or her son, if the deceased got control of the firearm.

[33] The applicant said two shots rang out. He was then falling backwards and so was trying to get his balance. At this point the deceased used his left hand to check his side and said, "Pussy, yuh shot mi? A murder your rass".

[34] The applicant described how the deceased lunged at him and how he raised his hand and fired the third shot. The deceased stumbled back. The applicant watched as "[the deceased] kneeled on his van, to the door of his van, and then slid down to a sitting position and then stumbled forward".

[35] The applicant then saw Mr Jackson and Mr Dunkley coming and go past him to attend the deceased. He moved his van to allow them to leave with the deceased in the Toyota Tacoma. The applicant remained until the police arrived. He was transported by

the police to the Matilda's Corner Police Station where he met Mr Fletcher who remained with him for the rest of the evening.

[36] The applicant said a lot of things took place with the police that evening. He was however adamant that he did not speak to Detective Sergeant Jonas at anytime. He insisted that he definitely did not say the things that Detective Sergeant Jonas attributed to him.

[37] The applicant gave extensive evidence as to the nature of the relationship he had with the deceased. He testified of the problems he had previously had with the deceased. He said he was fearful of the deceased and found him to be irrational, angry and hateful. He was also allowed to testify of his knowledge of the deceased abusing Mrs Carrington-Jackson over the years although he did not say he had witnessed any of that abuse.

[38] The applicant explained that his belief on the afternoon of 12 July 2012 was that the deceased "wanted to do [him] serious harm, he had promised it, he had threatened [him] on numerous occasions". He said he had felt threatened and in imminent danger when the deceased had reached for his gun. He denied stomping the deceased and explained that he weighed only 165 pounds and was much smaller than the deceased who he described as "a massive man". He denied pursuing the deceased and shooting him.

[39] Under cross-examination, the applicant continued to explain that when he fired the weapon he did so without aiming or pointing. He said when he squeezed the trigger

and it discharged two shots, he did not know where they went. He said that the deceased was then 2 feet away from him at an elevated position on the driveway. He was below the deceased who was trying to get control of him.

[40] When tested as to what was his intention when he exited his motor vehicle and went towards the deceased, the applicant explained that he had no plan or intention and he was still waiting on the police to turn up. He said that when he got to the left hand side of the vehicle and saw the deceased, he thought that good sense would have prevailed and that the deceased would have calmed down.

[41] When questioned further about his intention the following dialogue took place between the applicant and the prosecutor, at page 411 of the transcript:

> "Q. ...having discharged your weapon three times ...
>
> A. Yes
>
> Q. ...in Shango's direction, wasn't it your intention to cause him serious harm?
>
> A. Absolutely not, absolutely not, ma'am, absolutely not. My intention was to defend myself.
>
> Q. Having discharged your weapon three times in Shango's direction, wasn't it your intention to kill him?
>
> A. I had no intention, whatsoever, the only intention I had was to defend myself."

[42] Mrs Annette Carrington-Jackson gave evidence of the abusive relationship she had endured with the deceased, before and during their marriage. She testified as to injuries she had suffered at his hands. She had obtained a restraining order against him

in 2006 or 2007. There were matters that had been reported to the police and which had been the subject of proceedings before the court.

[43] She also testified of physical abuse meted out by the deceased to other members of the family including the deceased's father and brother. She gave evidence of fights which the deceased had with other persons.

[44] Mrs Carrington-Jackson said that the incident on 12 July 2012 commenced with her receiving a phone call from her daughter. As a result of which she went home to call the applicant and tell him what her daughter had told her. She also called the police.

[45] Once home, she had an argument with the deceased. She eventually got back into her car but the deceased got into his vehicle and reversed down the driveway "very very fast". She drove down the driveway after him until her car stalled. The deceased exited his vehicle and walked towards her. She heard a horn and saw the applicant's vehicle behind the deceased's.

[46] As the deceased approached her she said he looked angry so she locked her car door. She could not have passed his parked vehicle. She saw him then heading down towards the applicant. They started to fight. All this time she was trying to call the police.

[47] She described how she got out of her vehicle in a state of panic shouting and crying. It was to the deceased that she shouted, telling him to stop. She was running

back and forth until she heard two explosions. She heard the deceased say, "pussy a shot yuh shot mi...I kill you blood claawt now". She saw as he moved towards the applicant's waist. She ran past both of them to the bottom of the driveway when she heard a third shot.

[48] She saw as the deceased slid down and dropped to the ground. At that point, she saw Mr Jackson and Mr Dunkley run up. She remained until they had left with the deceased and the police arrived.

[49] The next witness called by the defence testified of an incident that had taken place sometime in 2010/2011 where he had witnessed the deceased threaten the applicant. This was supportive of evidence that the applicant had given about such an incident.

[50] A medical doctor was called to testify of a medical condition from which Mrs Carrington-Jackson suffered. Another doctor was called to give evidence about domestic abuse and its causes and effect. She had never seen or given any kind of treatment to either Mrs Carrington-Jackson or the deceased.

[51] Mr Carl Lazarus gave evidence as to the character of the applicant. He described him as reliable, responsible and honest with strong Christian faith. He spoke of his strong admiration of the applicant. He said he found that the stories he had heard about the incident were out of character for the applicant and he did not know the applicant to be a man of aggression.

[52] The final witness called in the defence case was a police officer who testified as to making an entry into the station diary on 12 July 2012 at the Matilda's Corner Police Station. He was permitted to read the entry although it was not admitted into evidence. The entry related to a report from an unknown male caller that there was "a dispute at 50 Shenstone Drive, Beverly Hills, Kingston 6, that one, Shango Jackson, was using his motor vehicle to block the driveway of two houses".

The appeal

[53] At the commencement of the hearing of this application Mr Delano Harrison QC, who appeared for the applicant, sought and obtained the leave of the court to abandon the original grounds of appeal and to argue instead five supplementary grounds of appeal. These supplementary grounds are:

> "1. The learned trial judge's directions on the issue of lawful self-defence were so diffuse and so lacking in clarity and simplicity as to have left the jury not merely confused, but also (more particularly) unsure, as to how properly to treat with the applicant's defence (of self-defence). In the result, justice miscarried: the applicant was thus deprived of a fair chance of acquittal.
>
> 2. The learned trial judge misdirected the jury as respects the law governing the issue of self-defence expressly raised by the applicant in his defence under oath. The misdirections here complained of were so material as to warrant the Court's interference with the verdict.
>
> 3. In his charge to the jury the learned judge deployed unfair comments which viewed severally or cumulatively, were clearly calculated to disparage the applicant's defence as being obviously implausible.

The applicant was thereby deprived of the substance of a fair trial."

"4. The learned trial judge erred in his direction leaving manslaughter for the jury's consideration as a possible alternative verdict in relation to the charge of murder."

"5. The sentence of ten (10) years' imprisonment is manifestly excessive."

[54] There are four main issues that arise in the appeal:

1. whether the learned trial judge erred in his treatment of the issue of self-defence (grounds 1 and 2);

2. whether the comments made by the learned trial judge were unfair and such that the applicant was denied of a fair trial (ground 3);

3. whether the learned trial judge erred in leaving manslaughter for the jury's consideration (ground 4); and

4. whether the sentence is manifestly excessive (ground 5).

Issue 1: Treatment of the issue of self-defence

The submissions

[55] Mr Harrison observed that the defence's case and the prosecution's case were diametrically opposed to each other. He contended that the prosecution's case was that the applicant was an unreserved aggressor in every aspect of the violence meted out to the deceased whereas the defence's case was self-defence. Thus, learned Queen's Counsel submitted that in these circumstances, studiously careful directions were called for so as to ensure that the jury approached the applicant's defence with complete comprehension, fairly and with balance. Learned Queen's Counsel referred to **Sigismund Palmer v The Queen** [1971] AC 814 and **Solomon Beckford v R** [1987] 3 WLR 611 in support of his submissions.

[56] Mr Harrison submitted that the learned trial judge introduced his directions on self-defence to the jury with the following assurance: "A person who acts reasonably in self-defence commits no unlawful act". Mr Harrison contended that this direction was inviting the jury from early in the summation to consider the applicant's self-defence on an objective basis, which was distinct from the subjective basis, laid down in **Beckford v R** and this approach constituted a material misdirection.

[57] Learned Queen's Counsel identified a second direction by the learned trial judge which he submitted encouraged the jury even further to consider the applicant's stated defence applying the objective test of reasonableness. The portion of the learned trial judge's summation complained about is as follows:

> "did [the applicant] have a reasonable apprehension that he was in danger of death or serious bodily harm, that is, was he in imminent danger?" (page 602 of the transcript)

[58] Mr Harrison submitted that there were two vices in this passage. The complaint is such that to do justice to it requires it be reproduced in exact terms, as stated in the written submissions filed on 7 November 2017:

> "(i) on any reasonable interpretation, the jury were directed to determine whether a reasonable man, in the circumstances then facing the applicant on his evidence, would have entertained a fearful/anxious belief, or did the applicant have reasonable grounds for apprehension/anxiety; (ii) the purported explanation of vice (i) - 'that is, was he in imminent danger' - plainly suggests not an apprehension (reasonable or not) of 'imminent danger', but, as worded, can only mean, **actually** imminent danger." (Emphasis as in original)

[59] During discussions with this court, learned Queen's Counsel acknowledged that it was only this second extract that deserved the criticism that the learned trial judge had invited the jury to apply the objective test of reasonableness. He also accepted that the learned trial judge at other times in his summation did direct the jury in proper terms. He however submitted that the material directions constituted a veritable hotchpotch of directions which served to confuse the jury. He contended that the one misdirection effectively neutralised all the other correct directions.

[60] It was learned Queen’s Counsel's contention that by its verdict of not guilty of murder, but guilty of manslaughter, the jury plainly rejected the evidence of Mr Kwame Jackson, who provided the evidence which was the very essence of the prosecution's

case of murder. Mr Harrison concluded his submissions in this area by opining that had the jury clearly understood every aspect of the law relating to the applicant's defence of self-defence, a verdict of not guilty of murder, not guilty of manslaughter would have been the proper verdict in the matter. Queen's Counsel submitted that the case of **James Russell Shannon v R** [1980] 71 Cr App R 192 is quite instructive in this area.

[61] In response, counsel for the Crown, Miss Malcolm, candidly admitted that the complaint levelled at the one portion of the learned trial judge's direction may well be warranted. She however submitted that the entire extract of the learned trial judge's direction in which the portion complained about is located should be considered. She contended that it is improper to single out statements taken from his overall directions to conclude that they were substantially flawed.

[62] Miss Malcolm also relied on **Palmer v The Queen** which she noted had been recently quoted with approval in, a decision from this court, **Delroy Laing v R** [2016] JMCA Crim 11. She also noted that the principles from both **Palmer v The Queen** and **Beckford v R** have been helpfully outlined in the Supreme Court of Judicature of Jamaica Criminal Bench Book, at pages 258 and 259.

[63] Learned Crown Counsel submitted that there is no merit in the submission that the learned trial judge's directions on self-defence were unclear, diffuse or amounted to misdirection in law. She stressed that the learned trial judge on more than one occasion emphasised to the jurors that they were to judge the belief held by the applicant based on the circumstances as they would have appeared to the applicant. She contended

that the assertion that the jury would have taken away from the summation that the test of honest belief was objective and not subjective was not supported by the totality of the directions given by the learned trial judge.

The law

[64] The dictum of Lord Morris in **Palmer v The Queen** remains the standard applicable to any consideration of the appropriateness of directions given in relation to the issue of self defence. At page 831, he had this to say:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that 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 these a jury can decide...."

[65] It is now well settled that there are two limbs which must be established in proof of self-defence, namely:

1. that the accused held an honest belief in facts which if true would justify self-defence. The issue of reasonableness of the belief is relevant only to the question whether the accused's mistaken belief was honestly held (see **Beckford v R**); and

2. that the accused used such force as would have been reasonable in the circumstances which he honestly believed to exist, in defence of himself or another.

[66] Ultimately, there must be a consideration of the subjective knowledge of a defendant including the circumstances as he honestly believed them to be, even if mistaken, along with the objective assessment of what amounted to reasonable force in the circumstances. A trial judge is required to properly communicate to the jury, the sense of the principle of self-defence and its application to the case (see **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22).

Discussion and disposal

[67] Learned Queen's Counsel was entirely correct that the case for the prosecution was diametrically opposed to that of the defence. It is therefore commendable that the learned trial judge correctly explained to the jury that the general directions which he had given them regarding the burden and standard of proof were particularly important in the circumstances of the case. He directed them in the following terms, at page 547 of the transcript:

> "...'A person who acts reasonably in self-defence commits no unlawful act.' Reasonable self-defence is justified in the eyes of the law. By his plea of self-defence, the accused is raising in a special form the plea of not guilty. Since it is for the prosecution to show that the plea of not guilty is unacceptable, the crown, must therefore, satisfy you so that you feel sure that self-defence has no basis in the present case."

[68] This direction was closely in keeping with the approach suggested by Edmund Davies LJ in **R v Alan Abraham** (1973) 57 Cr App Rep 799, at page 803, which was approved by this court in **Ronald Webley and another v R**.

[69] It is not disputed that the learned trial judge gave full and unexceptional directions on self-defence in keeping with **Palmer v The Queen** and there is no complaint as to the adequacy or accuracy of those directions. Further, it is noted that on several occasions during the summation the learned trial judge related the evidence to the issues which arise in self-defence.

[70] The specific section complained about occurred in the summation after the full and accurate directions had been given from pages 599 to 601 of the transcript. Crown Counsel is correct that the overall context of the words complained of should be considered. The learned trial judge had this to say at pages 601 and 602 of the transcript:

> "Now, the force used by the accused must have been used to protect himself either from death or serious bodily injury intended towards him by his attacker or from a reasonable apprehension of it induced by the word or conduct of his attacker, even though the latter may not in fact have intended death or serious bodily injury. So it is a question then of what---let me start again. It is not a question of what Mr. Shango Jackson intended but did Mr. Gowdie have a reasonable apprehension that he was in danger of death or serious bodily harm, that is, was he in imminent danger.
>
> Now, that is another way of saying that it is, Mr. Gowdie's state of mind that is important when determining the question of the attack on [sic] the imminence of the attack; it is for the prosecution to negative the assertion of

> honest belief. If in that they fail, the issue of the necessity to resort to defensive action must be resolved in favour of the accused."

[71] The learned trial judge was in error when he seemed to have been suggesting that there was to be consideration of what the attacker may have intended. The learned trial judge clearly recognised the error in the way he had embarked on the direction and hence indicated he was starting again. His efforts at correcting that statement invited the jury to consider whether the applicant had a reasonable apprehension which may well be interpreted as conveying an objective standard as Mr Harrison complains. However, the learned trial judge did not leave it there but went further to correct that impression by saying the comment was "another way of saying" the subjective standard was what the jury was to determine, that is, the applicant's state of mind. Any confusion that might have been caused would have been cleared up by the giving of the ultimate direction which was correct.

[72] There is no complaint that at least five other references made by the learned trial judge to the issue of the applicant's state of mind were incorrect. It is useful to note one, at pages 607 to 608 of the transcript, that came shortly after the section complained about:

> "Now under cross-examination [the applicant] said after Mr. Jackson checked his body he lunged at him that was when he raised his hand at about the height of his shoulder and fired. He said he squeezed the trigger out of absolute fear. He was fearful of Mr. Jackson doing him harm. It was his view that if Mr. Jackson had taken his firearm, he would have killed him, Mrs. Carrington-Jackson,

> Lori-Ann and probably Jamani, Mr. Shango Jackson's own son, as Mr. Jackson was an angry man. He said he felt threatened and in jargon of the common lawyer, in imminent danger....And Members of the Jury, you may recall the narrative for you incident of threats or the use of threatening language which came from Mr. Shango Jackson towards him before the date of the incident….Now listen closely, I have told you that the law is that, a person only acts in lawful self-defence if in all the circumstances he believes it is necessary for him to defend himself or a member of his family as Mr. Gowdie claims in this case and the amount of force which he uses in doing so is reasonable. It follows therefore, that in relation to this issue, you must ask two main questions. And the first of them is this; did the accused man believed [sic] or may be [sic] honestly have believed that it was necessary for him to defend himself?"

[73] It is also significant to note that at the end of the summation, the learned trial judge, before sending the jury out to consider their verdict, had this to say at pages 635 to 636 of the transcript:

> "...If in your judgment Mr. Gowdie believed or may have believed that he had to defend himself and he did no more than what he honestly and instinctively thought was necessary to do so, that would be very strong evidence that the amount of force used by him was reasonable. If, bearing these matters in mind, you are sure that the force used by Mr. Gowdie, was not reasonable, then he cannot have been acting in lawful self-defence. If that is your finding then you must go on to further consider the case in the way that I will shortly direct you. If you find that the force was reasonable or it may have been, he is not guilty to any offence."

[74] Any analysis of the learned trial judge's direction on self-defence must be looked at as a whole. The complaint that it was a veritable hotchpotch of directions does not

appear to be fair. The learned trial judge gave clear and concise directions on the law of self-defence. He thereafter conducted an exercise which was clearly to relate the law to the facts and left it ultimately to the jury to determine the issue. There is no merit in this complaint and grounds one and two must fail.

Issue 2: Comments made by the learned trial judge

The submissions

[75] Mr Harrison submitted that from the tenor of certain of the learned trial judge's directions to the jury, he was plainly suggesting to them that the applicant's defence of lawful self-defence was implausible. Mr Harrison complained about the learned trial judge using "the recurring theme of the deceased being an 'unarmed man' at the material time". Learned Queen's Counsel also complained about what he described as the strongly emotive language of the learned trial judge seen for example in his saying "shooting to death".

[76] Mr Harrison identified these comments, found at pages 633 to 634, as examples which supported his complaint in this area:

> "...In considering these matters, you should have regard to all the circumstances, you must therefore look at the nature of the attack. Mr. Gowdie described an attack in which his assailant Shango Jackson had no weapon, Mr. Jackson attacked him with his bare hands. You are not told that Mr. Shango Jackson practiced marshal [sic] arts, so that it could be said that he had lethal hands...Now according to Mr. Gowdie, Mr. Shango Jackson dwarfed him in stature. Even so this is not a situation where Mr. Gowdie was outnumbered by his attackers. There was no cause to fear a concerted attack from two or more persons. It was mano a

> mano, hand to hand combat between two men granted the one was dwarfed by the other...."

[77] Mr Harrison submitted that these directions taken together with the repetition of the deceased unarmed theme constituted undisguised advocacy. Accordingly, he argued, in reliance on **Byfield Mears v R** (1993) 42 WIR 284, that the comments in those directions went beyond the boundaries of permissible judicial comment.

[78] Learned Queen's Counsel submitted that in a criminal trial, however unimpressive the nature of the defence, the defendant is nevertheless entitled to have his case fairly presented to the jury both by his counsel and by the judge. Mr Harrison referred to **Fraser Marr v R** (1990) 90 Cr App R 154 in support of this submission.

[79] Further, in his written submissions, filed on 25 January 2018, Mr Harrison said:

> "5. It is submitted that, from the general tone and content of the trial judge's directions (subject of the foregoing complaint), it must have been clear to the jury that the judge was guiding them to share his own view of the applicant's defence, and so reject it. If rejection of the defence should eventuate in conviction for murder, then (plainly in the trial judge's view) that would have been no more nor less than the evidence warranted.
>
> 6. However, having regard to the trial judge's plain view of the applicant's defence, the applicant ought not to be totally acquitted; thus to obviate the risk of the applicant 'walking free', the trial judge left the jury **illegitimately**, it is submitted with a 'possible verdict' of guilty of manslaughter.
>
> 7. ...

> 8. It is submitted, in all the circumstances, that, if the jury were afforded a fair and balanced treatment of the applicant's case and, further, clear, lucid and correct directions in law (respecting the law relating to self-defence) (vid. supplementary grounds 1 & 2), the jury might very well have acquitted the applicant, not merely of the offence of murder."

[80] In response, Miss Malcolm submitted that the learned trial judge had merely restated the evidence in a manner which did not deprive the applicant of a fair trial nor was the applicant prejudiced in any way. She submitted that, in rehearsing the evidence, if any comments were made by the learned trial judge they were minimal.

[81] Learned counsel noted that the fact that the applicant was unarmed was critical to the assessment of the defence that he was acting in self-defence; hence the learned trial judge should not be faulted for using the expression often in reviewing the evidence. Accordingly, she submitted that such comment fell within the proper bounds of judicial comment.

[82] Miss Malcolm contended that the complaint about the comments has been divorced from the circumstances in which they were made. She submitted that when taken in the entire context of what was said, there was balance. She submitted that the comments may have been somewhat descriptive with the use of such words as "lethal hands" and "dwarfed him in stature". However, it was her contention that these comments did not devalue the applicant's defence and the learned trial judge did not go as far as to descend into the realm of advocacy.

[83] She pointed out that from early in his summation the learned trial judge had given the jury very clear and comprehensive directions which, she submitted, would have neutralised any belief that the jurors were bound by his comments.

[84] Miss Malcolm relied on **David John Evans v R** (1990) 91 Cr App R 173, **Byfield Mears v R** and **R v Rohan Ricketts and Erroll Williams** (1993) 30 JLR 144 in advancing her submission that the learned trial judge had done nothing that warranted the verdict in this matter being disturbed. She urged that the applicant had not been deprived of a fair trial.

The law

[85] The authorities referred to by counsel for the Crown does provide sufficient guidance as to the law applicable to this issue. In **David John Evans v R**, the Lord Chief Justice, in delivering the judgment of the court, had this to say at pages 173 to 174:

> "...The judge in directing the jury is not confined to the arguments which are propounded by the prosecution on the one hand or the defence on the other. Providing the matters with which he deals are matters which have been given in evidence, it is open to him to comment upon them.
>
> It scarcely needs explanation, but if explanation be required, it is this, that the jury have heard all the evidence. They will come to their conclusions upon the facts, whether the prosecution have mentioned or highlighted those facts, or whether the defence have highlighted or mentioned those facts. Consequently there is no reason at all that this court can see why in those circumstances the judge should not make such comment as he thinks fit to the jury, having warned them, as this judge did,that any comments that he made with which they did not agree they should disregard

> entirely. He is not introducing anything fresh or anything which comes as a surprise either to the prosecution or to the defence."

[86] The Privy Council in **Mears v R**, a matter from this jurisdiction, in a judgment delivered by Lord Lane, had this to say at page 289:

> "Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views...."

[87] Their Lordships indicated further on that page that the task for determining whether the judge's comments went beyond proper bounds of judicial comment is to:

> "take the summing-up as a whole and...then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at page 615 whether there was-
>
> > 'Something which …. deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future.'"

[88] When leaving the defence to the jury for its consideration, the trial judge is therefore always obliged to try to ensure that he does so fairly and adequately. In so

doing, he must, in putting the nature of the defence, remind the jury of what the evidence is in support of that defence. Whilst at liberty to make his own comments, the trial judge should make it clear that the jury are not obliged to accept his views. Ultimately, everything must be done in the interest of ensuring that the accused has a fair trial.

Discussion and disposal

[89] The learned trial judge in referring to the deceased as "unarmed" and "carrying no weapon" at the material time was stating undisputed facts. This was a fact that could not have escaped the jury in their assessing the evidence to understand why a man with a weapon could have been operating under the honest belief that an unarmed person was such a threat to him that he had to use the force he did to repel the attack. Crown Counsel's submission that the fact that the applicant was unarmed was critical to the assessment of the defence is correct.

[90] The learned trial judge's full comment that contained some of the words that Mr Harrison used as examples as "plainly suggesting to the jury that the applicant's defence was implausible" is found at page 588 of the transcript:

> "Now, it has not been denied that Mr. Shango Jackson carried no weapon while walking up the driveway. So you are perhaps asking yourselves, why did Mr. Gowdie removed [sic] his firearm from his waist even before he reached where Mr. Shango Jackson was? What was his intention in confronting an unarmed man with a loaded firearm?"

[91] This was not an inaccurate portrayal of the evidence that the Crown had led from Mr Kwame Jackson. It is certainly not inconceivable that the jury may have well

wondered about it. It is noteworthy therefore that the learned trial judge later followed up that comment with the following, at pages 590 to 591 of the transcript:

> "...Well, we already know that Mr. Jackson was no midget and you have seen Mr. Gowdie, he is no midget either, but he does not appear -- he does appear to be neither six feet nor 200 pounds. He told the prosecutor that he weighs less now than -- less then, rather, than the 165 pounds he weighs now. So there was an apparent imbalance in size and strength between Mr. Shango Jackson and Mr. Huey Gowdie. Therefore, although he was not armed, Mr. Shango Jackson by his very stature might have had the bearing of a formidable foe. Mr. Gowdie described him as a massive man, a big giant of a man...."

[92] The learned trial judge then went on to remind the jury of the Biblical story of David and Goliath and then said, at page 592 of the transcript:

> "So then, you may be thinking that the firearm was Mr. Gowdie's way of evening the odds when he confronted Mr. Shango Jackson."

[93] In the circumstances, the learned trial judge cannot be said to have been unfair to the applicant. Ultimately, he had highlighted the evidence accurately, he had engaged the jury in an exercise which made it clear what facts they had to decide in relation to the issue of self-defence. His comments did not purport to usurp their function in a manner which was unfair to the applicant.

[94] The example of the learned trial judge using strongly emotive language given by Mr Harrison was "shooting to death". The sentence in which the words were used is at page 627 of the transcript:

> "What he is inviting you to do is judge his act of shooting to death an unarmed man against the background of his fear of Mr. Jackson."

[95] This statement may well be viewed as the substance of the defence's case. The applicant had shot a man who eventually died as a result of the gunshot injury. To complain that the term shooting to death was strongly emotive in this context is without merit.

[96] The comments which Mr Harrison identified and made the object of his complaint, set out as he did at paragraph [76] above, had omitted the following comment, made by the learned trial judge at page 633 of the transcript, in relation to the deceased:

> "What was said was [the deceased] was pugnacious he loved to fight and was a cruel and abusive man."

Certainly, the inclusion of this comment demonstrated that the learned trial judge was not being unfair to the applicant in his portrayal of what the applicant was being confronted with that evening.

[97] When considered in totality the comments represented the learned trial judge in his own style engaging the jury in a manner which maintained a proper balance between the case for the prosecution and that for the defence. The learned trial judge's comments highlighted by Mr Harrison did not go beyond the proper bounds of judicial comment. The complaint that the learned trial judge was expressing a view and guiding the jury to share his view of the applicant's defence, and so reject it, is not

borne out in these comments when the sections complained about are read in their entirety. The applicant was not deprived of a fair trial. Thus, ground three fails.

Issue 3: Leaving the verdict of manslaughter to the jury

The submissions

[98] Mr Harrison submitted that where self-defence is raised in a charge of murder, the prosecution bears the duty of proving the accused was not acting under self-defence and if the prosecution fails to disprove the issue of self-defence, the accused is entitled to be acquitted. In such a case, the verdict of the jury would be uncomplicatedly either guilty or not guilty. He submitted that manslaughter would not arise.

[99] Learned Queen's Counsel submitted that the learned trial judge fell into error when he directed the jury to consider manslaughter on the basis of death occurring from the doing of an unlawful act without the intention "either to kill or cause really serious bodily harm". He contended that manslaughter may arise on that basis where a person is engaged in performing an act which is inherently unlawful and at the same time dangerous. However, learned Queen's Counsel's contention was that in the present case the applicant was not engaged in performing or doing an unlawful act from which death occurred. He referred to **Edward James Hall v R** (1961) 45 Cr App R 366, which followed **R v Larkin** (1942) 29 Cr App R 18, at page 23; [1943] 1 All ER 217.

[100] Mr Harrison pointed out that the evidence grounding the prosecution's case went in the direction of guilty of murder and this was plainly rejected. Thus, Mr Harrison submitted there was simply no other evidence that arose in the case on which it could be established that manslaughter could have been left for the jury's consideration. Learned Queen's Counsel contended that the conviction for manslaughter constitutes a miscarriage of justice.

[101] Miss Malcolm countered that not only was manslaughter properly left for the jury's consideration on the basis the learned trial judge did, but it arose in three other instances on the Crown's case and the defence's case.

[102] She submitted that the learned trial judge could have left the issue of provocation for the jury's consideration based on the deceased's actions and utterances. She said the evidence which gave rise to such a consideration is in the words said under caution to Detective Sergeant Dewayne Jonas about the manner in which the deceased had blocked the driveway.

[103] Further, she pointed to the words the applicant testified that the deceased had said to him when they had first faced each other. She said that those words said to him could have amounted to being provocative.

[104] Miss Malcolm also submitted that the applicant was reckless when he discharged his firearm in the manner he did. She noted that the applicant had said that "when [he] fired all three shots, [he] did not aim or point" and that when he fired he did not know where Mrs Carrington-Jackson or her daughter was. Learned counsel relied on the

words of Lord Bingham in **R v G and another** [2004] 1 AC 1034 in relation to what constitutes recklessness. She submitted that the applicant ought to have been aware of the consequences of discharging the firearm three times without ascertaining the location of the persons around him in the manner he did.

[105] Further, learned counsel submitted that the applicant had indicated that he had no intention to kill the deceased and his only intention was to defend himself. This she contended gave rise to the issue of lack of intent which would have reduced the offence from murder to manslaughter. She referred to **R v George Jarrett** (1963) 8 JLR 146, **R v Larkin** and **Rodrigues** (**Randolph**) **v The State** (2000) 61 WIR 240.

[106] Miss Malcolm concluded that there was no miscarriage of justice. She submitted that the learned trial judge gave clear and coherent directions which enabled the jury to properly apply the laws to the facts. She opined that in returning the verdict they did, the jury must have found that the applicant was not acting in lawful self-defence when he fired the fatal shot at the deceased and were very generous in finding that the applicant lacked the intention to kill or cause serious bodily harm.

Discussion and disposal

[107] It is now well settled that where on the evidence in a case, a particular defence arises, and even though not relied on by the defence, the trial judge has a duty to leave that possible defence for the consideration of the jury. Equally settled is that there has to be some credible evidence which a jury could reasonably accept before the defence can be left for their consideration.

[108] In **Alexander Von Starck v The Queen** [2000] 1 WLR 1270, Lord Clyde gave what has been described as the fullest statement of the principle. At page 1275, Lord Clyde had this to say:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside…."

[109] Lord Bingham in **R v Coutts** [2006] UKHL 39 provides what may be regarded as the reason for the principle at paragraph [12] of that judgment:

> "[12] In any criminal prosecution for a serious offence there is an important public interest in the outcome (*R v Fairbanks* [1986] 1 WLR 1202, 1206…). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a

> lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (*Von Starck v R* [2000] 1 WLR 1270, 1275, [2000] 4 LRC 232; *Hunter and Moodie v R* [2003] UKPC 69, para 27)..."

[110] The learned trial judge was clearly mindful of his duty to leave to the jury all options open to them on the evidence as he made his comments at the end of the summation. He briefly repeated the evidence related to the issue raised by the defence of self-defence and then had this to say at page 636 of the transcript:

> "So, there you have it, Mr. Foreman and Members of the Jury. This is a case of stark contrast. The Prosecution says it was Mr. Gowdie who was the aggressor that day, they say that although Mr. Jackson was blocking the driveway, Mr. Gowdie was the one who showed naked aggression when he arrived at the property and launched an attack upon Mr. Shango Jackson. On the other hand, the Defence is saying that Shango was the one who attacked Mr. Gowdie and during the course of that attack, attempted to remove Mr. Gowdie's firearm from his waist, causing Mr. Gowdie to shoot him to avoid being disarmed and being exposed to untold harm with the firearm in the hands of a pugnacious Shango."

[111] The learned trial judge subsequently went on to direct the jury on the possible verdicts. There is no dispute that the way he invited them to consider whether it was guilty of murder or not guilty of murder because of the issue of self-defence was adequate and appropriate. As he concluded his summation he had this to say at page 640 of the transcript:

> "If, however, you accept that when [Mr Gowdie] killed Shango Jackson he was not acting in self-defence then you must go on to look at the question of manslaughter. Manslaughter arises in the circumstances where death occurs from the doing of an unlawful act but at the time the person causing the death did not have the intention either to kill or cause really serious bodily injury. If you accept that it was Mr. Gowdie who killed Mr. Shango Jackson; that at the time he did so he was acting unlawfully, that is, he was not acting in necessary self-defence, but at the time Mr. Shango Jackson was killed Mr. Gowdie did not intend to either kill him or cause him really serious bodily injury, then you would be entitled to return a verdict of guilty of manslaughter…."

[112] The jury was therefore invited to consider the alternative verdict of manslaughter only if they rejected the defence raised of self-defence. The learned trial judge had from early in his summation (at page 570 of the transcript) correctly advised the jury that "the essential issue for [their] determination is whether at the time [the applicant] shot and killed [the deceased], he was acting in lawful self-defence". Nowhere in the summation did he intimate that the applicant in acting in self-defence was acting unlawfully. He seemed to have formed the view that once this lawful justification was rejected, then the act of shooting at the deceased would amount to an unlawful act.

[113] The applicant had been specifically asked about his intention at the time he fired the three shots. He had responded, at page 411 of the transcript, "[he] had no intention, whatsoever, the only intention [he] had was to defend [himself]". The learned trial judge seemed to have felt that with this assertion the matter of intention had to be left to the jury.

[114] In the classic pronouncement upon the law relating to self-defence in **Palmer v The Queen**, Lord Morris had commented on the need to leave the issues that may arise upon the evidence at page 832:

> "…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 the most potent evidence that only reasonable 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. But their Lordships consider, in agreement with the approach in the *De Freitas* case (1960) 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case...The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. **If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury**." (Emphasis supplied)

[115] In these circumstances where the applicant had been asked about his intention and had responded in the manner he had, the learned trial judge cannot be faulted for having taken the decision to leave the matter to the jury. However, it may be argued that once the explanation for the shooting was rejected, the issue of intention was so closely intertwined with the issue of self-defence that the entire defence should properly have been rejected. Hence, it can be viewed that the learned trial judge was generous to the applicant when he left the issue of intention for the jury's consideration in the manner he did.

[116] If the jury followed the directions given by the learned trial judge, they would not have considered the alternative verdict until having found that the applicant was not acting in self-defence. In **R v Coutts**, the House of Lords considered the matter of disturbing a verdict based on the failure of a trial judge to give the jury directions on any alternative verdicts. In his comments Lord Rodger of Earlsferry had this to say, at paragraph [87] of that judgment:

> "…Since the appeal court cannot inquire into what went on in the jury room, it is very far from clear how they are meant to satisfy themselves in any given case that a jury may have convicted out of a reluctance to see the defendant get clean away. Moreover, the test supposes that the jury will have consciously convicted the defendant in the face of the judge's directions. Yet the foundation of the system of trial by jury is the assumption, which is thought to be borne out by experience, that juries apply the directions which the judge gives them…."

[117] The directions given by the learned trial judge in these circumstances permitted the jury, having rejected the defence of self-defence, to find the applicant guilty of a lesser offence. If the learned trial judge erred in leaving that lesser offence for their consideration, this means that in rejecting the defence of self-defence the jury would have convicted the applicant of murder. Ultimately, his conviction of manslaughter cannot be viewed as a miscarriage of justice.

[118] In any event, the submission by Miss Malcolm that the lesser offence could properly have been left to the jury for consideration on the issue of provocation is compelling. In **Delroy Barron v R** [2016] JMCA Crim 32, McDonald-Bishop JA (Ag) (as she then was) distilled the relevant principles of law which should guide a determination of whether provocation should properly be left to a jury for consideration as had been discussed by this court in **Dwight Wright v R** [2010] JMCA Crim 17. At paragraph [19] of that judgment, McDonald-Bishop JA had this to say:

> "The court reiterated and accepted the relevant principles of law enunciated in some relevant authorities such as **Benjamin James Stewart** [1966] 1 Cr App R 229 and **Joseph Bullard v the Queen** [1957] AC 635 that:
>
> i. If the defence do not raise the issue of provocation, and even if they prefer not to because it is inconsistent with, and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked.
>
> ii. The issue should be left even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight.

iii. If on the evidence, be it the prosecution's or the defence's, there is evidence of provocation to be left to the jury, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond a reasonable doubt that the killing was unprovoked.

iv. Evidence that had been adduced to support an unsuccessful defence of self-defence may be relied on, wholly or partially, as giving rise to provocation which would reduce the crime from murder to manslaughter.

v. Every accused on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict could be given. To deprive him of that right must, of necessity, constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

[119] The question therefore is whether there was some evidence of acts done or words uttered which could have caused the applicant to lose his self-control for the jury to consider. There was evidence that the deceased in stopping his vehicle where he had was effectively blocking the driveway. Although the applicant had denied it, there was evidence from the initial investigating officer that this action of blocking the driveway had formed part of the applicant's explanation of what had caused the eventual shooting of the deceased. The applicant testified of words used to him by the deceased when he initially arrived at the scene followed by the deceased punching him and attempting to disarm him of his firearm. Whether these acts and words could have

amounted to provocative material that could have caused the applicant to lose his self-control was for the jury to consider.

[120] The learned trial judge seemingly appreciated a possible impact of the deceased's behaviour when towards the conclusion of the summation, he said at page 637 of the transcript:

> "Now, some of you, may be saying that Mr. Shango Jackson brought it on himself, since his act of blocking the driveway was the apparent root cause of this deadly altercation. Others among you may be saying, although he blocked the driveway and was apparently acting out the reputed meaning of his name, god of war and thunder to put himself in position to decide who drove on and off the property and when, he did not deserve the fate meted out to him. That however would be a shockingly wrong approach to your task."

[121] Having recognised a need for the consideration of the deceased's behaviour, the learned trial judge erred when he did not indicate that this behaviour could have amounted to a provocative act. Thus, he ought properly to have left the issue of provocation for the consideration of the jury. In the circumstances, this court may have felt compelled to have substituted a verdict of guilty of manslaughter, if the applicant had been convicted for the more serious offence. We cannot say that what has resulted is a miscarriage of justice such that the conviction of manslaughter should be set aside. Ground four also fails.

Issue 4: The sentence

The submissions

[122] Mr Harrison complained that the learned trial judge failed to apply the settled principles relating to sentencing, generally, to sentencing the applicant, particularly. He concluded that the learned trial judge proceeded on a wrong principle and this resulted in the sentence being manifestly excessive.

[123] A proper appreciation of the substance of the complaint being advanced by Mr Harrison can only be achieved by rehearsing what was said in his written submissions filed on 29 January 2018:

> "…[The learned trial judge] purported to have weighed the applicant's quite impressive antecedents as against 'what the jury accepted' (?) and concluded that 'the sentence must reflect the gravity of the offence' weighed in the scale of the trial judge's mind (as scale) were the interests of a convicted person standing in the dock, the applicant, on [sic] **individual**, who was 'demonstrably a productive member of society', a 'successful entrepreneur' (694:2-6), of 'excellent character, industry and standing in the society'. In the scale against the interests of the public at large and, of course, 'the gravity of the offence'. The **general** public interest obviously prevailed over the weighty, truly 'superlative' interest of the applicant, **particularly**." (Emphasis as in original)

[124] In her response, Miss Malcolm referred to the recent decision of **Meisha Clement v R** [2016] JMCA Crim 26 where Morrison P conducted a comprehensive review of authorities related to the principles of sentencing and formulated the correct approach a trial judge should take when carrying out this exercise.

[125] She submitted that full weight was in fact given to all relevant factors in the circumstances of this case. She further submitted that the learned trial judge imposed a sentence that was consistent with the normal range for this offence.

Discussion and disposal

[126] In **Meisha Clement v R**, at paragraph [43], Morrison P stated:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[127] At the sentencing hearing, the learned trial judge received the usual antecedent report and a social enquiry report before hearing from six witnesses who spoke to the character of the applicant. Their evidence was such that the learned trial judge commented, at pages 696 to 697 of the transcript:

> "…Never in my comparatively short judicial career of fourteen years have I seen a convicted person raised to such lofty heights by so many of those who spoke so effusively of Mr. Gowdie's superlative character. Aside from extolling his virtues and telegraphing the deleterious impact incarceration would have upon those connected to him, they asked that mercy be shown to him."

[128] The learned trial judge plainly demonstrated an appreciation of the need to consider the character and antecedents of the applicant and reminded himself of what he described, at page 687 of the transcript, as "the time-honoured, if hackneyed phrase, not expression, 'not only must the sentence fit the crime, but must also fit the offender'". He found it necessary, at pages 687 to 688 of the transcript, to acknowledge that "a first offender of good character and impeccable antecedents, like [the applicant] must be viewed differently from hardened recidivists".

[129] The learned trial judge expressly and extensively considered the four classical principles of sentencing: retribution, deterrence, rehabilitation and prevention. In considering the issue of retribution, the learned trial judge did find that the crime for which the applicant had been convicted was one that is abhorred. However, in recognising that the firearm used in the commission of this offence was one for which the State had issued the applicant a licence, the learned trial judge concluded, at page 689 of the transcript, that the applicant was "therefore, not being lumped with the several marauders toting illegal guns wreaking their own brand of mayhem upon the society".

[130] The learned trial judge was cognisant of and cited section 9 of the Offences against the Person Act which states:

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

[131] After detailed reasoning the learned trial judge rejected imposing a non-custodial sentence and concluded that the only fitting sentence was one of incarceration. He found that the maximum sentence of imprisonment for life was not applicable to the circumstances of this case. The learned trial judge correctly identified the normal range of sentence imposed for manslaughter as being between three and 15 years.

[132] Contrary to Mr Harrison's submission, the learned trial judge recognised and referred to, at page 701 of the transcript, the need to strike a "delicate balance between society's abhorrence of violence, the crime committed and the appropriate punishment for someone with [the applicant's] profile". He demonstrated an appreciation of the "excellent" character of the applicant and his "excellent prospect" for reintegration in the society.

[133] Ultimately, it cannot be said that the learned trial judge failed to apply the appropriate principles of sentencing. He took all the pertinent matters into consideration. It is not reflected in the record of his very extensive comments that the learned trial judge allowed the general public interest to prevail over the interest of the applicant. The sentence he eventually imposed fell within the range of sentences usually given for such an offence.

[134] In all the circumstances, the sentence cannot be regarded as manifestly excessive and there is no basis for this court to interfere with the sentence imposed. Accordingly, ground five fails.

Disposal of the appeal

[135] The application for leave to appeal against conviction and sentence is refused. The sentence is reckoned to have commenced on 22 July 2016.