[2017] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 74/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA (AG)

ORLANDO LAMONT v R

Patrick Peterkin for the appellant

Jeremy Taylor and Miss Donnette Henriques for the Crown

25 September, 13 October and 10 November 2017

STRAW JA (AG)

[1] The appellant was convicted on 14 July 2014 of the offence of manslaughter before G Brown J (the judge) and a jury by a majority verdict, after a retrial that commenced on 7 July 2014, in the Home Circuit Court. Subsequently, he was sentenced to five years' imprisonment at hard labour on 25 July 2014. The appellant applied for leave to appeal against his conviction and sentence and this application was considered by a single judge of this court on 15 May 2017. The single judge granted leave to appeal against the conviction but refused leave to appeal against sentence as in his view, "no reasonable challenge can be mounted against the sentence in this case".

[2] We heard this appeal against the appellant's conviction for the offence of manslaughter on 25 September 2017 and on 13 October 2017 we gave our decision and made orders in the following terms:

> "The appeal is allowed. The conviction is quashed and sentence set aside. Judgment and verdict of acquittal are entered."

We promised then the reasons for our decision and this is a fulfilment of that promise.

Background

[3] The appellant was initially tried and acquitted for the offence of murder of Mr Everton Parchment. However, the jury were unable to return a verdict for the offence of manslaughter. Consequently, a retrial was ordered, from which the issues on this appeal emanate.

[4] During the course of the retrial, the prosecution called nine witnesses in support of its case while the appellant made an unsworn statement from the dock and called one character witness. In an effort to highlight aspects of the evidence which are important for the ventilation of this appeal, reference will be made to the evidence adduced by several of the witnesses.

The evidence for the prosecution

[5] Mr Kevin Clarke gave an eye witness account of the incident. He testified that on 3 April 2010, sometime after 10:00 pm, he and two other passengers were travelling home to Arnett Gardens in a red Toyota Fielder motor car which was being driven by Mr Parchment. He stated that he was seated in the front left passenger seat and that

while approaching the intersection of Maxfield Avenue and Spanish Town Road, he saw a human object standing in the road. He was aided by the car lights to see this person. He further gave evidence that upon reaching about 20 feet from the object, he realised that it was a policeman clothed in dark coloured denim, wearing a helmet and carrying a long gun.

[6] He stated that he then said to Mr Parchment, " 'Ever' a police, soh wi can stop" (page 22, line 10). It was his evidence that the motor car decelerated and came to a complete stop about 9 to 12 feet from where the policeman was standing. He also maintained that the vehicle did not impact anything. He testified that he then saw the policeman standing in front of the vehicle with a long gun pointed at the motor car. About three seconds later, he heard an explosion. It was thereafter discovered that Mr Parchment had been shot. Mr Parchment later succumbed to his injuries at the Kingston Public Hospital.

[7] The witness testified that after the incident he noticed a single hole to the centre of the windscreen of the motor car.

[8] During cross examination, Mr Clarke denied the suggestions of counsel that the motor car had hit the policeman or that its manoeuvring had caused the tires to screech. While agreeing that he had directed the deceased to turn on the 'high beam' light of the car, he disagreed that the vehicle had being driving without the headlights turned on or at a fast speed.

[9] Detective Constable Michael Carnegie gave evidence that he was a police officer stationed at the Denham Town Police Station and that on the day of the incident he had issued an M16 rifle bearing serial number 8000393 and 60 rounds of ammunition contained in two magazines to the appellant.

[10] Corporal Dorman Whyte testified that on 3 April 2010, he was stationed at the Denham Town Police Station when he, along with Constable Orlando Lamont, the appellant, and Constable Jervis Jones were dispatched on mobile patrol. He identified the appellant sitting in the dock as Constable Orlando Lamont. He further deponed that at about 10:20 pm, they were conducting a stop and search operation of a Toyota Hiace bus on Spanish Town Road in the vicinity of Tewari Crescent. He stated that he was observing the operation while Constable Jones conducted the search of the passengers and Constable Lamont provided cover. He then heard an explosion that sounded like gunshots and observed Constable Lamont and a red motor car in the road. He was then informed by Constable Lamont that someone had been shot. He observed a man in the driver's seat of the red motor car bleeding from his neck.

[11] He also gave evidence that the police training dictated that weapons are to be kept on 'safety' unless there was a perceived threat of danger and that rounds are to be removed from the breach and placed back in the magazine when proceeding from one duty to another. He further stated that the nozzle of a gun should point to the ground or upward when being carried. In cross-examination, the witness agreed that it was acceptable to carry the M16 cradled against the chest. He also agreed that the safety feature on the gun could possibly be affected by the gun brushing against the

'paraphernalia' on the police vest. He also gave evidence that while at the hospital with the injured man, Constable Lamont spoke to feeling pain in the region of his foot.

[12] Dr S N Prasad Kadiyala, the pathologist, gave evidence that on 7 April 2010, he had conducted a post mortem examination on the body of Mr Parchment at the Spanish Town Hospital Morgue. He observed an inverted 'V' shaped sutured wound on the left lower anterior neck, extensive soft tissue haemorrhage and blood in the chest cavity. The cause of death was determined to be haemorrhage and shock due to the gunshot wound to the neck.

[13] Detective Sergeant Michael Frazer testified that he was stationed at the Denham Town Police Station on supervisory duty on the evening in question. Upon being informed of the incident, he proceeded to Spanish Town Road in the vicinity of Tewari Crescent where he observed a red Toyota Fielder motor car parked on Spanish Town Road. He observed that the front windscreen was shattered by what appeared to be a gunshot hole.

[14] He also stated that later that evening, he observed the appellant at the Denham Town Police Station walking with a limp and having a white bandage wrapped around his left knee. He deponed further that the appellant handed him a medical certificate and an M16 rifle bearing serial number 8000393, with two magazines, each containing 30 and 29, 5.56 cartridges respectively.

[15] He testified that when he returned to the scene of the incident on 4 April 2010, he observed a drag mark in the vicinity where the red Toyota Fielder motor car had stopped. He estimated that drag mark to be about 20 feet.

[16] Retired Superintendent Porteous testified that on 16 April 2010, he conducted ballistic tests on a 5.6 Colt M16 A2 rifle bearing serial number 8000393. It was his evidence that his examination revealed that the firearm was in a fairly good condition with no malfunctions and was capable of discharging bullets.

[17] Miss Orphia Hepburn testified that she was a back seat passenger in the red Toyota Fielder motor car driven by the deceased. She also averred that it was the deceased who had said that he had seen something in the road to which Mr Clarke had responded by saying that the deceased should turn on the 'high beam' light, which the deceased did. She testified that the car then suddenly braked and she pitched forward.

[18] During cross examination, Miss Hepburn agreed with counsel for the appellant that it was Mr Clarke who had stated that he had seen something in the road, to which the deceased had responded that he had not seen anything. She further testified that she had observed that the person in the road had a long gun pointed towards the motor car and then she heard an explosion. It is her evidence that the vehicle had stopped 19 to 20 feet from the person in the road.

Evidence for the defence

[19] The appellant made an unsworn statement from the dock. He stated that on 3 April 2010, he was a police officer stationed at the Denham Town Police Station and

dispatched on mobile patrol duties in the Spanish Town Road area. He stated that prior to being deployed in that area, he was briefed about the need for caution in certain volatile areas as there were reported threats of violence; that men heavily armed with high powered weapons were seen in the areas of Maxfield Avenue, Rose Town and Arnett Gardens. He stated that he was clad in a blue denim uniform, marked police vest and a ballistic helmet and that he had been assigned an M16 rifle which he had loaded with one magazine. A single round was loaded in the weapon and the weapon placed on safety.

[20] The appellant stated that at about 10:45 pm, his group was conducting a stop and search operation in the vicinity of Saint Andrew Technical High School. While standing on guard, he heard a loud screeching sound as if a motor vehicle was suddenly applying brakes. When he looked in the direction of the traffic light at the intersection of Spanish Town Road and Maxfield Avenue, he saw a motor vehicle going through the red stop light. He stated that at the time, the motor vehicle had no head lights on "other than those two peeny lights" at the bumper of the vehicle.

[21] He proceeded to hold up his right hand (in a stop signal) to the oncoming motor car while holding the M16 rifle in his left hand with the muzzle down at a 45 degree angle. He stated that the vehicle was coming fast when the headlights suddenly came on. He tried to run out of the road, however, the right bumper of the motor car hit him in the region of his left knee. He lost his balance and the weapon went off and discharged immediately. He fell to his knees, but quickly got up and rushed to the motor vehicle which had then stopped. He inquired whether anyone had been shot. He

was informed by the passenger sitting in the front seat that the driver had been shot. He noticed blood coming from the left-back side of the driver's neck. The injured man was transported to the Kingston Public Hospital by the service vehicle.

[22] The appellant also stated that at the police post of the hospital, he noticed blood coming from his knee and sought medical attention. Prior to receiving medical attention, he handed over his firearms to Sergeant Frazer.

[23] Mr Norman Blair gave character evidence on behalf of the appellant. He stated that he had known the appellant for 13 years and described the appellant as a caring, godly and family oriented person who was well loved by all who knew him in the community. When asked if he knew the appellant to be reckless, he replied "No, I would not say that. I truly could not say that".

The appeal

[24] On 15 May 2017, the appellant was granted leave by a single judge of this court to appeal against his conviction. At the commencement of this hearing, counsel for the appellant requested and was granted leave by the court to abandon the original grounds of appeal as filed on 28 July 2014, and to argue supplemental grounds of appeal filed on 15 September 2017. These were the grounds of appeal advanced before the panel:

> "1. That the Learned Trial Judge erred in not giving the jury character directions.
>
> 2. The Learned Trial Judge erred in not giving the jury expert directions.

3. The learned trial judge erred in not leaving self defence to the jury.

4. The Learned Trial Judge fell into error in that he failed to properly assess the eyewitness' evidence which was contradictory and out of reason and all common sense thus rendering it tenuous and inherently weak.

5. The Learned Trial Judge erred in not upholding the no-case submission."

The grounds of appeal will be treated in like order.

Ground 1: The absence of a good character direction.

Submissions for the appellant

[25] Mr Peterkin submitted that the learned judge had erred in his failure to give a good character direction as the issue of the appellant's character was raised in the evidence of Mr Norman Blair. Counsel argued that the learned judge, who spoke to the appellant being described as a 'cheery person', failed to properly direct the jury that the appellant was less likely to commit a crime, especially one of the nature with which he was charged. He stated that such a direction (relating to the propensity of the appellant), may have resulted in a different verdict and as such, the omission was critical especially where the guilty verdict of the jury was not unanimous and had required some finding of recklessness. He contended therefore, that the absence of the good character direction affected the safety of the conviction. The cases relied on by the appellant were: **R v Aziz** [1996] AC 41, **R v Hunter** [2015] 1 WLR 5367, **Jason Richards v R** [2017] JMCA Crim 5 and **Varidan Lakraj v Kelton Neptune PC No 17320** Mag App No P 063 of 2016.

Submissions for the Crown

[26] Mr Taylor conceded that the appellant was entitled to a good character direction under the propensity limb as the adjectives used by Mr Blair to describe him are in fact an assertion of his good character. He submitted that the learned judge was not obliged to give any direction in relation to the credibility limb of the good character direction as the appellant had not given evidence on oath. Counsel stated further that the appellant appeared to have been relying on the possibility of an accidental discharge of the firearm, therefore, the jury's assessment of the likelihood of the appellant being negligent or reckless in the handling of the firearm would be aided by the direction in relation to propensity.

[27] Counsel further submitted that there is no requirement to be formulaic in the directions to the jury and that an examination of the learned judge's summation revealed the essence of a good character direction. It was his contention, therefore, that the jury had before them the evidence of the appellant's good character in terms of both credibility and propensity, and that the majority had rejected it when they arrived at a verdict of guilty. Counsel relied on the cases of **Leslie Moodie v R** [2015] JMCA Crim 16 and **Tino Jackson v R** [2016] JMCA Crim 13 to support his assertions.

[28] Mr Taylor proffered that the issue is therefore whether the failure to give such a direction in relation to the propensity limb amounted to a miscarriage of justice (**Vijai Bhola v The State** (2006) 68 WIR 449, **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, **Jason Richards v R** [2017] JMCA Crim 5 and **Mark France and Rupert**

Vassell v The Queen [2012] UKPC 28). He submitted that in the circumstances of this case, there was no miscarriage of justice.

Discussion

[29] It is well settled in these courts that a good character direction should be given to the jury if the occasion for such arises during the course of the evidence. It is also settled that generally, in relation to the credibility limb, such a direction may be of little value to a defendant where he does not give evidence on oath (per Lord Hoffmann at paragraph 26 in **Gerald Muirhead v The Queen** [2008] UKPC 40 and per Lord Brown at paragraph 15 in **Peter Stewart v The Queen** [2011] UKPC 11).

[30] Morrison JA (as he then was) in **Michael Reid v R**, at paragraph 44, reviewed several authorities on the issue of good character direction and stated the following in relation to the components and purpose of the propensity limb of the direction:

> "(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)."

[31] Lord Carswell on behalf of the Board, in **Teeluck and John v The State** (2005) 66 WIR 319, at page 330, paragraph [33], crafted the propensity limb of the good character direction to the jury to be as follows:

> "(iii) ...that [the appellant] is less likely to commit a crime, especially one of the nature with which he is charged."

[32] In light of the guidelines provided in the above cited cases, the appellant would indeed be entitled to the propensity limb of the good character direction, having made an unsworn statement from the dock and in circumstances where the issue of his good character was raised in the evidence of Mr Norman Blair.

[33] Mr Taylor contended that both limbs of the good character direction were foreshadowed at page 24, lines 8-25 to page 25, lines 1-9 of the summation which is set out as follows:

> "He went back into the vehicle. So when the police officer who was out there said that when he saw Lamont, he was some distance away from the car, on the Crown's case already, the accused was by the car. Now, when the accused man saw his colleague and said, 'Beanie, a man get shot,' because between Mr. Clarke and the accused, they knew that the deceased was shot. Now, do you think you would expect the police officer to say at that time -- because he is frightened, what is happening out there, is that a calm atmosphere? No. Something tragic has happened. Would you expect the police officer to look on 'Beanie' and say, 'Beanie, the car lick mi down,' when his mind is focussed [sic] on the deceased? Because even when him tell Mr. Clarke who is his brethren, 'Carry him go hospital,' what was Mr. Clarke's response? 'Hospital, ah unno shoot him, ah unno fi carry him.' That is your brethren and something happened out there and Mr. Lamont was the one who sought, started to help. Because when something like that happen, you know when trouble ketch yuh, yuh trying to do everything. This is what is happening. He is not thinking of his own self but he is thinking of the deceased."

[34] Also importantly the judge's summation in relation to the character evidence of the appellant was recorded at page 36, lines 18-25 and page 37, lines 1-4 of the summation:

> "Now, he called a witness as to character, what kind of person is he. You Know, I think it was Detective Sergeant Fraser, he said when he told him that the man had died, he said he saw like water drop out of him eye. In other words, he felt some remorse at that particular time.
>
> Now, the witness that he called described him as a very cheery person. So what the witness is actually saying to you, you would not have expected him to deliberately fire his gun. And in all circumstances, when you look at what happened out there, he appeared to be more caring than the driver's brethren. He knows that his gun went off and shot the man, he never accused anybody then of being a criminal. His interest at the time was to render assistance. When the other policemen came he was already there."

[35] The above comments of the learned judge speak most favourably to the character of the appellant, especially his helpfulness in the circumstances. However, there is an absence of the traditional propensity limb of the good character direction to which the appellant was entitled. Nevertheless, as submitted by Mr Taylor, the failure of a trial judge to give a good character direction is not necessarily fatal to a conviction.

[36] At paragraph [12] of **Vijai Bhola v The State**, Lord Brown of Eaton-under-Heywood, cited with approval the Court of Appeal's decision in that matter, which had expounded quite aptly on the importance of a good character direction and the effect of its omission:

> "Notwithstanding the importance of good character evidence, it does not necessarily follow that a failure to lead

> such evidence or even the omission by the trial judge to direct the jury on the issue in his summing-up when the issue is raised, will result in the conviction being set aside (see **Barrow v The State** (1998) 52 WIR 493, at 499)."

And further that:

> "…Each case must depend on the particular circumstances. The question at the end of the day is whether the jury would necessarily have reached the same verdict if they had a full direction as to the appellant's good character."

[37] The above stated position was again reiterated in **Mark France and Rupert Vassell v The Queen**, where the Judicial Committee of the Privy Council examined the circumstances of a complaint of a failure of defence counsel to adduce evidence of the accused's good character. Lord Kerr, who delivered the judgement, at paragraph 44 cited **Nigel Brown v The State of Trinidad and Tobago** [2012] UKPC 2, [2012] 1 WLR 1577, in which it was held that:

> "...[I]n the absence of an explanation from counsel as to why he did not raise the issue of the defendant's good character, it is necessary to examine whether the lack of a good character direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction ought to have been given."

[38] At paragraph 45, Lord Kerr continued his consideration of the case of **Nigel Brown v The State** and quoted from the judgment, which discussed at length the effect of the judge's omission to give a good character direction:

> " 'It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction - **Jagdeo Singh** ... [2006] 1 WLR 146, para 25 and **Bhola v The State** [2006] 4 LRC 268, paras 14-17. As Lord Bingham of Cornhill said at para 25 in **Jagdeo Singh's** case, 'Much may turn on the nature

> of and issues in a case, and on the other available evidence.' Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case.' "

[39] Lord Kerr, at paragraph 46, stated that the Board in **Nigel Brown v The State** had concluded that:

> "46. ... It observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. **Jagdeo Singh** and **Teeluck** were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view 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. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[40] It is important therefore, that the nature of the issues, the strength of the evidence, as well as an assessment of the significance of a good character direction in relation to the propensity limb be examined.

[41] The jury would have understood that the Crown was alleging that the appellant, pointing the firearm at the vehicle, unlawfully, recklessly or using a grave lack of care, discharged the firearm into the windscreen of the vehicle which was being driven by Mr Parchment, as a result of which he met his death. Dr Kadiyala indicated that the bullet

entered the deceased from the front of the neck on the left side. They would have understood also that the appellant was alleging that the approach of the vehicle towards him and the turning on of the bright lights after he had directed the vehicle to stop, had caused him to move out of its way but that the motor car had still hit him on his left knee, causing him to lose his balance and that the weapon went off inadvertently, discharging a round. These clearly are two distinct versions.

[42] This court does not have the benefit of the appellant's demonstration as to how he was holding the weapon when he indicated that he held it forward, but he stated that at the time he held up his right hand to signal to the vehicle to stop, he was holding the weapon in his left hand with the muzzle down at a 45 degree angle. He indicated after that that he put his rifle forward. The evidence of the ballistic expert who examined the weapon that had been carried by the appellant noted that there were no malfunctions, that the rifle had a safety lever and plays both semi automatic and automatic three burst. His evidence was clearly that once the weapon was on safety and the trigger was pressed, it would not fire. If the safety lever is off, then 7.7 lbs of pressure had to be exerted with the finger for the weapon to fire. He agreed however, that it could be fired with one hand if it was vertical, that is pointing to the sky. However, if it is cradling on the chest, the rifle is designed to be fired with two hands. However, he did go on, in a further exchange with the prosecutor, to indicate that the rifle could be fired with one hand while cradled on the chest. Under cross examination, he also stated that the movement of the safety could be affected by the

flick of the thumb as well as by rubbing against a ballistic jacket when the firearm is cradled against the chest.

[43] The strength of the evidence against Mr Lamont therefore, would be the evidence of Mr Clarke and Miss Hepburn that the vehicle had stopped a distance of 9 to 12 feet and 19 to 20 feet respectively from the appellant, and that it never came into contact with him. They also both indicated that the weapon had been pointed to the front of the car. The jury would have had to consider these pieces of evidence within the context of a discrepancy between both witnesses as to the manner of the approach of the car towards the appellant, as well as the fact that the appellant complained of feeling pain while at the hospital. He would have also been observed subsequently at the Denham Town Police Station limping with a bandage wrapped around his left knee. At that time, he handed a medical certificate to Detective Sergeant Frazer. This evidence was never explained by the Crown.

[44] Mr Taylor has contended that the learned judge reminded the jury of certain of these issues in the light of the type of person the appellant was said to have been and stated that "[s]o what the witness is actually saying to you, you would not have expected him to deliberately fire his gun".

[45] It is clear that the judge focused the minds of the jury on the issues as to whether what took place was a voluntary act, in the sense of a deliberate or grossly negligent act of pulling the trigger, or whether it was inadvertence. However, bearing in mind that these issues involved contrasting views as to what took place, and also that

the jury would have had to determine whether the Crown had satisfied them so that they felt sure that the firearm was not triggered accidentally, it is not readily apparent that the good character direction in relation to the propensity limb would have had no effect on the verdict handed down.

[46] Mr Peterkin also averted our attention to an unfortunate exchange that took place in the presence of the jury between the trial judge and the prosecutor after the summation had been concluded (recorded at page 40, lines 12-24 to page 41, lines 1-3). The relevant section is set out below:

> "MISS P. LLEWELLYN: In terms of the comments that I heard your Lordship made, is your Lordship going to leave self defence.
>
> HIS LORDSHIP: Self-defence?
>
> MISS P. LLEWELLYN: No, I am going from the comments I heard.
>
> HIS LORDSHIP: Miss Llewellyn I am not going there.
>
> MISS P. LLEWELLYN: Well, as I said, I am just going from the comments your Lordship made.
>
> HIS LORDSHIP: As I said, it is going to be a deliberate act.
>
> MISS P. LLEWELLYN: Well, could your Lordship remind the jury of the evidence of the two experts and also the particular direction...
>
> HIS LORDSHIP: I am sorry, Miss Llewellyn, the expert. Nothing was wrong with the firearm, the firearm was in

> good keeping, no one questioned the evidence. Mr. Pearson did not say the firearm was defective. And what I am saying is that the policy, the force policy and law in this does not arise as far as I am concerned he held the firearm, and it is a deliberate act, if it was a deliberate act then it is manslaughter."

[47] These remarks were not directed to the jury and the judge had clarified beforehand the issues that they needed to resolve. However, while there was evidence on which the jury could have reached the verdict that it did, the judge did express the abovementioned words in their presence, that as far as he was concerned "he held the firearm, and it is a deliberate act". The learned judge did not caution the jury to disregard his comments at that time, when it would have been important to do so, because the jury had the responsibility to determine under what circumstances the firearm was discharged. These remarks, when added to the lack of the propensity limb of a good character direction, would have placed the appellant in an unfair position vis-à-vis the deliberations of the jury. I find therefore that there is merit in this ground which would be sufficient to allow the appeal and to order that the conviction of the appellant be quashed. However, for the purpose of completeness I will go on to consider the other issues raised in this appeal.

Ground 2: The absence of expert directions.

Submissions for the appellant

[48] Counsel argued that since two alternate situations had been put to the jury explaining how the deceased was shot, then an expert direction would have greatly

assisted the jury by directing them that they could either accept or reject the opinion proffered by both the forensic pathologist and the ballistic expert. Counsel conceded however that the pathologist's evidence was essentially unchallenged and did not raise any concerns. Counsel's focus was on the evidence of the ballistic expert and the effect of the failure to give the requisite directions to the jury as to how to treat with such a witness. He relied on **Trevor Whyte and others v R** [2017] JMCA Crim 13; and **R v Doheny and Adams** [1997] 1 Cr App Rep 369.

Submissions for the Crown

[49] Mr Taylor argued that it was highly unlikely that the inclusion of an expert direction in the summation to the jury would have made any difference to the conviction as there had been no challenge to the evidence of the experts by the appellant in cross examination. Further, relying also on the case of **Trevor Whyte and others v R,** counsel submitted that such an omission is not necessarily fatal to the conviction.

Discussion

[50] These are the comments of the learned judge as recorded at page 41 of the summation:

> "Nothing was wrong with the firearm, the firearm was in good keeping, no one questioned the evidence. Mr Pearson did not say the firearm was defective."

[51] It is evident that the above comments summarily and briefly related the evidence of the ballistic expert. Additionally, it is apparent that at page 5 of the summation, the

learned judge gave general directions on how the jury is to proceed where the evidence is capable of two interpretations. However, there is no expert direction. The assessment of the evidence of the expert becomes important when a determination has to be made on whether the omission of an expert direction may have affected the safety of the conviction. The case of **Trevor Whyte and others v R** is instrumental in supporting the position that where the evidence comprises primarily of statement of facts as against opinions, this will greatly impact the omission to give an expert direction. P Williams JA (Ag) (as she then was) stated that:

> "[121] Evidence from expert witnesses is generally permitted to provide the jury with scientific and other such information as well as give opinions on matters within the witness's expertise. It is necessary however to bear in mind that such evidence may involve pure statements of facts as distinct from the expert's opinion based on those facts. Where the expert gives evidence involving his opinion it would be necessary for the trial judge to give directions reminding the jury that they could reject that opinion as they, as arbiters of facts, could treat the expert in a manner similar to any other witness. Where, however, the evidence of the expert involves statements of facts which are not in dispute, the need to give those directions may be diminished and failure to do so may not be fatal."

[52] Having reviewed the transcript it is evident that there was no serious challenge to the evidence of the ballistic expert. Retired Superintendent Porteous gave evidence in relation to the firearm that was in the possession of the appellant as summarized at paragraph [42] of this judgment. It is to be noted that his evidence was mostly factual. He expressed the opinion that the firearm could have been fired on 3 April 2010. He also stated that it could be fired with one hand whilst cradled on the chest but that it was designed to be fired with both hands.

[53] The ballistic expert had even agreed with counsel during cross examination that it was possible for the safety feature of the M16 rifle to be affected by the gun rubbing on the vest of the appellant and that the movement of the safety could be affected by a flick of the thumb.

[54] While it is important that an expert direction be given to the jury to the effect that the opinions of the expert may be treated as any other witness, it is clear that the opinions expressed by the ballistic expert in this case gave support to the case presented by the defence. In the circumstances of this case, the failure to give an expert direction was not particularly detrimental. There is therefore no merit in this ground of appeal.

Grounds 3: The judge's failure to leave self-defence to the jury.

Submissions for the appellant

[55] Counsel advanced the position that the learned judge had erred in failing to leave the defence of self-defence to the jury. He acknowledged that the appellant had not raised the issue of self-defence, as his defence was one of accident. However, counsel contended that the issue of self-defence having been raised on the Crown's case, it ought to have been left to the jury. Counsel relied on the cases of **Clive Mullings v R** [2013] JMCA Crim 53 and **Dwight Fowler v R** [2010] JMCA Crim 51.

Submissions for the Crown

[56] Mr Taylor submitted that the unsworn statement of the appellant supported a defence of accident and that self-defence was never specifically raised by defence

counsel during the trial. He submitted that if it was found that self-defence ought properly to have been left to the jury, then the totality of the summation allowed the jury to consider that defence.

[57] Mr Taylor referred the court to the case of **Stanford v R** [2017] 3 LRC 443, where the legal principles in relation to this issue were reaffirmed by the Caribbean Court of Justice, in an appeal from the Court of Appeal of Barbados. He also relied on **Regina v Albert Thorpe** (1987) 24 JLR 206 and **Alexander von Starck v R** (2000) 56 WIR 424.

Discussion

[58] At the conclusion of the summation, the prosecutor had inquired of the learned judge if, whether from comments he had made, the issue of self-defence was to be left to the jury. That portion of the summation has been set out at paragraph [46] of this judgment. It falls to be determined whether there was any evidentiary material which would have constrained the judge to leave the issue of self-defence for the jury's consideration.

[59] Harrison JA examined several authorities in relation to this issue in **Dwight Fowler v R**. At paragraphs [17] and [19] of his judgment, he stated as follows:

> "[17] In **R v. Michael Bailey** S.C.C.A. No. 141/89 (unreported) dated 31 January 1991 this Court per Carey, J.A., again reiterated the duty of the trial judge and at page 3 he stated:
>
> > 'There can be no doubt that a duty which is placed on a trial judge is to leave any issue,

> i.e., defence which fairly arises on the facts of a case, to the jury irrespective of such issue being raised by the defence: **R. v. Porritt** 45 Cr. App. R.; **R. v. Albert Thorpe** S.C.C.A. 7/84 (unreported) dated 4th June, 1987.'
>
> [18] ...
>
> [19] It is therefore plainly settled on the basis of the authorities referred to above that where, on the evidence in a particular case, a particular defence arises, even though not relied on by the defence, the trial judge has a duty to leave that issue for the consideration of the jury."

[60] Once the evidence reveals the basis for self defence to be raised, it would not matter therefore whether the appellant relied on such a defence. It was a question for the judge to answer by applying "common sense to the evidence in the particular case" and as such, self defence was to be left to the jury when there was evidence strong enough to raise "a prima facie case of self defence" (per Rajnauth–Lee JCCJ at paragraph [23] in **Stanford v R** referring to **R v Bonnick** [1977] 66 Cr App Rep 266).

[61] In relation to the evidence led by the Crown, the issue of self-defence did not arise as both witnesses stated that the vehicle did not come into contact with the appellant, and in fact had stopped a certain distance from him. The evidence from Dr Kadiyala is that the bullet entered the front of the neck of the deceased on the left side and that the deceased would have been around the driver's seat. On the Crown's version of the incident also, the gun would have been pointed at the front of the vehicle while it was moving towards the appellant as he was standing in the road. It is to be noted also that there was no evidence from any of the police officers who spoke to the appellant after the explosion was heard or while he was at the hospital that he had

been hit by the vehicle, albeit he was seen with an injury. He himself gave no explanation to anyone at the time of the incident how that injury had occurred.

[62] In his unsworn statement, the appellant spoke to the circumstances that led to him being on duty at the time, his remorse in relation to the death of Mr Parchment, the fact that his team had been told at various times to take extreme caution whist patrolling certain divisions and that there was an actual report of armed men who intended to fire at the police at will. He also indicated that before leaving for duty, he had manually loaded a round in his weapon and made it safe. He stated that he had done this as a result of continuous attacks on the police, so "we always have been alert". He also spoke of his responsibility that morning to give cover to the other two police officers who were conducting a search of the mini-bus at the time of the incident.

[63] It is to be noted, as stated at paragraph [20], that he indicated that his suspicions were aroused because of the manner in which the car approached. Having held up his right hand with the muzzle of the gun in his left hand pointing down, he then spoke of putting the rifle forward. He spoke to the fact that the vehicle was coming fast and then the headlights came on, and that he tried to run out of the road but was not quick enough.

[64] The relevant remainder of his statement recorded at page 259, lines 7-15 is as follows:

> "The right bumper of the vehicle hit me in the region of my left knee. I lost my balance. Instinctively, the weapon go off and a round discharged immediately. I fell on the

> ground on my knees, quickly got up and rushed to the vehicle that stopped in front of the service vehicle, as they were face to face along the road. And I reached the vehicle I said, 'Anybody get shot?' "

[65] I would agree with the submissions of Mr Taylor, that from the tenor of the appellant's unsworn statement, he may have suggested the issue of self-defence. His statement however spoke to an explanation as to why the bullet was in the breach in possible contravention of the force orders and it did speak to a heightened tension in relation to a possible criminal attack. It is not clear how he said he held the firearm when he said that it was held forward, but during the cross examination of Mr Clarke, it was suggested to him that the firearm was never pointed at the vehicle as the car came towards the appellant.

[66] The appellant has not said that he pointed the weapon at the vehicle at any time due to any misapprehension on his part. There is no evidence therefore to suggest he may have had an honest belief that he and/or his colleagues may have been under attack. It would be his state of mind that would be important in assessing the issue of honest belief even if he was mistaken. See **Solomon Beckford v R** [1987] 3 All ER 425. His statement speaks quite plainly to an accidental, inadvertent discharge of the bullet. In those circumstances, it cannot be said that there was sufficient evidence to raise a prima facie case for self-defence.

Ground 4: The failure to properly assess contradictions in the eyewitness' evidence.

Submissions for the appellant

[67] Another argument put forward by counsel was that the learned judge had failed to properly address certain instances of inconsistency in the evidence of the eye witnesses, Mr Clarke and Miss Hepburn. Counsel submitted that there was no direction as to how the jury should resolve the inconsistencies in relation to whether the motor car had stopped at the traffic light. Further, counsel contended that it was of consequence that Mr Clarke gave evidence that at all times the motor car was travelling within the stipulated speed limit, while Miss Hepburn spoke to the motor car braking suddenly and she pitching forward. Mr Clarke merely indicated that the vehicle decelerated and came to a stop. While conceding that the inconsistencies arising on the evidence were slight, counsel argued that the jury received no assistance on how these inconsistencies were to be resolved or their perceived impact on the defence's case. Mr Peterkin complained that the judge was required to tell the jury that the presence of a previous inconsistent statement might lead them to conclude that the testimony was unreliable.

[68] Reliance was placed on the case of **Mustapha Ally v The State** (1972) Criminal Appeal No 45/1972 (Guyana) and also on **R v Colin Shippey and others** [1988] CLR 767 where Turner LJ had ruled that the jury required a warning on how to act on inconsistencies.

Submissions for the Crown

[69] The Crown submitted that the judge had properly and adequately directed the jury on the treatment of inconsistencies in the evidence. Counsel further submitted that the judge had also commented on these inconsistencies. Counsel relied on **Steven Grant v R** [2010] JMCA Crim 77 and quoted Harris JA at paragraph [69] of that judgment where she stated that discrepancies and inconsistencies give rise to the issue of credibility which is a question of fact reserved for the jury's domain.

Discussion

[70] It is to be noted that the judge gave directions regarding the general credibility of the witnesses and further directed the jury that they could accept or reject the whole or parts of the witnesses' evidence. Even more aptly, the judge gave the standard directions on inconsistencies and contradictions as well as discrepancies. The following comments of the judge were recorded at page 10, lines 20-25 to page 12, lines 1-11:

> "In most trials it is always possible to find inconsistencies and contradictions in the evidence of witnesses especially when the facts about which they speak are not of recent occurrence. They maybe serious or slight material or immaterial. If slight, you the jury will probable [sic] think they do not really affect the credibility of the witness or witnesses concerned. On the other hand, if they are serious you the jury may say that because of them it would not be safe to believe the witness or witnesses on that point at all. It is a matter for you, Mr. Foreman and members of the jury, to say in examining the evidence whether there are any such, and if so whether they are slight or serious and bearing in mind the principles that I said before you the jury should take into account the witnesses level of intelligence, his or her ability to put accurately into words what was seen, the witnesses powers of observation. In most cases difference in the evidence of witnesses are to be expected.

> The occurrence of disparity in testimony recognizes that in observation, recollection and expression the ability of individuals vary. Indeed when the testimony of two witnesses coincide exactly as judges of fact you will be entitled to become suspicious of their voracity, of course, disagreement between witnesses on the facts are also a warning of falsehood or error. This is one of the purposes of cross-examination to ferret out conflicts in the evidence and to provide material for the suggestion that the truth has not been spoken, whether there has been honest mistake or wicked intention. It is essentially a question for your determination. You have seen and heard the witnesses it is for you to say whether the inconsistencies are profound and inexplicable or whether the reason which has been given for the inconsistencies are satisfactory."

[71] Further, the judge reminded the jury of the inconsistency in Mr Clarke's evidence as to whether the car had stopped at the traffic light. He also pointed out the discrepancy with the evidence of Miss Hepburn in relation to the manner of the car's approach. He pointed out to them within that context that on the Crown's case, brake marks were seen on the road and he asked the jury to consider whether that was consistent with a sudden stop. He also pointed out the issue of the appellant's injury.

[72] It is clear therefore that the learned trial judge gave sufficiently adequate directions on how to deal with both inconsistencies and discrepancies and reminded the jury of these in the context of the case for the defence.

[73] While it is clear that the trial judge did not specifically state that a previous inconsistent statement is not evidence that can be acted upon unless the witness indicated it is the truth, Mr Clarke did give an explanation for the inconsistency in relation to whether the car had stopped at the traffic light. This inconsistency would therefore be dissipated to some extent. This reasoning was expressed at page 90, by

Persaud JA in the case of **The State v George Mootoosammy and Henry Budhoo** (1974) 22 WIR 83, when considering this issue of inconsistencies and discrepancies. He reasoned that once there is a previous inconsistent statement, the material portion should be put to the witness and an opportunity be afforded to him to explain it. The jury having heard the explanation would have been able to assess the consequent weight of the testimony. Bearing in mind the treatment of the judge of the inconsistencies and discrepancies in this case, the jury would have been well aware of their duty to assess the credibility of the witnesses. There is therefore no merit in this ground of appeal.

Ground 5: The judge's failure to uphold the no-case submission.

Submissions for the appellant

[74] It was counsel's contention that the judge had erred in not upholding the no-case submission as neither of the eye witnesses had identified the appellant as the police officer standing in the road with the weapon pointed on the vehicle.

Submissions for the Crown

[75] Crown counsel noted that there was no record of the submissions and ruling on the application in relation to the no-case submission. He, however, was of the view that both limbs of the test laid down in **R v Galbraith** [1981] 2 All ER 1060 had been satisfied and that the judge had properly left the case for the consideration of the jury.

Discussion

[76] Although there is no transcript available to this court in relation to the submissions of either counsel before the judge, this ground of appeal is the weakest link in the submissions of Mr Peterkin. It is abundantly clear that there is adequate circumstantial evidence or evidence from which the jury could draw reasonable inferences that the appellant was the police officer standing in the road that day. Firstly, there was no challenge by the defence that the appellant was indeed present at the scene of the incident. The evidence is uncontested that he was one of three officers on the scene. Mr Clarke observed a police officer standing in the road with his firearm pointed at the vehicle. The other two officers were in the process of searching a vehicle when the shot was heard. After the explosion occurred, the appellant went to Corporal Whyte and stated that a man was shot. It was his firearm that was turned over to Detective Sergeant Frazer and tested by the ballistic expert.

[77] Having viewed the evidence in its totality, it is clear that there was abundant evidence pointing to the identification of the appellant. This ground of appeal therefore fails.

[78] Although the appellant has failed on grounds 2 to 4, we find that there is great merit in ground 1. Having examined the totality of the evidence before the court, and the summation of the judge, it is our view that it cannot be reasonably contended that the absence of a good character direction would not have affected the safety of the conviction. This finding is especially more glaring having regard to the dialogue of the judge with Crown counsel in relation to the issue of the shooting being deliberate and

how the jury may have treated with such comments in the absence of any direction as to how to treat with same. We therefore allowed the appeal, quashed the conviction and set aside the sentence.

Should there be a retrial?

[79] However, that does not bring an end to the matter as the court must consider whether, pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act ("JAJA"), it is in the interests of justice to order a retrial. That section provides that:

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[80] In the case of **Dennis Reid v The Queen** [1980] AC 343, Lord Diplock on behalf of the Board, provided much guidance as to how the above provisions ought to be applied. His lordship opined that decision of whether a retrial should be ordered will depend on the circumstances of each particular case and the local conditions. Importantly, he recognised that where the verdict of the jury has been set aside because of the inadequacy of the prosecution's evidence, in such a case, that is a conclusive factor against ordering a retrial. Alternately, he noted that there were cases where the strength of the evidence was such that any reasonable jury properly directed would have convicted the defendant. In that instance, prima facie, it would be apt to apply the proviso to section 14(1) of the JAJA. Further, he was of the view that in circumstances where the case fell between those two extremes, certain factors were deserving of consideration. At page 350, he stated that:

> "The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and the jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial."

[81] This case falls between the two extremes and thus deserves a consideration of the factors weighing for and against ordering a new trial. It is clear that the circumstances do not relate to inadequate evidence presented by the Crown, but to omissions of the learned judge. However, the appellant has undergone the ordeal of two trials through no fault of his own. The first trial took place in September and October 2011, that is, more than one year and five months after the commission of the offence. The second trial was approximately two years and nine months after the determination of the first trial. Even more significant is the fact that he has already served three quarters of the prison sentence imposed on him. Bearing those factors in mind, we believe that it is not in the interests of justice that a new trial be ordered.

Disposition

[82] It was therefore ordered that a judgment and verdict of acquittal be entered.

Concluding remarks

[83] We think it is timely to issue a caution to trial judges in their engagement with counsel in relation to issues that are considered to be relevant for the deliberation of the jury. In most cases, this may be an innocuous exercise, but, as demonstrated in this matter, it may lead to an overturned verdict.

[84] We would suggest strongly that these issues be canvassed out of the hearing of the jury, especially if there is any indication that there may be some rigorous debate on the point. Ultimately it is for the trial judge to determine what is relevant for the consideration of the jury, but prudence may dictate that some reflection be given to the suggestions of counsel during the process of preparation.