[2018] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 78/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

CHRISTOPHER THOMAS v R

Lord Anthony Gifford QC and Vernon Daley for the applicant

Miss Kathy-Ann Pyke and Leighton Morris for the Crown

25, 26 May 2016 and 31 July 2018

MORRISON P

Introduction

[1] The applicant has now been tried three times for the murder of a detective corporal of police, Mr Dave Daley ('the deceased'). The first trial, which took place in February 2008, resulted in a hung jury. The second trial resulted in his conviction on 5 May 2010. On that occasion, he was sentenced to a term of imprisonment for life, with the stipulation that he should not become eligible for parole until he had served a minimum of 30 years. On 30 September 2011, the applicant's appeal against this

conviction and sentence was allowed and, in the interests of justice, the court ordered a new trial[1]. The ground on which the appeal succeeded was that the conduct of prosecuting counsel in the cross-examination of a witness for the defence, and the trial judge's inaction in the face of it, were such as to undermine the integrity of the trial and thereby rendered it unfair.

[2] The applicant's new trial for the murder of the deceased again took place in the Home Circuit Court, this time before Sykes J (as he then was) ('the judge') and a jury, in July 2013. On 11 July 2013, he was again convicted and, on 20 September 2013, the judge sentenced him to a term of 40 years' imprisonment at hard labour, with a stipulation that he should serve a minimum of 20 years before becoming eligible for parole.

[3] The applicant applied for leave to appeal against his conviction and sentence. The application having been considered and refused by a single judge of appeal on 28 August 2015, the applicant now renews the application before the court. The basis of his application is that the trial was vitiated by unfairness on the part of prosecuting counsel in her conduct of the case, as well as by error on the part of the judge.

[4] The case for the prosecution was based on the testimony of two eye-witnesses to the killing of the deceased, Messrs Leighton Gallimore and Haroon Smith. Although there were some differences in detail between them, their evidence was to the general

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[1]**Christopher Thomas v R** [2011] JMCA Crim 49. For ease of reference, we will refer to this decision as **Christopher Thomas v R (No 1)**.

effect that, on the evening of Monday, 12 February 2007, the applicant shot and killed the deceased at a high-rise residential complex in the Brook Avenue community in the parish of Saint Andrew. On the evening in question, it appeared that someone tossed a stone, described in the evidence as about the size of a cricket ball, from an upper floor of the complex. The stone fell in front of a car being driven by the deceased. He stopped and got out of the car, apparently to investigate. Armed with a gun, he gave chase to a man, known only as Joel, who was standing nearby. The deceased discharged a shot from his firearm in Joel's direction, whereupon Joel fell to the ground. As the deceased walked towards Joel, the applicant ran up behind the deceased, pulled a gun from his waist and shot him in his back. The deceased fell and the applicant continued to fire shots at him. Shortly afterwards, the applicant went over to Joel's body, before returning a few minutes later, accompanied by another man, to the spot where the deceased had fallen. The applicant and the other man then fired several further shots ("too numerous to count") at the deceased. During the first and second shooting of the deceased by the applicant, according to one of the eye-witnesses, the deceased was murmuring and crying for help. After the shooting subsided, the applicant and the other man fled; and the place fell quiet until the police arrived.

[5] The police response was led by Superintendent Michael Phipps, who was then the Deputy Superintendent of Police in charge of investigations for the Saint Andrew South Division. Upon his arrival at the scene of the shooting at some time after 9:50 pm on 12 February 2007, he saw and spoke to other police officers who had preceded him there. He also received further information and observed the dead bodies of two

persons. He recognised one of them as that of Detective Corporal Dave Daley, who was known to him previously, and the other was later identified as that of a Mr Joel Anderson of the Brook Valley Community. Superintendent Phipps testified at trial that, during the ensuing investigation of the double homicide, both on the night of 12 February 2007 and afterwards, he interviewed "several persons who were potential witnesses … [and] also caused statements to be recorded"[2]. Messrs Gallimore and Smith were among the persons from whom he recorded statements subsequent to the night of the killings.

[6] At the trial, both eye-witnesses positively identified the applicant as the person who shot the deceased. Mr Gallimore testified that the applicant had been known to him for three years before 12 February 2007; while Mr Smith said that he and the applicant grew up in the same community and he had therefore known the applicant from childhood. Both eye-witnesses said that the state of the lighting, the distance at which they were able to observe the applicant and the general circumstances in which he was seen were adequate to allow them to identify him correctly.

[7] The applicant gave evidence on his own behalf. He said he lived on one of the blocks in the complex. On the evening in question he was on the pathway between his block and another talking on his cell phone when he heard explosions. He went to his aunt's house, which was on the third floor of the same block on which he lived. He spent some 45-50 minutes there before returning to the pathway downstairs, where he

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[2]Transcript of evidence, volume 2, page 432

saw a lot of people, objects on the ground, police tape, police officers and a line of police cars at the scene. At that point, he called a taxi-cab and went off to his girlfriend's home on Molynes Road, where he remained for the rest of the week. He did not have a gun with him that night, nor did he shoot anyone.

[8] On 25 February 2007[3], accompanied by his attorney-at-law, the applicant turned himself in to the police, after hearing on the television news that he was wanted by them. In answer to his counsel in examination-in-chief, he told the court that he had no criminal convictions and that, before his arrest, he had had plans to further his education by pursuing a degree in business management or marketing.

[9] The judge told the jury[4] that identification was "at the heart of this case" and directed them extensively on the issue. In his written submissions on behalf of the applicant[5], Lord Gifford QC described the judge's directions on identification as "most thorough and fair"; and, in the result, no issue of identification arises on this application for leave to appeal.

[10] But the applicant complains that (i) his right to fair trial was fatally compromised by persistently improper conduct on the part of prosecuting counsel at his trial (grounds 1 and 2); (ii) the judge failed to give proper or adequate directions to the jury as to how to treat with evidence of his good character (ground 3); and (iii) the judge erred in

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[3] This is the date given by the investigating officer, Superintendent Michael Phipps (see para. [55] below). However, in his evidence, the applicant gave the date as 17 February 2007 (see Transcript, volume 2, page 491.
[4]Transcript, volume 2, page 614
[5]At para. 7

withdrawing the question of defence of another from the jury's consideration (ground 4). The applicant also complains that the sentence which the judge imposed was manifestly excessive in all the circumstances of the case.

The fair trial issue

[11] Grounds of appeal 1 and 2 are as follows:

> **Ground 1**
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> "The fair trial of the Applicant was fatally compromised by the conduct of prosecuting counsel during the evidence in chief of Detective Superintendent Phipps, in that she repeatedly asked improper and irrelevant questions designed to convey to the jury that there were other witnesses who had implicated the Applicant, other than the witnesses Leighton Gallimore and Haroon Smith who were called at the trial …"
>
> **Ground 2**
>
> "The fair trial of the Applicant was further fatally compromised by the conduct of prosecuting counsel during her cross-examination of the Applicant, in that she repeatedly asked improper questions, suggesting that the Applicant's wish to obtain legal representation before he turned himself in at a police station was evidence of his guilty knowledge. Prosecuting counsel continued with this improper line of questions in defiance of the rulings of the learned trial judge, and by her demeanour disrespected the learned trial judge ..."

[12] These grounds, as will have been seen, relate specifically to the conduct of prosecuting counsel in, first, her examination-in-chief of the investigating officer, Superintendent Phipps; and, second, her cross-examination of the applicant. It is

therefore necessary, as Lord Gifford very helpfully did in his supplemental grounds of appeal and written submissions, to refer to the passages complained of in some detail.

[13] Early on in examination-in-chief, prosecuting counsel led evidence from Superintendent Phipps that, on the night of the killings and afterwards, he interviewed several potential witnesses and caused statements to be recorded from them. He begun to add that he obtained the name of someone, but he was stopped by a successful objection by Lord Gifford (who also appeared for the applicant at the trial). The following exchanges between prosecuting counsel, the witness and the judge then ensued[6]:

> "Q. Now, based on having received statements …
>
> A. Yes, ma'am.
>
> Q. … and your observation that you made, did you commenced [sic] investigation against anyone in relation to this matter.
>
> LORD GIFFORD: No, please. I object to that question. Both my friend and the officer know quite well what the hearsay rule is about.
>
> HIS LORDSHIP: I don't know, don't know what the officer knows.
>
> LORD GIFFORD: But certainly, my friend knows.
>
> HIS LORDSHIP: Yes, ...
>
> Q. You said - - so did you commence investigation into any matter, while you were there?

[6] Transcript, volume 2, pages 432-433

> A. Yes, ma'am. Well, the homicide of Detective Corporal Daley as also Joel Anderson.
>
> Q. Now, did you have any suspect in mind?"

[14] The judge intervened at this point and asked the jurors to retire to the jury room. At the judge's invitation to address the court, prosecuting counsel reminded the judge that Superintendent Phipps had been to the scene of the killings and thereafter commenced a murder investigation. She continued as follows[7]:

> "M'Lord, it is explicit in that to continue in his investigation, m'Lord ...
>
> … Being the person investigating m'Lord, then he would have, m'Lord, in mind, he would have to be pursuing persons with whom this investigation would lead to and, m'Lord, this would be based on what he has done subsequently, m'Lord. And so, m'Lord, Certainly, m'Lord, you have before this Court an accused person and my question was to the investigating officer, did he have any suspect in mind at that time, m'Lord. And so m'Lord, it would have to be when considering this evidence, m'Lord, that the case has to be looked in the general circumstances on the thrust of the investigation, which led m'Lord to subsequent action, and so, m'Lord, that background evidence will certainly be relevant to the proceeding, as to who or what persons were arrested, m'Lord, and so at this time, the evidence is relevant, m'Lord.
>
> Further to that m'Lord, there is also evidence of witnesses, m'Lord, who indicated, m'Lord, eyewitnesses to what they have seen, which has been given in this Court, m'Lord and the officer who is in charge, m'Lord, made certain, at least commenced an investigation as to what he did, because the question is what he has done subsequently, m'Lord, and so it is that evidence as to what he has done. He commenced

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[7]Ibid, pages 433-434

> investigation, m'Lord, with respect to suspect or suspects m'Lord, which becomes the continuation of his investigation and the further arrest of person or persons in this matter, m'Lord. And so, m'Lord, it would not, m'Lord, based on what he has done, falls [sic] under the rule of hearsay, in its technical way, m'Lord, because, m'Lord, having gone there, having done the investigation, made certain observation, m'Lord, what next he has done that he has commenced an investigation into the case of homicide, m'Lord."

[15] The judge then pointed out to prosecuting counsel, at some length[8], that the line of questioning which she wished to pursue could give rise to "a danger … that the jury may conclude that the Defendant was identified by persons other than the two eyewitnesses who gave evidence". Among other things, the judge reminded prosecuting counsel of the case of **R v Winston Blackwood**[9], in which this court characterised the evidence of a police officer along not dissimilar lines as inadmissible hearsay. The judge's concluding observation to prosecuting counsel on this point[10] was that "… it is a question commonly asked, but of course, while attorneys my [sic] not have heeded the decision of the Court of Appeal, I have to pay attention to them and apply them". When prosecuting counsel responded in a manner which clearly suggested that the matter was at an end ("Very well, m'Lord"), the jurors were recalled and the examination-in-chief of Superintendent Phipps resumed.

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[8]Ibid, pages 435-439
[9] (1992) 29 JLR 85
[10] Ibid, page 439

[16] However, it was not long before prosecuting counsel returned to the question of the persons from whom Superintendent Phipps had taken statements. After being told by Superintendent Phipps that Messrs Gallimore and Smith were among the potential witnesses from whom he took statements, prosecuting counsel asked him[11] if he knew "one Allison Grandison". Superintendent Phipps' answer was that Miss Grandison was one of those persons as well. Prosecuting counsel's next question to Superintendent Phipps was whether, having perused the statements, he "[h]ad any suspect in mind". The judge again intervened, asking, "[w]hy is this necessary?" And, again, prosecuting counsel appeared to desist.

[17] But, to the contrary, she persisted, by referring Superintendent Phipps to his previous answer that he had received a statement from Miss Grandison. Despite Lord Gifford's immediate objection, which the judge obviously accepted, prosecuting counsel's very next question to Superintendent Phipps[12] was, "… so you have been able to locate Miss Allison Grandison?" This time, as is clear from the tone of his immediate response, the judge was plainly annoyed:

> "HIS LORDSHIP: Why are we going this route? Why do we need this evidence?
>
> [PROSECUTING COUNSEL]: He indicated that he collected statements from persons.

[11]At page 440
[12]At page 460

> HIS LORDSHIP: He indicated that he collected statements from a lot of persons. Are you going to ask him about all of them.
>
> [PROSECUTING COUNSEL]: Not particularly, m'Lord.
>
> HIS LORDSHIP: But what relevance it is to asked [sic] about Miss Grandison and not all of them? I tell you, this is not a Commission of Enquiry. It is a criminal trial, and we need to appreciate that, prosecuting counsel, whether they like to accept it or not -- although I am addressing you, clearly you are not looking in my direction -- it is really an indication where we are. The fact of the matter is, prosecution must understand that there [sic] are under restriction when it comes to leading evidence and the defence is not under any, because the role and function are quite different. Your attitude seem [sic] to be whenever the judge makes a ruling, you seem to be challenging it in some other way. This a [sic] persistent and consistent behaviour. We need to bring this to an end now.
>
> So, on [sic] objection is made, then you need to respond. It is not a matter of oh, the judge can say anything he wants to say. I am going to do it my way. It cannot work like that.
>
> [PROSECUTING COUNSEL]: Very well, m'Lord, I am guided."

[18] Lord Gifford submitted that the prejudicial effect of these exchanges was incurable. The essence of his contention on this point is succinctly captured in the following extract from his written submissions[13]:

> "The effect of all of this on the jury must have been devastating. First, they were led to believe that there were other witnesses against the Applicant who for some reason were unable to come to court. This consideration would tend to lessen any doubts they might have had about the inconsistencies in the evidence of Gallimore and Smith.

[13]Written Submissions on behalf of the Applicant filed 20 May 2016, para. 11

> Secondly, they were witnesses to an unseemly battle between the learned judge and counsel, which they may have interpreted in favour of counsel, who was certainly indicating that she had no respect for the judge. ..."

[19] Lord Gifford submitted that prosecuting counsel's conduct amounted to a breach of Canon V(a) of the Canons of Professional Ethics, which provides that "[a]n Attorney shall maintain a respectful attitude towards the Court, not for the sake of the holder of any office, but for the maintenance of its supreme importance, and he shall not engage in undignified or discourteous conduct which is degrading to the Court"; and Canon V(b), which provides that "[a]n Attorney shall encourage respect for the Courts and Judges".

[20] Lord Gifford referred us to **R v Winston Blackwood**, the decision of this court to which the judge had referred prosecuting counsel during the exchanges between them, and **Norman Holmes v R**[14], also a decision of this court. **R v Winston Blackwood** was a case in which, at the appellant's trial for murder, identification was in issue. The sole witness who purported to identify the appellant did not know his name and so could not have named him to the police. But the investigating officer was nevertheless permitted to give evidence that, five days after the murder, he was looking for two men, one of whom was the appellant who he referred to by name. Giving the judgment of the court, Wright JA dismissed this evidence[15] as "patently hearsay",

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[14][2010] JMCA Crim 19
[15](1992) 29 JLR 85, 90

before going on to observe[16] that, "Hearsay is hearsay whether fully exposed or thinly veiled".

[21] **R v Winston Blackwood** was applied in **Norman Holmes v R**, in which the court again referred to[17] "the stubborn persistence in our courts of [this] kind of forensic device to evade the rule against hearsay …". We would also note in passing that these decisions are entirely in keeping with the decision of the Privy Council in **Delroy Hopson v The Queen**[18], an appeal from a decision of this court. In that case, a police constable testified that, upon visiting the victim of a violent attack in hospital soon afterwards and being told something by him, he made a decision to look for someone "in particular" (i.e., the defendant) in connection with the investigation. The Board's terse comment[19] was that "[t]his evidence was, of course, hearsay, highly prejudicial, and wholly inadmissible".

[22] The second aspect of the fair trial issue (ground 2) relates to the way in which prosecuting counsel cross-examined the applicant, particularly as regards his having turned himself in to the police, accompanied by his attorney-at-law, a few days after the killings. The applicant's complaint is that prosecuting counsel repeatedly – thereby flouting the judge's rulings - asked improper questions, which implied that his wish to

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[16]At page 91
[17]At para. [38]
[18]Privy Council Appeal No 35/1992, judgment delivered 13 June 1994
[19]At page 4

obtain legal representation before turning himself in was evidence of his guilty knowledge.

[23] So, for instance, the applicant's evidence was that he first heard the news that he was a person of interest to the police on 13 February 2007. Early in her cross-examination[20], prosecuting counsel asked him if he had tried to get in touch with a police officer whom he knew to go with him to the police station. The applicant answered no, adding that[21], "I wasn't sure why they wanted me to come in at all". The applicant was then asked why he did not go in to the police that same night and his answer was that he wanted to go in "with proper representation". Prosecuting counsel's further question ("[w]hy is that so?"), drew a pointed reminder from the judge[22]:

> "Because the [C]onstitution gives him that right. It's a right that he has."

[24] But, despite her assurance to the judge at this point that she would "move on", prosecuting counsel again persisted, asking the applicant[23] why he had not asked his girlfriend's mother to accompany him to the police station. Her further suggestion[24] that "it is when being charged for something" that one would usually engage a lawyer, led the judge to exclaim that "it is an out of order question ... Persons get lawyers all the time, even to find out what their legal responsibilities are". But still prosecuting counsel

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[20]Transcript, volume 2, page 521
[21]Transcript, volume 2, page 522
[22]Ibid
[23]Transcript, volume 2, page 547
[24]Transcript, volume 2, page 548

pressed on, asking the applicant[25] if he had not considered asking the pastor of the church which he attended to go with him to the police station. This again prompted the judge's intervention[26]:

> "You going back along that route again? The man has already indicate [sic] that he wanted to get an attorney. The law allows him to do that. If you are suggesting other possible ways, you have been down that road. The law gives him that right."

[25] At this point, the judge invited the jury to retire to the jury room, so that he could address prosecuting counsel directly[27]. The following extract suffices to capture the tone of what was a fairly lengthy exchange:

> "HIS LORDSHIP: You understand that this is a third trial?
>
> [PROSECUTING COUNSEL]: Yes, m'Lord.
>
> HIS LORDSHIP: You understand that the conviction was overturned in the last trial?
>
> [PROSECUTING COUNSEL]: Yes, m'Lord.
>
> HIS LORDSHIP: Did you read the judgment? Do you appreciate that it was because of improper questioning by the prosecutor, do you understand that was one of the primary conditions of the over turning [sic] of the conviction?
>
> [PROSECUTING COUNSEL]: Yes, M'Lord.
>
> HIS LORDSHIP: And yet, you are going to be persisting, to insinuating the jury [sic] that something is wrong with the

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[25]Transcript, volume 2, page 551
[26]Transcript, volume 2, page 551
[27]Transcript, volume 2, pages 551-553

> defendant choosing – because the [un]ambiguous evidence is, he turned up with his attorney-at-law? All of that is not in dispute. The constitution gives him the right to get legal representation. Why you persisting with the insinuation that somehow something is wrong with him getting an attorney-at-law as opposed to a pastor, police, mother, uncle, aunty or whomever. Why are you doing this when the law gives him the right to an attorney-at-law? The right to an attorney is not just when you are about to be charge [sic] you can get an attorney. At any time, the law gives him that right. So if he chooses as he had said to exercise the right given to him by law, why are you insinuating to the jury that something is wrong with that choice? That is the sole purpose of the questions.
>
> Because, let us be reminded what the Court of Appeal says, is that the judge failed to intervene. So the two errors were, prosecution attorney error and judicial error. So what is the objective?"

[26] A further discussion then followed. In it, prosecuting counsel attempted – unsuccessfully - to explain the objective of her line of questioning to the judge, before finally telling him that, "I will move on, m'Lord, because you had indicated that it is a constitutional right". And, this time, by and large, she kept to her word. But, with the jury now back in court, there was one other occasion on which prosecuting counsel's seeming reluctance to accept the judge's ruling on a different point led him, obviously in exasperation, to remark[28] that -

> "Every time I make a ruling it is met with mirth and laughter. Clearly you think this is absolutely a joke."

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[28]Transcript, volume 2, page 560

[27] In summing up the case to the jury, the judge spoke directly[29] to the manner and content of the cross-examination of the applicant:

> "The other thing I need to say to you is this, that he was cross-examined about some policeman in the community, parson, whomever. The implication being that after this incident on the 12th, he did not rush immediately to the police after there was this announcement on the television or whatever media [sic] it was. And, you may be left with this impression as, 'I wonder why he did not -- why didn't he go to the pastor's office and do all this Indian Chief?' Because he said he wants a lawyer. He has a right to, just like you, just like me, just like everybody in this courtroom including counsel for the Crown. He has a right to legal representation. And one would want to think that if you hear a senior police officer announcing that he wants to speak to you, I am not so sure that mother and aunty and granny could be of much help to you when you turn up at the officer's office. Also, I would want to suggest to you that a lawyer may be of greater help to you in those circumstances than your well thinking mother or pastor or policeman in the community. So, you can't use the fact that he wanted a lawyer, you cannot draw any inference that the reason why he wanted a lawyer was because he knew he was in difficulty, you can't do that; that's illegitimate inference. There is nothing which says because the announcement was made, for example 12 o'clock Monday, the man must be running out of his house by five minutes past twelve. So, you can't use any of that to draw any adverse conclusion as far as Mr. Thomas is concerned."

[28] And again, closer to the end of the summing-up, in the course of reminding the jury of the applicant's evidence in cross-examination, the judge directed the jury as follows[30]:

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[29]Transcript, volume 2, pages 582-583

> "He was being asked why he didn't go to some policeman in the community or to go look for some 'Passin' and granny and all of these people. But, I would want to suggest to you, that, if you are going to look for police officers, the only thing granny can offer you is [sic] prayers. She can't help you, when policeman want to ask you questions. Your granny can't, mother can't help you, pastor can't help you, except to pray to the Creator."

[29] Lord Gifford relied on the decisions of this court in **Johnson (Gregory) v R**[31] and **Christopher Thomas v R (No 1)**, in addition to the well-known decision of the Privy Council in the case of **Randall (Barry) v R**[32]. It may be convenient to look briefly at each of these authorities.

[30] This court's decision in **Johnson (Gregory) v R** neatly encapsulates both aspects of the applicant's complaints on the fair trial issue. The appellant in that case was charged on an indictment containing a single count of murder. The sole eye-witness to the murder gave a statement to the police in which he purported to identify the appellant. At the appellant's trial, the prosecution also called evidence from a police officer who testified that, on the day of the murder, he had received a report and started investigations; and that two days later, he obtained a warrant for the arrest of the appellant, whom he did not know, but about whom he had recorded statements in the matter. This court held that this evidence had been wrongly admitted, conveying to the jury as it must have, the impression that a person or persons not called as

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[30]Transcript, volume 2, page 706
[31] (1996) 53 WIR 206
[32](2002) 60 WIR 103

witnesses had also identified that appellant as the murderer. The evidence therefore had no probative value and was wholly prejudicial.

[31] Evidence was also led by the prosecution which strongly suggested that the appellant had been charged with another murder committed on the same night as the one for which he was now being tried. Further, during the course of the trial, prosecuting counsel made a number of improper and unfounded allegations against defence counsel. Giving the judgment of the court, Patterson JA stated[33] that "such outrageous conduct before a judge and jury was quite improper and should not have been allowed to occur". Patterson JA also commended what he described as "[t]he sage words" of Lord Hewart CJ in **R v Wadey**[34] to prosecution counsel:

> "Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair."

[32] In that case, the question for the court at the end of the day was whether the appellant had been afforded the substance of a fair trial, having regard to the admission of inadmissible evidence and the "reprehensible conduct of counsel"[35]. After referring to a trial judge's duty to "guard against the admission of inadmissible evidence", and "to ensure and maintain the dignity and authority of the court, and to guard against conduct that may improperly influence jurors in the performance of their duties",

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[33]At page 215
[34](1935) 25 Cr App R 104
[35](1996) 53 WIR 206, 215

Patterson JA concluded that the trial judge had fallen short of his duty in this case and that the appeal therefore had to be allowed.

[33] **Randall (Barry) v R** was also a case in which the appellant's complaint on appeal from his conviction on several counts of theft was that the trial was conducted in a manner which was grossly and fundamentally unfair, having regard to the conduct of prosecuting counsel and the failure of the trial judge to restrain him in that conduct. In his notice of appeal to the Court of Appeal, the appellant listed 79 instances in respect of which he complained of improper conduct by prosecuting counsel. The Court of Appeal dismissed the appellant's appeal, but his further appeal to the Privy Council succeeded.

[34] The judgment of the Board was delivered by Lord Bingham, who set out the standard of conduct which should guide prosecuting counsel as follows:

> "[9] A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevance and admissibility of evidence. There will almost always be a conflict of evidence. Some witnesses may be impugned as unreliable, others perhaps as dishonest. Witnesses on both sides may be accused of exaggerating or even fabricating their evidence. Defendants may choose to act in an obstructive and evasive manner. Opposing counsel may find each other easy to work with, or they may not. It is not unusual for tempers to become frayed and relations strained. In a fraud trial the pressures on all involved may be even more acute than in other trials. Fraud trials tend to involve a

> great deal of documentation, which is particularly cumbersome to handle in a jury trial. They tend to involve much unfamiliar detail, often of a technical nature, which is difficult for many people to understand, assimilate, retain and recall. And fraud trials tend to be very long, which in itself tends to increase the strain on all involved, whether the defendant, witnesses, jurors, counsel or the judge. The appellant's trial was said to be the longest criminal trial ever held in the Cayman Islands.
>
> [10] There is, however, throughout any trial and not least a long fraud trial, one overriding requirement: to ensure that the defendant accused of crime is fairly tried. The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well understood and are not in any way controversial. ..."

[35] Lord Bingham then went on to identify three of the principal rules, which we would summarise as (i) the duty of prosecuting counsel is not to obtain a conviction at all costs, but to act as a minister of justice; (ii) the jury's attention must not be distracted from its central task of determining the guilt or innocence of the defendant, applying the required standard, based on all the evidence adduced before it, counsel's submissions and the trial judge's directions; and (iii) it is the responsibility of the trial judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence.

[36] Before stating its conclusion on the appellant's complaint that there had been a departure from proper standards of prosecutorial conduct, the Board observed as follows[36]:

> "While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[37] In the result, after anxious consideration of the matters complained of, the Board concluded (albeit reluctantly) that the departures from good practice in the course of

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[36]At para. [28]

the appellant's trial in that case had indeed been such as to deny him the substance of a fair trial. This how Lord Bingham put it[37]:

> "... Prosecuting counsel conducted himself as no minister of justice should conduct himself. The trial judge failed to exert the authority vested in him to control the proceedings and enforce proper standards of behaviour. Regrettably, he allowed himself to be overborne and allowed his antipathy to both the appellant and his counsel to be only too manifest. While none of the appellant's complaints taken on its own would support a successful appeal, taken together they leave the Board with no choice but to quash the appellant's convictions. It cannot be sure that the matters of which complaint is made, taken together, did not inhibit the presentation of the defence case and distract the attention of the jury from the crucial issues they had to decide."

[38] As we have already indicated, the applicant's complaint on appeal in **Christopher Thomas v R (No 1)** also had to do with the manner in which counsel for the prosecution conducted the cross-examination of a witness called by the defence. During the course of an extensive cross-examination, it was put to the witness on three occasions that she had been paid to testify on behalf of the applicant. The witness denied these suggestions, but the prosecution made no application to call any evidence in rebuttal of her denials. It appears that the trial judge's only response to these suggestions was to instruct the jury that "the case should be judged on the evidence and not the unsubstantiated suggestion".

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[37]At para. [29]

[39] The submission on behalf of the applicant on appeal was that the prosecutor ought not to have made those suggestions, amounting, in effect, to suggestions of a conspiracy to pervert the course of justice, unless she intended to call evidence in rebuttal. Counsel for the Crown conceded that the suggestions were improper in the absence of any application to call rebuttal evidence. He also accepted that the trial judge's directions "were not of a sufficient standard to erase the suggestion from the juror's [sic] minds". However, he submitted that, given the evidence in the case, there had been no substantial miscarriage of justice.

[40] Writing for the court, Harris JA considered[38] that the two issues for determination were whether (i) the conduct of prosecuting counsel was such as to undermine the integrity of the trial and thereby amount to an injustice to the applicant; and (ii) the trial judge had failed to exert authority and properly control the proceedings, thereby rendering the trial unfair.

[41] In a passage explicitly based on Lord Bingham's judgment in **Randall (Barry) v R** (which was also quoted at length), Harris JA stated the applicable principles in this way[39]:

> "[13] It is a cardinal rule of law that every accused who is brought before the court is presumed innocent. The presumption of innocence remains throughout until the evidence produced points to his guilt beyond a reasonable doubt. The law accords him a fair trial. His right to a fair trial

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[38]At para. [12]
[39]At paras [13]-[14]

> is absolute. Persons who are charged with the responsibility of marshalling evidence for the prosecution as well as a trial judge must at all times ensure that the conduct of the trial is beyond reproach.
>
> [14] Admittedly, the trial process being adversarial cannot always proceed flawlessly. There may be a deviation from good practice as there are times when things are done or said which may not be in keeping with good practice. However, procedural breaches do not always result in harm so serious as to imperil the fairness of conviction. Despite this, where the occurrences of breaches are substantially prejudicial and an appellate court is of the view that great harm was occasioned to an appellant, a conviction will be quashed as unsafe ..."

[42] Having examined the transcript of the proceedings at trial, Harris JA concluded[40] that prosecuting counsel "had surpassed the latitude permissible in cross-examination", and further[41] that her conduct "undeniably undermined the integrity of the trial and is without doubt indefensible". In so far as the part played by the trial judge was concerned, Harris JA concluded[42] that the brief warning which she gave to the jury would not have been sufficient to rectify the damage caused by prosecuting counsel's improper suggestions:

> "... The fact that the learned judge permitted counsel to tread along the dangerous path by suggesting on three occasions that the witness had been paid to attend the trial would have been deeply ingrained in the minds of the jury that this was true. As a consequence, the mischief caused thereby could not have been cured by a warning."

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[40]At para. [18]
[41]At para. [19]
[42]At para. [21]

[43] Against this background, Lord Gifford submitted that, in this case, rather than adhering to her proper role as a minister of justice, the prosecutor had sought to obtain a conviction at all costs. He submitted that the conduct of prosecuting counsel was even more serious than that of prosecuting counsel in **Christopher Thomas v R (No 1)**, "since it was more persistent, and it involved a running conflict with a highly experienced trial judge"[43]. Accordingly, he submitted, the trial of the applicant was again seriously prejudiced by the unfair conduct of counsel for the prosecution. Further, counsel's conduct was such that it could not be cured by the judge's directions to the jury on how to treat with the suggestion that the applicant's attendance at the police station, accompanied by his lawyer, somehow implied guilty knowledge on his part. It was submitted that in all the circumstances, and especially when the matters complained of in grounds 1 and 2 are considered together, the applicant did not get a fair trial.

[44] In his response on behalf of the Crown, Mr Morris accepted that counsel who prosecuted at the trial had asked what he described as "inappropriate questions". However, he submitted that none of the matters complained of amounted to prosecutorial misconduct sufficient to vitiate the trial. He pointed out that this was a 10 day trial and observed that, when one looked at the close to 800 pages of transcript, it was clear that the various transgressions occupied but a small part of the total. In fact, they were isolated and the judge could not be faulted for his "keen and decisive

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[43]Applicant's written submissions, para. 17

response" to all instances of inappropriate conduct by prosecuting counsel. This case was therefore distinguishable from cases like **Johnson (Gregory) v R**, **Randall (Barry) v R** and **Christopher Thomas v R (No 1)**, in which the egregious conduct of prosecuting counsel was held to have vitiated the trial. More to the point, Mr Morris submitted, are cases like **Montgomery v HM Advocate and another**[44] and **Bonnett Taylor v R**[45], which invite confidence in the fact that juries, acting in accordance with the directions given to them by the trial judge, will render true verdicts in accordance with the evidence.

[45] In so far as is presently relevant, the issue in **Montgomery v HM Advocate and others** was whether, despite considerable pre-trial publicity of the matter, it was still possible for the defendants to receive a fair trial before an impartial jury, properly directed by the trial judge. By unanimous decision, the Privy Council (on appeal from the Appeal Court of the High Court of Justiciary of Scotland) affirmed the decision of the court below that it was. The leading judgment was delivered by Lord Hope of Craighead, who said this[46]:

> "The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as

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[44][2003] 1 AC 641
[45] [2013] UKPC 8
[46] [2003] 1 AC 641, 673-674

may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict.

The judges in the court below relied on their own experience, both as counsel and as judges, of the way in which juries behave and of the way in which criminal trials are conducted. Mr O'Grady[47] submitted that there was no basis upon which one could assess the likely effect of any directions by the trial judge. He said that this was something that was incapable of being proved. But the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence.

The Scottish judges are not alone in proceeding upon this assumption. In the Supreme Court of Canada, in **R v Corbett** [1988] 1 SCR 670, 692, Dickson CJ said that jury directions are often long and difficult but that the experience of trial judges is that juries do perform their duty according to law. In **R v Vermette** (1988) 50 DLR (4th) 385, 392 La Forest J, under reference to the **Corbett** case, said that dicta in that case underlined the confidence that may be had in the ability of a jury to disabuse itself of information that it is not entitled to consider. In the High Court of Australia, in **R v Glennon** (1992) 173 CLR 592, 603 Mason CJ and Toohey J said that the law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence and that to conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge. In the Irish High Court, in **Z v Director of Public Prosecutions** [1994] 2 IR 476, 496 Hamilton P, drawing upon his experience as counsel and as a judge, said that he shared in the confidence that his legal system has in juries to act with responsibility in accordance

[47]Leading counsel for one of the defendants

> with the terms of their oath, to follow the directions given by the trial judge and a true verdict give in accordance with the evidence. I consider that the judges in the court below were entitled to draw upon their experience, and I see no reason in the light of my own experience to disagree with their assessment."

[46] In **Bonnett Taylor v R**, a decision of the Privy Council on appeal from Jamaica, a juror was discharged by the trial judge, following the late disclosure to the court of her previous acquaintance with the defendant. In his directions to the jury, the trial judge told them this:

> "Decide this case on the evidence and only on the evidence. Do not be influenced by anything that you might have been told by anyone, whether by some fellow member of the jury that sat or are sitting with you about some prior knowledge or feeling or view. That is unimportant, and if you act upon that justice will have miscarried because that is not evidence.
>
> I hope that I am making myself absolutely clear that it is the evidence and only the evidence in this case that you have heard that you are entitled to act upon, and determine. Having looked at the evidence, examined it, weighed it, determine what the facts are and ultimately what your verdict is, after applying the law that I will give you to the facts that you find proved."

[47] One of the issues before the Board was whether these directions were a sufficient safeguard against any prejudice to the defendant arising from the possibility that the juror might have shared information with her fellow jurors before she was

discharged. Covering much the same ground as he did in **Montgomery v HM Advocate and others**, Lord Hope reiterated[48] that "[t]he assumption must be that the jury understood and followed the direction that they were given". He went on to conclude that –

> "The direction which the judge gave in this case was clear, understandable and to the point. The Board is satisfied that it was sufficient to deal with any risk that the juror who was excused might have said something that the jury ought not to have been told."

[48] It is clear from **R v Winston Blackwood**, and the other decisions to the same effect to which Lord Gifford referred us[49], that the line of questioning which prosecuting counsel spent so much time attempting to develop in this case was impermissible. The judge was therefore entirely correct to have taken the view that any evidence from Superintendent Phipps as to whether, having spoken to others, he had any suspect in mind, would have been unvarnished hearsay and entirely inadmissible. In all the circumstances, prosecuting counsel's persistence in these questions, flying directly in the face of the judge's clear and increasingly strident intimations to her to desist, was completely improper.

[49] No less so was prosecuting counsel's sustained attempt to establish that there was something sinister about the fact that the applicant chose to have an attorney with

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[48]At para. 25
[49]See paras [20]-[21] above

him when he went to the police station. It is true that, at this point, the applicant had not yet been charged with anything; and that, strictly speaking, therefore, his constitutional right to defend himself by a legal representative of his own choice[50] had not yet been triggered. However, as the judge told prosecuting counsel, the applicant was fully entitled to choose whomever he wished to accompany him to the police station. So it seems to us that, just as in **Christopher Thomas v R (No 1)**, prosecuting counsel's ill-conceived challenge to the applicant surpassed the latitude permitted to counsel in cross-examination. And further, that by deliberately flouting the judge's directions to desist, prosecuting counsel behaved as no minister of justice ought to have.

[50] The question is therefore whether, in all the circumstances, the applicant was denied the substance of a fair trial. In our view, he was not. It seems to us that what clearly distinguishes this case from cases like **Johnson (Gregory) v R, Christopher Thomas v R (No 1)** and **Randall (Barry) v R,** is the active role the judge played in forestalling and mitigating any potential prejudice to the applicant.

[51] Thus, when prosecuting counsel renewed her attempt to elicit hearsay evidence from Superintendent Phipps in the presence of the jury, after he had already spoken strongly to her in their absence, the judge's intervention was swift and firm[51]. Prosecuting counsel was plainly told to desist, and that any evidence relating to a "Miss

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[50]Constitution of Jamaica, section 16(6)(c)
[51]See para. [17] above

Grandison", or others unknown, was irrelevant and inadmissible. It is true that the judge did not, as perhaps he might have done, return to the issue in his summing-up with a warning to the jury to put those exchanges out of their mind altogether. But, in our view, that was entirely a matter for the judge's discretion, to be exercised in the light of his own experience in overseeing the trial and his sense of what would best keep the jurors' minds focussed on their duty. In this regard, the judge could well have considered that any further reference to this aspect of Superintendent Phipps' examination-in-chief was more likely to remind the jury of the inadmissible evidence than to assist them.

[52] In relation to the cross-examination of the applicant, the judge's direction to the jury was, as has been seen[52], unequivocal. It may be helpful to reproduce a part of it here:

> "... you can't use the fact that he wanted a lawyer, you cannot draw any inference that the reason why he wanted a lawyer was because he knew he was in difficulty, you can't do that; that's illegitimate inference. There is nothing which says because the announcement was made, for example 12 o'clock Monday, the man must be running out of his house by five minutes past twelve. So, you can't use any of that to draw any adverse conclusion as far as Mr. Thomas is concerned."

[53] So it seems to us that in this case, unlike in either **Johnson (Gregory) v R** or **Randall (Barry) v R**, it cannot fairly be said of the judge that he failed to guard

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[52]At para. [27] above

against conduct that might improperly influence jurors in the performance of their duties. In our view, the judge took all such steps as were open to him in the circumstances to safeguard the applicant's right to a fair trial. Nor do we find it possible to say that prosecuting counsel's inexplicable behaviour in this case, egregious as it was, amounted to such a prejudicial and irremediable departure from good practice as to oblige us to declare that the applicant was denied the substance of a fair trial.

[54] In this regard, we bear in mind, first, the judge's plainly disapproving interventions during prosecuting counsel's examination-in-chief of Superintendent Phipps[53] and cross-examination of the applicant[54]; and, second, his clear and unequivocal directions to the jury as to how they should approach the latter[55]. In the light of both these factors, particularly the second, we think it is fair to conclude that prosecuting counsel's conduct would not have diverted the jury in any way from their duty to return a true verdict in accordance with the evidence. The assumption must be, as it seems to us, that the jury heard, listened to and gave effect to what the judge had to say.

The good character issue

[55] When he was cross-examined, Superintendent Phipps confirmed that the applicant had no previous convictions. He also stated that, on 25 February 2007, the applicant had come voluntarily to the police station, accompanied by his attorney-at-

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[53]See paras [16]-[17] above
[54]See paras [23]-[24] above
[55]See paras [27]-[28] above

law. In his evidence-in-chief, the applicant testified that he had attended high school (Jamaica College) for five years and had good success in the Caribbean Examination Council (CXC) examinations, obtaining passes in five subjects, four at grade one and one at grade two. Although he was not allowed to graduate because of a problem with outstanding fees, he was later able to collect his certificates. He later obtained another CXC pass (also at grade one) and had plans to further his education when he could afford to do so. At the time of his arrest, he was gainfully employed.

[56] After reminding the jury of this evidence given by the applicant, the judge explained its impact to them in the following terms[56]:

> "... all of those really design [sic] to say, this man, Mr. Thomas, is not any gunman ... this is a man who is on a steady path, academic progress from basic school right through. So, people who have that kind of background and suppen [sic], they don't walk up and down shooting people he is saying to you, he is a man of good character, because when he said that he does not have any previous conviction, what he is really saying, you know, I am an honest, upstanding law abiding citizen of the land and so, people of good character enjoy, correct that is to say that they are more likely to speak the truth rather than tell a lie, because they are people of good character, you don't call a liar a good character, so that is what he is saying to you.
>
> He is also saying to you, that, people of good character don't commit crime, don't have any propensity for criminal activity, so, you take in good character into account, not because he has a duty to prove anything, you know, but it is part of the assessment process, and you ask yourselves, 'boy, but Mr. Thomas is a man who go to school, go to JC and study book and if it leaves you in a state of doubt,

[56] Transcript, volume 2, pages 698-699

> reasonable doubt as to whether he was doing these things that have been attributed to him as Mr. Gallimore and Mr. Smith, that is, have heard it, is not guilty. If you believe his story, not guilty. You can only convict if you reject his evidence 'contract' come back to the prosecution's case, examine it closely, bearing in mind all the warnings I have given you about identification, SUPTS [sic] witness, discrepancy, inconsistency and omission, all of these things, and it is only when you conduct that kind of assessment and you say to yourselves, 'Well, yes, I am satisfy [sic] so that I feel sure that Mr. Thomas was indeed the man doing all these things attributed to him.' Then and only then, can you say he is guilty. Because the presumption of innocence applies from the beginning to the end, until you, by your verdict, say he is guilty."

[57] Lord Gifford submitted that the judge's "remarks" set out above were defective in that, rather than directing the jury as to the effect in law of the applicant's good character, the judge merely told them what the applicant "was saying". In other words, the judge's remarks did not have the force of a direction carrying the authority of the court. Mr Morris' answer to this was that while the judge's good character direction "may not have been fully in keeping with the authorities", it was nevertheless sufficient in the circumstances to convey the meaning and spirit of the standard good character direction to the jury.

[58] As has been seen, the applicant gave evidence in his defence. It is also clear that, as the judge accepted, he put his good character in issue as part of his defence. In these circumstances, there is no question that he was entitled to a direction from the judge as to the relevance of his good character to (i) his credibility; and (ii) the likelihood of his having committed the offence for which he was charged (see, for

example, **Teeluck and John v The State**[57], **Michael Reid v R**[58]; and **Nigel Hunter et al v R**[59]). As Lord Carswell explained in **Teeluck and John v The State**[60],the standard good character direction contains two limbs –

> "... the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged."

[59] In support of his submission that the judge's good character directions in this case were adequate, Mr Morris referred us to the decision of this court in **Ronald Medley and Rohan Meikle v R**[61]. The trial judge purported to give a full good character direction in that case and the issue on appeal, as Brooks JA explained[62], was "whether the words and the phraseology that he used, did communicate the sense of what the good character direction was intended to convey". After pointing out that a summation to the jury is not required to conform to any particular format or form of words, Brooks JA stated[63] that "[i]t should be couched in language that communicates to the jury the nature of the issues and the approach to resolving those issues". In that case, although Brooks JA considered that the trial judge's directions as to both

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[57](2005) 66 WIR 319, para. [33](iii)
[58] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 113/2007, judgment delivered 3 April 2009
[59] [2015] EWCA Crim 631
[60]At para. [33](iii)
[61] [2013] JMCA Crim 22
[62]At para. [38]
[63]At para. [39]

credibility and propensity were somewhat deficient, he nevertheless concluded[64] that the language used by the trial judge had been sufficient to convey to the jury "the import of the direction concerning good character". And that, even if the direction did fall below the required standard, there had been no miscarriage of justice.

[60] But in the course of his judgment, Brooks JA drew attention to an important consideration[65], which is that "where a good character direction is required, it is not to be diluted when it is given". To make this point, he cited the decision of the Court of Appeal of England and Wales in **Regina v Moustakim**[66], in which, in relation to a defendant of previously good character, the trial judge directed the jury as follows:

> "Well, a defendant of good character is entitled to say that I am as worthy of belief as anyone, so in the first place it goes to the question of whether or not you believe [the defendant's] account. Secondly, she is entitled to have it argued on her behalf that she is perhaps less likely than a defendant of bad character to have committed this or any criminal offence. Good character is not a defence to a criminal charge. We all start life with a good character, some of us lose it on our way through, and it will be for you to decide what weight is proper to put upon this lady's good character when you come to consider the evidence which is your principal focus."

[61] In the judgment of the Court of Appeal, these directions were held to be inadequate for the following reasons:

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[64]At para. [45]
[65]At para. [40]
[66][2008] EWCA Crim 3096, para. 10

> "1. There is no explicit positive direction that the jury should take the appellant's good character into account in her favour.
>
> 2. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
>
> 3. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word 'perhaps' is a significant dilution of the required direction.
>
> 4. In the judge's direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself."

[62] **Ronald Medley and Rohan Meikle v R** and **Regina v Moustakim** therefore make it clear that, where a full good character direction is called for, the trial judge must make an explicit, positive statement to the jury, using whatever language he or she considers appropriate, that the defendant's good character (i) supports his or her credibility; and (ii) renders it less likely than otherwise that he or she would have committed the offence in question.

[63] We think that Mr Morris' concession that the judge's directions in this case fell somewhat short of this requirement was well made. It seems to us that the judge's repeated emphasis on the applicant's good character as something which "he is saying to you", and "really saying", was plainly apt to give the impression that good character

was part of the applicant's argument, rather than an objective factor which supported his innocence. As Lord Steyn observed in his oft-cited speech in **R v Aziz and other appeals**[67], "[f]airness requires that the judge should direct the jury about good character because it is evidence of probative significance". So, as the authorities make clear, the judge was required to explain to the jury in affirmative terms, the significance which the applicant's good character had for his case, not just as a matter of argument, but as a matter of law.

[64] The question which next arises is whether the omission of the judge to give an adequate good character direction amounted to a miscarriage of justice sufficient to lead to the conclusion that the applicant's conviction was unsafe. In this regard, Lord Gifford realistically accepted that the absence of a good character direction is not necessarily fatal to the fairness of a trial or to the safety of a conviction. For, as Lord Bingham observed in **Jagdeo Singh v The State**[68], "[m]uch may turn on the nature of and issues in a case, and on the other available evidence".

[65] Lord Gifford also referred us to the decision of the Privy Council on appeal from this court in **Mark France and Rupert Vassell v The Queen**[69]. In that case, Lord Kerr, after referring to the earlier decision of the Board in **Nigel Brown v State of Trinidad and Tobago**[70], said that:

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[67][1995] 3 All ER 149, 156
[68] (2005) 68 WIR 424, para. [25]
[69][2012] UKPC 28, para. 46
[70] [2012] UKPC 2

> "The Board ... 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."

[66] However, Lord Gifford submitted that this was not a case in which the evidence against the applicant could be said to have been overwhelming. He pointed out that the judge had taken the care to warn the jury[71] of the need to approach the evidence of Mr Gallimore with "great caution", and to remind them[72] that there was a "fairly significant discrepancy between what the two witnesses [Messrs Gallimore and Smith] say". Added to that, Lord Gifford submitted[73], was the fact that "a firm and full direction on good character was particularly important in the light of the prejudice which prosecuting counsel sought to create against the Applicant, and the unfair attack on his credibility".

[67] The principal issue at trial in this case was whether the applicant was correctly identified by Messrs Gallimore and Smith as the person who shot and killed the

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[71]Transcript, volume 2, page 619
[72]Transcript, volume 2, pages 664-665
[73] Applicant's Written Submissions, para. 22

deceased. Indeed, as has been seen[74], the judge described the issue of identification as being "at the heart of this case"[75]. There has been no complaint on appeal about the judge's directions to the jury on the issue.

[68] But the question of credibility was also a live issue in the case. Therefore, in discussing the approach that they should take to credibility generally, the judge said this to the jury[76]:

> "In coming to your decision concerning the credibility, reliability of witnesses, you look at a number of things; what the witness has actually said, you may even look at what the witness may have said when you might have a witness to have that kind of information, the way in which the witness said the evidence, how the witness responded to questions, and the manner of the witness', what lawyers called [sic], demeanor [sic] in the witness box, and what impression the witness made on you; and in our system of trials we place a great deal of emphasis on witnesses turning up in the flesh to give the evidence so that you can see them, observe them. That is why you are not just presented with a document, because documents don't have tone, infliction [sic], whether the voice is raised, whether the voice is lowered, whether the witness is muttering, whether the witness were shuffling, documents don't indicate those kind of things. That is the part of the body of information that you take into account in determining whether the witness has convince [sic] you of the story; is this witness truthful? Is this witness reliable? You also look at the internal logics of the witness' account to see whether it makes sense. You are entitled to look at the witness' evidence in the context of the other evidence in the case. So, all of these things you can do and indeed you are required to do. I should tell you that your responsibility is to look at all the evidence given, even if

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[74]See para. [9] above
[75]Transcript, volume 2, page 614
[76]Transcript, volume 2, pages 594-595

> I do not mention it, because you may attach significance to some bit of evidence that I have not mention [sic]. If that is the case, then you are required to take it into account in coming to your decision."

[69] Then, just before reminding them of the salient features of the applicant's evidence, the judge told the jury that[77] –

> "You must take it serious. Don't discount it and say, cho man, you take it seriously. You don't discount it because it comes from the person charged. But, remember he has no burden to prove."

[70] The applicant makes no complaint about any part of these directions on credibility. But we accept that they would obviously have been enhanced by a good character direction on credibility in appropriate terms. However, it seems to us that, given what the judge did tell the jury, they could have been in no doubt at the end of the day that, even if they rejected the applicant's evidence, they should not convict unless they were sure of his guilt. As the judge concluded on the point[78], "[t]hen and only then, can you say he is guilty. Because the presumption of innocence applies from the beginning to the end, until you, by your verdict, say he is guilty".

[71] By their verdict, the jury, acting pursuant to fair and accurate directions on the law, accepted Messrs Gallimore and Smith as witnesses of truth, on evidence which, as it seems to us, clearly revealed an ample basis for making a proper identification of the

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[77]Transcript, volume 2, page 697
[78]Transcript, volume 2, page 699

applicant. In these circumstances, we would therefore conclude that, notwithstanding the deficiencies in the good character directions, there was no miscarriage of justice in this case.

The judge's withdrawal of the question of defence of another from the jury's consideration

[72] This issue arises out of the evidence[79] that, before he was himself shot by the applicant, the deceased had been giving chase to a man ('Joel') and discharged a shot in his direction, whereupon Joel fell to the ground. The evidence was that it was while the deceased was walking towards Joel that the applicant ran up behind him (the deceased) and shot him in his back, continuing to do so even after the deceased had fallen to the ground.

[73] This is how the judge dealt with the matter in the summing-up[80]:

> "The evidence is that, Mr. Daley comes out of his car, goes through the main entrance with Mr. Smith behind him, going in the direction of Jowell [sic] and Jack. Jowell [sic] runs off. There is no evidence that Jowell [sic] attacked anyone, no evidence that Jowell [sic] committed any crime. No police officer, including Mr. Phipps, has said to you, we were investigating Jowell [sic] for whatever it is, so as far as the evidence is concerned, Jowell [sic] is upstanding law-abiding citizen of the land.
>
> The evidence is, Mr. Daley had his firearm, but at the point in time when Jowell [sic] was shot, there is no evidence that Jowell [sic] had committed any crime, attacking anyone. So on the face of it, there was no lawful justification for the police officer to shoot Jowell [sic].

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[79]See para. [4] above
[80]Transcript, volume 2, pages 709-711

> HIS LORDSHIP: Mr. Smith is saying, that he came around behind Mr. Daley, when the shots were firing by Mr. Daley. Now, the evidence is that after Joel was shot and fell, Mr. Daley moved towards him with his gun. What the law indicates, is that persons can take steps to prevent the continuation of an attack, but the law draws a clear line between prevention or interruption of an attack and revenge. So, if you were to say, interpret the evidence and you say, yes, Mr. Thomas was there and that the first shot, when he shot Mr. Daley, he was preventing this continuation of the attack of Mr. Daley, no offence would be committed there. When Mr. Daley falls to the ground, there would be no basis now for the continuation of the shooting of Mr. Daley, because if Mr. Daley has fallen to the ground, what danger is he posing, and if he continues to shoot, that is Mr. Thomas, in those circumstances, Mr. Daley fallen to the ground, there is no lawful justification, or [sic] the continuing of the shooting at that point, none whatsoever.
>
> And so the question now of the joint enterprise will still be in tact [sic], because Mr. Daley would have been on the ground, no longer in a position to continue on the face of it, was an unlawful attack of Joel, and so when 'Harry Dog' came up, coming back with 'Jaba', that is if you go with Mr. Gallimore's version. If you go with Mr. Smith's version, he is saying, that Mr. Thomas, after Mr. Daley fell, continued to fire. If that is so, and you are sure about that, the question of defence of another Has been eliminated from the case. So, that is how you can manage that aspect of it, should you ask yourself what was happening between Joel and Mr. Daley."

[74] This is the background to ground of appeal 4, which reads as follows:

> "The learned trial judge erred in law in his directions to the jury on the considerations which arose from the undoubted fact that on the evidence before the jury the deceased police officer Dave Daley had shot a person named Joel without lawful justification just before the Applicant was alleged to have shot Dave Daley. The learned judge correctly directed the jury that the first shot allegedly fired by the Applicant would not constitute an offence as he would be acting in

> defence of another. But the learned judge wrongly withdrew the issue of lawful shooting from the jury. His reasoning was that on the evidence of Leighton Gallimore there was continued shooting when Daley was on the ground, by 'Harry Dog' and later by 'Juba' and the Applicant acting in concert, so that the principle of joint enterprise would apply; and that on the evidence of Haroon Smith the Applicant himself continued to fire at Daley when he was on the ground. The learned [sic] was wrong in suggesting that the question of defence of another 'has been eliminated from the case', because:
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> (1) There was no medical evidence called, so that the jury had no way to knowing how many shots entered the body of the deceased, how many of those shots were capable of causing death, and which shot or shots cause [sic] his death.
>
> (2) Thus it was possible that the first (lawful) shot killed the deceased, in which case subsequent (unlawful) shots would not have caused his death.
>
> (3) The learned judge ought to have taken account of this possibility by withdrawing the case from the jury or by directing the jury upon it."

[75] Lord Gifford submitted that the judge erred in suggesting that the question of defence of another had been "eliminated from the case". He contended that, given that no medical evidence had been adduced at the trial, the jury had no basis on which to determine accurately how many shots entered the body of the deceased, how many of those shots were capable of causing death and which of them in fact caused the deceased's death.

[76] By way of contrast, Lord Gifford referred to **R v Clegg**[81], in which the appellant was at the material time a British soldier stationed in Northern Ireland. While the appellant and three colleagues were on patrol at night, a car accelerated away from a checkpoint in the centre of the road with its headlights full on towards them. Someone at the checkpoint shouted to stop it and the appellant and his colleagues opened fire at the approaching car. The driver and a rear-seat passenger of the car were killed and the latter was later found to have been hit in the back by a bullet fired from the appellant's rifle. At his trial for murder before a judge alone, his evidence was that he thought that the life of a colleague on the other side of the road was in danger and that he fired three shots at the windscreen and a fourth into the side of the car as it was passing. However, the scientific evidence showed, and the trial judge found as a fact, that the fourth shot, which was the one that killed the deceased, was fired after the car had passed and was already some 50 feet down the road. In these circumstances, the trial judge accepted that the first three shots had been fired in self-defence or in defence of a colleague, but found that the fourth shot could not have been so fired, since, once the car had passed, the soldiers were no longer in any danger.

[77] The appellant appealed unsuccessfully to the Court of Appeal of Northern Ireland. His subsequent appeal to the House of Lords had to do, in part, with the issue of whether a soldier or police officer who, in the course of his duty, killed a person by firing a shot which constituted the use of excessive and unreasonable force in self-

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[81][1995] 1 All ER 334

defence was guilty of murder or manslaughter. The House of Lords held, applying the well-known decision of the Privy Council (on appeal from this court) in **Palmer v R**[82] that a killing in these circumstances amounted to murder and not manslaughter. As Lord Lloyd observed[83] -

> "... so far as self-defence is concerned, it is all or nothing. The defence either succeeds or it fails. If it succeeds, the defendant is acquitted. If it fails, he is guilty of murder."

[78] But Lord Gifford's reference to **R v Clegg**, as we understood him, was by way of analogy to its facts, in particular to demonstrate the part played by medical or scientific evidence in establishing which of the several shots fired by the appellant in that case actually caused the death of the victim. In this case, on the other hand, no medical evidence was proffered to enable the jury to make a definitive determination of the factual position. So it was possible that the first shot, which, as the judge told the jury, was the one fired in lawful defence of another, had killed the deceased, in which case the subsequent unlawful shots would not have caused death. It was therefore submitted that the judge ought to have taken account of this possibility by either withdrawing the case from the jury or by directing them on it.

[79] Mr Morris submitted that the judge had been wise not to leave the question of defence of another to the jury, given the evidence of Messrs Gallimore and Smith, both

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[82][1971] 1 All ER 1077
[83]At page 341

of whom had indicated that the applicant and the other man who was with him had continued to fire several shots into the body of the deceased, even while he lay wounded on the ground, murmuring and crying for help. It was further submitted that, even if the pathologist had given evidence at the trial, he or she would only have been able to speak to the cause of death and the injuries inflicted on the body of the deceased. However, the pathologist could not have spoken to the order in which each injury was inflicted, especially given the short space of time in which the events occurred.

[80] In our view, the way in which the judge dealt with this issue cannot be faulted. There was, as the applicant correctly pointed out, no medical evidence called in this case. So there was no possibility of tying down the issue of causation with the precision which such evidence was able to achieve in **R v Clegg**. The judge was therefore obliged to deal with the matter on the basis of the evidence, rather than of theoretical possibilities. It accordingly seems to us that any invitation to the jury to consider the possibility that the fatal injury was inflicted on the deceased by the first 'lawful' shot fired by the applicant, to the exclusion of any of the many others that the witnesses said he fired that evening, would have been an invitation to them to indulge in pure speculation.

[81] The fact is that, as the judge pointed out, once the deceased fell to the ground after that first shot was fired, the danger which the applicant would have sought to avert would have dissipated. The evidence, which the jury must be taken to have

accepted, suggests that when the second round of shooting started the deceased was still alive. During that second round, the applicant fired about 10 shots at the deceased, some of them into his back. On this evidence, we consider that the judge was fully entitled to direct the jury that, the deceased having fallen to the ground after the applicant fired the first shot, "there [was] no lawful justification, [for] the continuing of the shooting at that point, none whatsoever".

[82] We would observe parenthetically that even if, as the judge told the jury, the applicant fired the first shot in lawful defence of another, the evidence revealed a clear basis upon which the jury could have concluded that the applicant, by continuing to fire shots into the deceased's inert body, was guilty of using unreasonable or excessive force. In these circumstances, as **R v Clegg** demonstrates, the applicant would in any event have been guilty of murder.

[83] We therefore conclude that the judge was right to withdraw the question of defence of another from the jury's consideration.

Sentence

[84] As has been seen, the judge sentenced the applicant to a term of 40 years' imprisonment, with a stipulation that he should serve a minimum of 20 years before being eligible for parole. Lord Gifford submitted that this sentence was manifestly excessive because (i) the applicant was a man of good character who was well regarded in his community; (ii) having witnessed the deceased shoot and kill Joel immediately before he (the applicant) fired at the deceased, the applicant would have

been "affected by it"; and (iii) as at the date of sentencing on 20 September 2013, the applicant had been in custody since 17 February 2007, that is, for more than six and a half years.

[85] The applicant was born on 29 July 1986. At the time of the offence, he was therefore just a few months short of 21 years of age. He had no previous convictions. In considering the appropriate sentence to impose on the applicant, the judge had the benefit of a social enquiry report and a psychiatric report. It appears that the former was generally favourable to the applicant, while the latter made reference to his having some psychiatric issues. Accordingly, despite his conclusion that the applicant "was **not** operating under an abnormality of his mind at the time of the offence" (emphasis added), the psychiatrist recommended that the applicant "should continue to receive regular psychiatric assessment and appropriate treatment" (for what was described as a "Psychotic Disorder").

[86] In extensive sentencing remarks, the judge reviewed this material in detail, before concluding, in part as a result of the urgings of Lord Gifford, that life imprisonment was not an appropriate sentence in this case. On this basis, the judge went on to consider[84] what would be a suitable term of years to which to sentence the applicant:

> "You are now twenty six years old, no previous convictions and you have been in custody approximately six years, six and a half to

[84]Transcript, volume 2, pages 767-770

seven years. However, you have been convicted of the offence of Murder which, in the scheme of things and the criminal calendar is the most serious offence against a person that can be committed. The Court of Appeal has upheld sentences of thirty years in the context of a guilty plea, where the person had no previous conviction and it was an unprovoked killing.

I mention that to say, Mr. Thomas, that in sentencing, whenever a defendant pleads guilty, it is an important factor to be taken into account and, this is a mandatory sentence, results in a reduction of sentence that would normally be imposed if the person has gone through a trial. That is so for a number of reasons.

One, the guilty plea indicates that the person has accepted responsibility. Two, it prevents the victims or the witnesses having to relive and recount the incident. When you exercise your right to a trial and the jury have found you guilty, then clearly those considerations that would arise under guilty plea can't arise in that context of a full scale trial. So nothing is wrong with exercising your right for a trial. But as in everything in life, when you make particular decisions there are consequences that follow.

So, in the absence of a guilty plea in this case, then those considerations that is, a reduction in the sentence arising from a guilty plea simply cannot arise. So if it is going to be a reduction it has to be found in somewhere else or in some other bases. So now, the question is, are those other bases or circumstances present in this case?

So, we have your age; we have time spent in custody; we have a Social Enquiry Report and Psychiatric Report. So that is really the material and, of course, the circumstances of the offence. The other thing, too, is that it is my view that sentencing in murder cases should reflect that it is indeed a very serious offence. And so there should be an appreciable distance between sentences for Murder and sentences, for example, for a very bad case of Wounding with Intent. Very bad cases of Wounding with Intent attract sentences of eighteen years or so. Very, very bad cases manslaughter in the same range. So, to my way of thinking, Murder now, should be significantly removed from that range of sentences and as I indicated to you, the Court of Appeal has approved thirty-years sentences on a guilty plea in a knife murder from Trelawny and the gentleman was having a long standing dispute with a neighbour and one morning he decided to put an end to it. He just went over there,

> held the victim by the neck, slit her throat and went back over to his house. That's what he did.
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> It would seem to me, Mr. Thomas, that forty years is an appropriate sentence in this case and the question then becomes, what should be the minimum period which you should serve before becoming eligible for parole?
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> Now, the evidence revealed that after the police officer fell to the ground, he was still being shot. So it may very well be that the jury concluded that even if the police officer acted unlawfully when he shot Joel, when he went down, there was really no need to continue shooting the police officer. And if that is their reason in which, I suspect that it was, I can't say that I disagree with them. So, in the circumstances, here is the sentence of the Court: That you are to serve forty years maximum and twenty years minimum before you become eligible to be considered for parole. That's it, sir."

[87] Although the judge referred more than once to previous decisions of this court in which sentences of 30 years for murder have been upheld, "in the context of a guilty plea", he did not identify any of them by name. We have therefore not been able to make a meaningful comparison of the circumstances of this case with the cases mentioned by the judge. However, **Glenroy Mitchell v R**[85] is one recent example of a sentence imposed after a guilty plea for murder. In that case, this court dismissed an appeal against the sentence of 25 years' imprisonment for a murder committed during the course of a home invasion with a view to committing the offence of robbery.

[88] As far as sentences for murder imposed after a trial are concerned, a brief consideration of a few recent decisions of this court may be helpful. In **Andre Minott v**

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[85][2016] JMCA Crim 27

R[86], the applicant was convicted for murder as a result of his, apparently unprovoked, shooting of his victim to death as he exited a bar in the community. The applicant was sentenced to 20 years' imprisonment, with the stipulation that he should not be eligible for parole until he served 10 years. This court refused his application for leave to appeal against conviction and sentence.

[89] In **Franklyn Williams v R**[87], the applicant was convicted for the murder of his brother in the context of what appeared to have been a purely domestic dispute. He was sentenced to 18 years' imprisonment and the trial judge ordered that he should serve at least 10 years before becoming eligible for parole. The applicant's application for leave to appeal against sentence failed, the court taking the view that the sentence imposed by the trial judge was entirely in keeping within the relevant statutory provisions[88] and The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines').

[90] In **Jason Palmer v R**[89], the applicant was convicted for the gruesome murder of an elderly pensioner in a rural setting. He was sentenced to life imprisonment, with a stipulation that he should serve at least 30 years before being eligible for parole. On appeal, the applicant's very experienced counsel readily conceded that the 30 year period before parole fixed by the trial judge could not be said to be in any way out of

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[86] [2016] JMCA Crim 7
[87][2018] JMCA Crim 19
[88]Offences Against the Person Act, section 3(1)(b)
[89][2018] JMCA Crim 6

range. However, the application for leave to appeal was granted and the appeal succeeded on the ground that the trial judge had failed to give the applicant credit for the five years spent by him in custody pending trial. In the result, the court ordered that the applicant should serve at least 25 years before being eligible for parole.

[91] In **Anthony Russell v R**[90], the applicant was convicted for what this court described as the brazen and brutal murder of two persons to whom he was related through his children's mother. When one of the victims fell after being shot by the applicant, he proceeded to shoot her again at least four more times. He was sentenced to imprisonment for life, with the stipulation that he should not be eligible for parole until he had served a minimum of 25 years on each count. On his application for leave to appeal against sentence, this court considered[91] that this sentence "may well be viewed as more than reasonable". The application was therefore refused in so far as the overall period to be served before parole was concerned, although the court did make a deduction for the time spent by the applicant in custody pending the trial. In the result, the court substituted a sentence of life imprisonment with the stipulation that the applicant should serve 22 years before becoming eligible for parole.

[92] In **David Russell v R**[92], the appellant was convicted for the murder of two men who had been shot and killed as a result of what the prosecution characterised as "a drug deal gone sour". The bodies of the two men were subsequently found bound and

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[90] [2018] JMCA Crim 9
[91]At para. [107]
[92] [2013] JMCA Crim 42

gagged in the back of a car in a cane field. The trial judge sentenced the appellant to 30 years' imprisonment on count one; and life imprisonment, with the stipulation that he should serve 40 years before becoming eligible for parole, on count two. His appeal against conviction was dismissed, and the court affirmed the sentences imposed by the trial judge.

[93] This limited sample of recent sentences imposed after trial for murder seems to us to suggest a usual range of 20 to 40 years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range. The sentence imposed by the judge in this case was therefore right at the top of the range.

[95] As this court held in **R v Alpha Green**[93], and has reiterated many times since, a sentence which is the subject of an appeal will not normally be disturbed unless that sentence appears to have been arrived at as a result of a failure to apply the right principles. In particular, this court will not disturb a sentence merely on the ground that members of the court might themselves have imposed a different sentence in similar circumstances.

[96] In this case, we have been concerned by two aspects of the sentencing exercise carried out by the judge. First, it is not all clear from his sentencing remarks how the judge, despite mentioning the applicant's age and the fact that he had no previous

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[93] (1969) 11 JLR 283

convictions, struck the required balance between those and other mitigating factors and the plainly aggravating factor of the applicant having continued to shoot the deceased when there was "really no need" to do so. And second, although the judge did refer to the time spent by the applicant in custody pending trial as a relevant consideration, it is not clear whether, and, if so, to what extent, this was reflected in the sentence which was finally imposed.

[94] As regards the first of these two concerns, it is a matter of regret that the judge did not set out in explicit terms the process by which he arrived at the sentence which he ultimately imposed. Despite the principle of appellate restraint in relation to sentences imposed by the trial court, it seems to us that the mitigating factors of the appellant's age; his previous good character; and the good report in which he was held by his community, all outweigh the aggravating factor to which we have already referred. In these circumstances, we consider that a reduction in the appellant's sentence from 40 to 35 years' imprisonment, which also falls well within the usual range of sentences after trial for murder established by the authorities, should be made to reflect that disparity.

[95] With respect to the time spent by the applicant on remand pending trial, the applicant had been in custody for a total of six and a half years by the time he came to be sentenced on 20 September 2013. There is now no dispute that, in sentencing an

offender, full credit should generally be given for time spent in custody pending trial[94]. On this basis, we consider that the sentence of 35 years must be reduced, by a further six and a half years, to 28.5 years' imprisonment. However, we see no reason to disturb the judge's order that the applicant should serve a minimum of 20 years in prison before becoming eligible for parole.

Conclusion and disposal

[96] For the reasons which we have attempted to state in this judgment, we have come to the conclusion that the applicant has not made good his complaints that, first, his right to fair trial was fatally compromised by persistently improper conduct on the part of prosecuting counsel at his trial; and second, that the judge erred in withdrawing the question of defence of another from the jury's consideration. While there may have been some deficiencies in the judge's good character directions, we are satisfied that they were not such as to bring about a miscarriage of justice in this case. However, in relation to sentence, we have come to the conclusion that the sentence of 40 years' imprisonment imposed by the judge was manifestly excessive in the circumstances and should therefore be reduced to one of 28.5 years' imprisonment at hard labour, subject to a stipulation that the applicant must serve at least 20 years in prison before becoming eligible for parole.

[97] In the result, we make the following orders:

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[94]Sentencing Guidelines, para. 11.1; see also **Meisha Clement v R**[2016] JMCA Crim 26, paras [34]-[35] and **Richard Brown v R** [2016] JMCA Crim 29

1. The application for leave to appeal against conviction is refused.

2. The application for leave to appeal against sentence is allowed and the hearing of the application is treated as the hearing of the appeal.

3. The appeal against sentence is allowed and the sentence of 40 years' imprisonment, with 20 years to be served before parole, is set aside.

4. In its stead, the court imposes a sentence of 28.5 years' imprisonment and orders that the applicant must serve a period of 20 years before becoming eligible for parole. The sentence should be reckoned as having commenced on 20 September 2013.

An apology

[98] We cannot leave this matter without acknowledging the inordinate delay in producing this judgment. While some of the reasons for such delays are matters of public record, they do not in any way dilute the sincerity of the apology which we now proffer to the applicant and counsel on both sides.