[2025] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 65/2017

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

LINVAL AIRD v R

Mrs Melrose Reid for the appellant

Mrs Kelly-Ann Murdoch for the Crown

18, 19, 20 December 2023 and 25 July 2025

Criminal appeal – Murder – Circumstantial evidence – Whether sufficient evidence for matter to be left to the jury – Whether judge erred in not upholding no case submission

Trial – Unfair Trial – Whether summation biased and unbalanced – Whether trial judge failed to adequately put self-defence before the jury – Whether the judge undermined the defence by descending in the arena and making unfair comments

Trial – Summing up – Whether judge adequately directed the jury on the forensic evidence – Whether judge adequately directed the jury on the circumstantial evidence and causation

Trial – Summing up – Good character direction – Whether good character direction diluted

EDWARDS JA

Introduction and background

[1] On 29 June 2017, the appellant, Mr Linval Aird, who at the relevant time, was a member of the Jamaica Constabulary Force ('JCF'), was convicted of the murder of 17-year-old Shanakay Clarke ('the deceased'), in the Westmoreland Circuit Court, before

Gayle J ('the learned judge'), sitting with a jury. On 18 July 2017, he was sentenced by the learned judge to life imprisonment, without the possibility of parole before serving 20 years' imprisonment.

[2] There were no eyewitnesses to the murder, and the prosecution's case was based entirely on circumstantial evidence. The prosecution's case at trial, was that the circumstantial evidence proved that, on the night of 11 April 2010, on Great George Street, Westmoreland, the appellant was in his car with the deceased, who was his girlfriend, when they had a disagreement and he shot her to death.

[3] The post-mortem report revealed that the deceased had sustained four penetrating gunshot wounds, and that she died from haemorrhagic shock consequent upon gunshot wounds to the chest and abdomen.

[4] It was undisputed that the appellant had fired his service weapon that night. The ballistics evidence revealed that several of the expended bullets, bullet fragments and spent casings recovered from the scene (inside and outside of the car) came from the appellant's assigned firearm. The ballistics evidence, however, also revealed that there were expended bullets, fragments and spent casings recovered from the scene that came from another gun that the prosecution failed to link to the appellant. This second gun, and who had fired it, were not accounted for by the prosecution. The evidence also showed that the appellant's vehicle, in which he and the deceased sat at the material time, had several bullet holes to its exterior. Human blood was also found in the car.

[5] Sometime after the shooting, the appellant gave a written statement to the police. In that statement, he asserted that, at the material time, he and the deceased were sitting in his car when a lone gunman appeared and fired upon the vehicle. He said he returned gunfire to repel the attack, and when the shooting stopped, he discovered that the deceased had been shot. He immediately took her to the Savanna-La-Mar General Public Hospital, where she was later pronounced dead. This account in the statement was consistent with the evidence given by several of the police witnesses of what they said

the appellant had told them on the night of the incident. The appellant did not suffer any injuries in the incident.

[6] On 29 May 2010, whilst inside the Criminal Investigative Branch office ('CIB') of the JCF in Savanna-La-Mar, in the presence of Detective Sergeant ('Det Sgt') Etham Miller, the investigating officer, the appellant pointed out a man to Det Sgt Michael Moore, as the man who had shot up his car on the night of 11 April 2010. This man, who was later identified as Andre Campbell, was then arrested and charged for the murder of the deceased and placed before the Savanna-La-Mar Resident Magistrate's Court (as it was then called). At some point during those proceedings, a *nolle prosequi* was entered against Andre Campbell by the Director of Public Prosecutions, following a ruling that the appellant should be charged for the murder. The appellant was subsequently arrested and charged with the murder of the deceased.

[7] At the appellant's trial, the prosecution led evidence from a witness, Mr Johnson, who said he had been walking along Great George Street at the material time, when he saw a man and a woman who appeared to him to be fighting. He saw the couple re-enter the car and surmised that they had been "playing". Shortly, thereafter, he heard what sounded like gunshots and ran away. He did not see who was firing, and he did not see the faces of the appellant and deceased in order to be able to identify them. Mr Johnson also testified that, immediately after the shooting, a man rode up to him on a bicycle, and that man laughed and said something to him whilst riding past him. He identified this man as someone he knew by the name of "Glasses". This man was not located and questioned by the police. The police did not ascertain whether Andre Campbell was also called "Glasses."

[8] At the end of the prosecution's case, trial counsel made a no case submission on behalf of the appellant, which was unsuccessful. The appellant gave an unsworn statement from the dock in which he denied deliberately shooting the deceased whilst also raising the defence of self-defence in line with what he had said in his statement to the police.

[9] Having been convicted, the appellant filed his appeal against conviction and sentence. On 20 December 2023, we heard the appeal, and having considered the submissions and arguments by counsel on both sides, we made the following orders:

> "1. The appeal is allowed.
> 2. The conviction is quashed.
> 3. The sentence is set aside.
> 4. Judgment and verdict of acquittal is entered."

We promised then to give reasons in writing for making those orders, and we do so now.

Grounds of appeal

[10] At the hearing of the appeal, permission was sought and granted for the appellant to abandon the original grounds of appeal filed, and to rely on the following grounds filed along with the submissions on 29 November 2022:

> "**GROUND 1** – The learned Trial Judge (LTJ) failed to see the **Lurking doubt** in the case, and to realize that the evidence did not meet the threshold of the criminal standard and failed to point out the "lurking doubt" to the jury, resulting in the jury wrongfully convicting the [appellant].
>
> **GROUND 2** – The LTJ erred in not upholding the **No Case Submission**.
>
> **GROUND 3** – The LTJ failed to adequately address the potent issue of **Self Defence** and when he did; he paid lip service and tainted it with his comments which created doubts in the minds of the jury that self defence did not exist.
>
> **GROUND 4** – The LTJ erred in not giving the jury the **causation warning**.
>
> **GROUND 5** – The LTJ failed to show the jury that the **circumstantial evidence** did not fit together so as to establish the guilty [sic] of the [appellant].

> **GROUND 6** – The LTJ misdirected the jury on the **forensic evidence**, by he having not effectively nor legally dealt with the forensic evidence
>
> **GROUND 7** – The LTJ **mismanaged the trial** by allowing the Crown to call four additional [sic] in defiance to the Law on disclosure.
>
> **GROUND 8** – The LTJ **was biased in his summation**, causing the jury to side with him and came to a verdict of guilty.
>
> **GROUND 9** – The Learned Trial Judge (LTJ) **entered into the arena**, resulting in an unfair and biased summation
>
> **GROUND 10** – The LTJ derided the Good Character of the [appellant] instead of giving a good character direction.
>
> **SENTENCING** – The LSJ erred in the principles of sentencing" (Emphasis as in original)

[11] During the course of the appeal hearing, ground seven was abandoned by counsel for the appellant, and the sentencing ground was reformulated with the permission of the court. The reformulated ground was filed by the appellant with further submissions, on 19 December 2023, as follows:

> "Ground 11 – SENTENCE
>
> (1) In the circumstances the sentence of Life imprisonment with 20 years before parole is manifestly excessive…
>
> (2) The Learned Trial Judge (LTJ) failed to give consideration and credit for the Pre-Trial delay of almost seven years before the Appellant's case was heard and determined."

[12] However, in the light of the orders we made quashing the conviction, there is no need to discuss ground 11 with regard to sentencing.

Issues

[13] The grounds of appeal raised the following issues:

1. Whether the "lurking doubt principle" forms part of the law in this jurisdiction; (ground 1);

2. whether there was sufficient evidence before the court for the matter to be left to the jury (ground 2);

3. whether the learned judge failed to adequately and fairly address the issue of self-defence in his directions to the jury, and undermined the appellant's defence by being biased in his summation (grounds 3 and 8);

4. whether the learned judge erred in failing to give a direction on causation (ground 4);

5. whether the learned judge erred in his direction to the jury on the circumstantial evidence (ground 5);

6. whether the learned judge failed to effectively direct the jury on the forensic evidence (ground 6);

7. whether the learned judge descended into the arena, resulting in an unfair and biased summation (ground 9); and

8. whether the learned judge failed to give a good character direction and derided the good character of the appellant (ground 10).

Issue 1-whether the "lurking doubt principle" forms part of the law in this jurisdiction (ground 1)

A. Submissions

[14] Counsel for the appellant, Mrs Melrose Reid, relied on the "lurking doubt" principle set out in the case of **R v Cooper** [1969] 1 All ER 32, which, she said, empowered the

court to quash the conviction in those circumstances. Mrs Reid submitted that there was no evidence in the case which pointed conclusively to who may have killed the deceased. Counsel maintained that, at the end of the prosecution's case only a "lurking doubt" remained, which meant that the evidence fell below the requisite standard to link the appellant to the killing of the deceased and to support a conviction. In that regard, she submitted that there was no evidence - factual, forensic, circumstantial or otherwise - that pointed in the direction of the appellant, which she said, left only speculation that the appellant had committed the crime. The prosecution, she argued, failed to put the "pieces of the puzzle" together for the jury and the learned judge failed to accept that there was "lurking doubt".

[15] Counsel for the Crown, Mrs Murdoch submitted that the case of **R v Cooper**, relied on by the appellant, is distinguishable and that, as established by the case of **Michael Reid v R** [2011] JMCA Crim 28, the principle of "lurking doubt" is not applicable to this jurisdiction, and that whether the verdict should be set aside should depend on the test set out in section 14 of the Judicature (Appellate Jurisdiction) Act ('JAJA').

[16] Nonetheless, counsel submitted that there was no "lurking doubt" in this case, and that sufficient evidence was presented by the prosecution upon which the jurors could have found the appellant guilty beyond a reasonable doubt.

B. Analysis and disposal of issue 1 (ground 1)

[17] The "lurking doubt principle", relied on by counsel Mrs Reid, is not applicable in this jurisdiction, as this court has clearly stated in **Michael Reid v R**, at para. [24]. That test, as applied in **R v Cooper**, is based on section 2 of the English Criminal Appeal Act 1968, which permits the setting aside of a verdict on the ground that it is unsafe or unsatisfactory. As stated by the court in that case, section 2 allows the Court of Appeal of England and Wales to allow an appeal against conviction after asking itself the subjective question of whether there was some "lurking doubt" in the court's mind that raises the question of whether an injustice was done.

[18] Ground 1 was clearly without merit.

Issue 2 – whether there was sufficient evidence before the court for the matter to be left to the jury (ground 2)

A. Submissions

[19] Counsel Mrs Reid contended that there was no connection between the gunshot wounds to the body of the deceased and the appellant's service pistol, or the spent shells found at the scene. This, she said, meant that the prosecution failed to prove causation and the learned judge erred in leaving the case to the jury.

[20] Counsel also highlighted several issues that she said left the prosecution's case in a state of doubt at the close of their case. These included:

i. the failure of the prosecution to identify who the second shooter was in the light of the fact that there was evidence of cross-firing and that there were at least two separate firearms discharged on the scene;

ii. the failure of the prosecution to identify who had actually shot and killed the deceased, as well as the failure to identify from which firearm the bullets that hit the deceased had come; and

iii. whether it was logical that there was no gun powder on the deceased's body if she had been shot by the appellant from inside the vehicle, as the prosecution had theorised.

[21] These questions, counsel submitted, remained unanswered at the end of the prosecution's case, and there was simply no direct evidence that the appellant had committed the crime. The circumstantial evidence, she said, was inconclusive and did not "fit together" to lead to the conclusion that the appellant was guilty. As a result, she submitted, the learned judge should have acceded to the no case submission, and not having done so, the verdict was unreasonable and resulted in a miscarriage of justice.

[22] Counsel pointed out that no bullet or bullet fragment was found inside the deceased's body, and there was no forensic evidence indicating which bullet had killed her and from which gun that bullet had come. In other words, she said, there was no evidence that the bullet that killed the deceased had been fired from the appellant's gun. Counsel submitted that, although the prosecution was alleging that the appellant had shot the deceased at close range whilst they were both in the car, there was no gun powder residue found in the car or on the deceased's body.

[23] Counsel pointed to the power of the court, in section 14(1) of the JAJA, to overturn a conviction where the evidence does not support it.

[24] Counsel Mrs Murdoch submitted that the prosecution's case was supported by the evidence of 16 witnesses for the prosecution, inclusive of the forensic evidence of the pathologist, as well as the ballistics and scene of crime evidence. In that regard, counsel pointed to several "pieces of circumstantial evidence" from which, she said, the inference of guilt could have been drawn at the end of the prosecution's case. These, she said, included the fact that:

i) the appellant had placed himself on the scene and had admitted that he had had a disagreement with the deceased that night (which accorded with the evidence of the witness Mr Johnson);

ii) the deceased had a defensive wound on her right forearm;

iii) the deceased had injuries to her left side and back;

iv) the ballistics evidence proved that the appellant had fired his weapon;

v) the appellant did not suffer any injuries even though there was a bullet hole in the driver's seat;

vi) the only other person seen in the vicinity by Mr Johnson had nothing in his hand;

vii) there was no evidence of anyone else running in the direction of downtown Savanna-La-Mar;

viii) a spent shell fired from the appellant's firearm was found on the right-hand side of Great George Street heading downtown, which was contrary to the position he said he was in, at the material time, as given in his statement to the police;

ix) there were only two bullet holes in the windscreen, and no bullet holes directly to the front of the glass of the windscreen; and?

x) the evidence of retired Det Cpl Lawrence was that if there had been a shootout and the appellant was returning fire, there would have been more bullet holes in the windscreen, and the direction of the bullet holes would show that they were exiting the vehicle.

[25] Counsel for the Crown admitted that there were several unexplained issues arising in the prosecution's case, including the spent shell casings that did not match the appellant's firearm, the fact that another person had been arrested and charged in the matter initially and was subsequently released after a *nolle prosequi* was entered, and the evidence that a person known as "Glasses" had been seen riding in the vicinity immediately after the shooting. However, counsel submitted that these issues were fully ventilated at trial before the members of the jury, and were properly addressed by the learned judge. The fact that the learned judge properly directed the jury as to the burden and standard of proof, and that the verdict of the jury was unanimous, it was submitted, showed that the verdict should not be disturbed.

[26] Counsel submitted that there was no basis upon which it could be said that the verdict was unreasonable, palpably wrong, or could not be supported by the evidence. The cases of **R v Alrick Williams** [2013] JMCA Crim 13, **R v Joseph Lao** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 50/1973, judgment

delivered 16 November 1973 and the English case of **R v Jeremy Nevill Bamber** [2002] EWCA Crim 2912, were relied on in this regard.

[27] The authorities of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 and **Director of Public Prosecutions v Varlack** [2008] UKPC 56, were also relied on by counsel for the proposition that, in cases dependent on circumstantial evidence, the case should not be withdrawn from the jury once there is some evidence on which a reasonable jury properly directed could find the accused guilty beyond a reasonable doubt. Counsel submitted that, in this case, there was sufficient evidence available for the jury to so find.

B. Analysis and disposal of issue 2 (ground 2)

[28] In assessing the instant case, this court was mandated to have regard to section 14(1) of JAJA. Section 14(1) states as follows:

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

[29] This section empowers this court to set aside a verdict of guilty on the three bases set out there. The authorities relevant to our jurisdiction establish that, where the issue before the court turns on the particular view of the facts that a jury is entitled to take, this court will only set aside a verdict of guilty where it, nevertheless, concludes that the

verdict is obviously and palpably wrong. This court will not set aside a jury's verdict simply because it entertains some doubt as to the correctness of the verdict or because it considers the prosecution's case to be so weak and the verdict to be against the weight of the evidence (see **R v Alrick Williams** and **R v Joseph Lao**, and the several cases which have approved this standard since). Where the jury is entitled to make, and does make, findings of fact, this court will not interfere so long as there is sufficient evidence to support those findings (see **Everett Rodney v R** [2013] JMCA Crim 1, at para. [21]).

[30] Cases like **R v Joseph Lao** are only applicable where the sole ground of appeal is that the verdict of the jury is unreasonable and cannot be supported having regard to the evidence. In such cases, the court will regard the question as one of fact for the jury to decide. The question in such cases, largely, is whether the issues of fact were properly placed before the jury (see **Lescene Edwards v The Queen** [2022] UKPC 11). In **R v Jeremy Nevill Bamber**, the court concluded that it was not the function of the Court of Appeal to decide whether the jury's verdict was correct. The court went on to reiterate, at para. 513, that the Court of Appeal would not interfere with the jury's assessment of the evidence, unless the verdict was manifestly wrong or unless something had "gone wrong in the process leading up to or at trial so as to deprive the jury of a fair opportunity to make their assessment of the case, or unless fresh evidence has emerged that the jury never had the opportunity to consider".

[31] As said by the Privy Council in **Lescene Edwards**, cases such as **R vJoseph Lao** do not assist where there is fresh evidence or where there is an alleged misdirection or other irregularity which may have led to a miscarriage of justice (see para. 53). They also do not apply where there is no evidence to go before the jury at all on the question of guilt.

[32] In **R v Joseph Lao**, the sole complaint was that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. Counsel had also submitted that the conviction was unsafe and unsatisfactory, and that the "state of the evidence at the end of the prosecution's case was such that the learned trial judge

ought to have withdrawn the matter from the jury". Counsel relied on issues with the identification evidence and the credibility of the main witness in support of that challenge. This court accepted, which was admitted by counsel, that there were some unusual features" in the case, but that these had been carefully set out to the jury and dealt with by the trial judge in his summing-up.

[33] In coming to its decision on the appeal in that case, this court, at page 4 of its decision, relied on the summary of the law set out in Ross on The Court of Criminal Appeal, First Edition at page 88, which was as follows:

> "It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal - that the verdict was against the weight of evidence – is not a sufficient ground. It does not go far enough to justify the interference of the Court. The verdict must be so against the weight of evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the Judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the Court feel some doubt whether, had they constituted the jury they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a Court composed as a Court of the appeal that such cases should practically be retried before the Court. This would lead with [sic] a substitution of the opinion of a Court of three judges [f]or the verdict of the jury."

[34] The court, at page 5 of **R v Joseph Lao**, also cited an excerpt from Archbold, at page 341, para. 934, (which can be found in the 36th edition of the Archbold) where the learned editors said that:

> "The court will only set aside a verdict on this ground, where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[35] Having considered those two authorities, Henriques P, who wrote the judgment of the court in **R v Joseph Lao**, concluded at page 5, that because the evidence was "fully ventilated" before the jury, the court could not disturb the appellant's conviction.

[36] In the instant case, trial counsel for the appellant made a no case submission at the close of the prosecution's case, on the basis that the essential ingredients of the charge had not been made out, in that, there was no evidence to establish the requisite *mens rea* and *actus reus* of the offence, and that the evidence, taken at its highest, could not support a conviction. The learned judge refused the submission and ruled that the appellant had a case to answer.

[37] We took the view that this was not a case where the approach taken in **R v Joseph Lao** would be applicable.

[38] The proper approach of a trial judge hearing a submission of no case to answer, in a case based largely on circumstantial evidence, is set out in **Melody Baugh-Pellinen v R** (which applied **Regina v Galbraith** [1981] 1 WLR 1039 and **Director of Public Prosecutions v Varlack**). In the case of **Melody Baugh-Pellinen v R**, this court, having helpfully defined circumstantial evidence, considered whether the trial judge should have upheld the no case submission made at trial. The court stated that the correct approach to be taken is to consider "whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt" (see para. [34]). Such necessary inference must be drawn from the "whole of the evidence".

[39] In his judgment, delivered on behalf of the court, Morrison JA (as he then was) relied on the case of **Director of Public Prosecutions v Varlack**, where the Privy Council reiterated that the underlying principles in **Regina v Galbraith** were equally applicable to cases where the jury was required to draw inferences (see para. 21). At para. [22] of **Director of Public Prosecutions v Varlack**, the Privy Council cited the following dicta of King CJ, sitting in the Supreme Court of South Australia in of **Questions of Law Reserved on Acquittal** (No 2 of 1993) (1993) 61 SASR 1, at page 5, which it regarded as a correct statement of the law:

> "It follows from the principles…in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. **He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution.** It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence [are] reasonably open on the evidence…**He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence**…
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. **If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer**

> **only if the evidence is not capable in law of supporting a conviction**. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence." (Emphasis added)

[40] We would, therefore, summarise the principles as follows:

a) If there is direct evidence capable of proving the charge, such that a jury properly directed could find the accused guilty beyond a reasonable doubt, there is a case to answer, no matter how weak or tenuous a judge may think that evidence is;

b) if there is no evidence pointing to guilt of the crime, or if the evidence cannot, in law, support a conviction for the offence, then the case must be withdrawn;

c) it is not the judge's duty to choose between inferences which are reasonably open on the evidence. It is for the jury to draw such inference as are reasonably open, which are most favourable to the prosecution, and on which they can reasonably conclude on guilt beyond a reasonable doubt; and

d) in the case of circumstantial evidence, if that evidence is to be accepted by the jury it must be capable of producing in reasonable minds a conclusion of guilt beyond a reasonable doubt. For reasonable minds to so conclude, the evidence must be in such a state as to cause reasonable minds to exclude all competing hypotheses as being unreasonable.

[41] There was no direct evidence in this case. The evidence was purely circumstantial. For an inference of guilt to be drawn in such a case, it must be reasonable and inescapable (see **Kevin Peterkin v R** [2022] JMCA Crim 5).

[42] In our view, the evidence presented by the prosecution, in this case, was not capable, in law, of supporting a conviction. Given the state of the evidence at the close of the prosecution's case, even if the jury had accepted all the prosecution's evidence and drew all the possible inferences that were reasonably open to them and which were most favourable to the prosecution, a reasonable jury would not have been entitled to conclude that the appellant was guilty beyond a reasonable doubt. Put another way, the evidence was not capable of causing a reasonable mind to "exclude all hypotheses consistent with innocence as unreasonable".

[43] On the circumstantial evidence before them, the members of the jury would have had to be able to draw the reasonable inference from that evidence, that the appellant not only did the act of shooting the deceased which caused her death, but also, that he did so intentionally and without lawful justification, intending to cause her death or grievous bodily harm. This would mean that there would have needed to be evidence on the prosecution's case that it was the appellant who had shot the deceased, and such evidence would, *prima facie*, have had to negative self-defence or accident. Self-defence was raised on the prosecution's case through the evidence of the appellant's written statement to the police, as well as through the evidence of the various police witnesses, who the appellant had told that his car had been fired upon and he returned the fire to repel the attack. Self-defence was also raised on the ballistic evidence, which showed that the car had indeed been fired upon. The defence of accident too would have been raised on that evidence, as, if there had been a shootout, it was possible that the deceased could have been mistakenly shot by the appellant when he returned fire to repel the attack.

[44] Before us, counsel for the Crown set out the pieces of circumstantial evidence that were before the jury at the close of the prosecution's case, which, she said, if accepted by the jury, were capable of supporting the inference of guilt (see as set out in para 24 above.)

[45] None of these pieces of evidence, by themselves or pieced together, pointed to any inference of guilt. There was indeed some evidence on the prosecution's case that, it could be said, cast suspicion on the appellant. There was no doubt that the appellant had placed himself on the scene (in his car on Great Georges Street), in the company of the deceased, and that he had discharged his service firearm. These facts were admitted by the appellant in his statement given to the police, and were corroborated by the ballistics and scene of crime evidence. The appellant also admitted in his statement to having, what he called a "discussion", with the deceased that night, after which the deceased exited the car, he followed her, hugged her, and walked her back to the car. That evidence, in fact, aligns with the evidence of Mr Johnson.

[46] The statement of the appellant was put into evidence, on the prosecution's case, through Det Sgt Owen Grant. In it, the appellant gave his account of what, he said, had taken place. He stated that on 11 April 2010, sometime after 9:30 pm, he had taken the deceased to Devon House on Great George Street in Savanna-La-Mar, to buy ice-cream. After having the ice-cream, they sat in the car and talked for a while. He was taking her home, when on reaching the vicinity of the Bashco store and the Davis Music Store on Great Georges Street, he turned around the car in the road, and his cell phone, which was on the back seat of the car, fell to the floor. He stopped the car beside Davis Music Store and retrieved the phone. He then had a "discussion" with the deceased about a text message she had sent earlier. She then stepped out of the car and said she was going to walk home.

[47] He stated that he switched off the car and walked after her. When he caught up with her, he hugged her and walked her back to the car. He put her in the front passenger seat and went around to the driver's seat. They then sat in the car with both front windows down. At about 11:30 pm, whilst they were still in the car talking, a man in dark clothing walked up to the front of the car, from an unfenced property. When the man was about 20 feet from the car, the man pointed a gun that he had in his hand in the appellant's direction and the appellant immediately saw bright flashes of light coming

from the nozzle of the gun, which were accompanied by loud explosions. The appellant reached for his service pistol and pointed it at his attacker, who was moving, and fired back through the front windshield. The man kept moving closer to the left of the car and firing shots at the car. The appellant continued to turn anti-clockwise in his seat, returning fire in attempts to stave off the attacker. When he stopped hearing shots, the man ran away in the direction of downtown, Savanna-La-Mar.

[48] The appellant, thereafter, looked at the deceased, who was sitting upright in the front passenger seat. He asked her if she was okay. She said she was shot and then fell over into his lap. He held her head in his palm and drove to the Savanna-La-Mar Public General Hospital. At the hospital, he took her out of the car through the left front passenger door and carried her into the emergency room. Shortly thereafter, he was advised that she was dead. He then used a hospital telephone to call the Savanna-La-Mar Police Station guardroom and CIB office, but the calls went unanswered. Later that night, at the hospital, he handed over his firearm to Cons D O Campbell, and made a report to Det Sgt Miller. The appellant also gave a full description of the person he said had shot up his car that night.

[49] The evidence of Mr Johnson, the prosecution's main witness, was that, on the night in question, he had walked past a car on Great George Street in which a male and a female were sitting. Shortly after he passed them, he heard a noise and saw a man pulling a woman "backway" and the woman was trying to pull the man's hands off her waist. The witness wondered if they were fighting. The man eventually let the woman go, and they went back into the car. So then he thought they might have been playing. Mr Johnson did not see the faces of the man and woman sufficiently to identify them. But it was not seriously disputed that the man and woman were indeed the appellant and the deceased, and it would have been open to the jury to so find. Mr Johnson described the car he saw as "ashes" grey, and the evidence of scene of crime officer Det Cpl Wayne Lawrence was that the appellant's car was white with a grey trunk and grey door.

[50] However, the prosecution could not have relied on Mr Johnson's testimony as evidence from which an inference of guilt could have been drawn by the jury. That evidence, by itself, was insufficient to establish either the *actus reus* or the *mens rea* for the murder. The further evidence of Mr Johnson was that after the man and woman went back in the car and he had started walking again, he heard what sounded like gunshots. He immediately ran and did not look back. He, therefore, did not see who was doing the shooting. He said that when the explosions stopped, and he stopped, he saw a man he knew as "Glasses" ride up on a bicycle. The man laughed, and said something to him. He turned and saw the car drive off.

[51] Therefore, if Mr Johnson's evidence was to be accepted, even though Mr Johnson said "Glasses" had nothing in his hand when he rode past him, the presence of "Glasses" would have introduced on the prosecution's case, a third person, other than the deceased, who would have been in the vicinity at the time of the shooting, and who would either have been at the least a potential witness or at the very most a "person of interest". The police did not locate or take any statement from a man named "Glasses". In fact, the evidence of investigating officer Det Sgt Miller was that he did not investigate any such person.

[52] Also, although the prosecution relied on the fact that "Glasses" had nothing in his hand when he rode past Mr Johnson, this fact could prove nothing one way or the other. It would not then be correct to infer, as counsel for the Crown argued, that the only other person in the vicinity who could have killed the deceased was the appellant.

[53] The Crown also relied on the nature of the injuries sustained by the deceased, the fact that the appellant had suffered no injuries from the incident, as well as the ballistic, forensic, and scene of crime evidence, as evidence from which reasonable minds could have concluded on guilt beyond a reasonable doubt. These bits of evidence, the Crown submitted, showed that the incident could not have taken place the way the appellant said it had. However, it was not for the appellant to prove that the incident had happened

the way he said it did, but for the prosecution to prove that the incident had happened the way they were alleging it had.

[54] To determine whether the prosecution succeeded in doing, so we considered very closely the evidence adduced in support of the prosecution's case.

[55] Counsel for the Crown submitted that the fact that one spent casing from the appellant's firearm was found outside the car proved that he was not where he said he was when the shooting took place. However, the prosecution's case was never that the appellant was outside the car when he shot the deceased. The prosecution also did not prove that the spent casing could not have been ejected outside of the car as the appellant fired on the assailant whilst turning anti-clockwise in the driver's seat, as he claimed. The evidence from the police was that the casings from the appellant's firearm would have been ejected to the right and that where they ended up would have depended on the angle he was shooting from. Furthermore, the deceased received four gunshot wounds. Only one spent casing from the appellant's firearm was found outside the car.

[56] As for the bullet holes in the windscreen, two were from bullets fired from outside of the car, and one was from a bullet fired from inside of the car. In his written statement to the police, the appellant said he fired through the front windscreen. No trajectory for that bullet was done as the shattered glass was found to be too delicate to handle. The Crown submitted that if there had been a shoot-out, more bullets would have exited the windscreen from inside the vehicle. That submission assumes that the shooter remained standing in front of the car, and that the appellant had to fire more than one shot through the windscreen to repel the attack. However, the appellant's account in his statement was that the shooter was moving left whilst firing into the car, and that he, the appellant, returned the fire whilst turning anti-clockwise in his seat.

[57] Counsel for the Crown also relied on the fact that there was a bullet hole in the middle of the backrest of the driver's seat of the car, where the appellant had been sitting. This could not prove that the appellant shot the deceased. It also could not prove

conclusively that the appellant was not in the car when it was being fired upon. The trajectory of that bullet, on the prosecution's case, was that it had come through the left passenger door, across the passenger seat, through the driver's seat back rest and landed in the right back door. If the appellant had been turning anti-clockwise in the seat to return the gunfire, he would not have been leaning back in his seat, and it was, therefore, not impossible for the bullet to have hit the seat without hitting him.

[58] The evidence on the prosecution's case, also, was that it was possible that the two bullets that had come through the left passenger window where the deceased was sitting, could also have hit the deceased as they travelled across the passenger seat.

[59] The evidence of Dr Murari Sarangi, the consultant forensic pathologist who conducted the post-mortem on the deceased, was that the deceased had sustained four gunshot wounds. These were located to the lower back of the left side of the chest; on the lower part of the right forearm, towards the wrist (bullet coming out the back of the forearm); on the left buttocks; and on the upper part of the left thigh. Her cause of death was noted as haemorrhagic shock consequent upon the gunshot wound to the chest and abdomen, with injuries to the lungs, diaphragm, liver and spleen. That bullet entered through the lower left side of her back and moved up through her abdominal cavity through to her chest. The forearm injury, the doctor said, was typical of a defensive injury. He said he would position the shooter to the right side of the deceased. He also said that whatever the deceased was doing, she would have turned her back on the shooter.

[60] In relation to the question as to how far, in his opinion, the shooter would have been from the deceased when she was shot, Dr Sarangi said the muzzle of the gun would have been at least a distance of two feet away. In his opinion, if the deceased was in the vehicle at the material time, all the injuries would have been sustained when the deceased turned her back to the shooter, possibly trying to get out of the vehicle. This aspect of Dr Sarangi's evidence was seemingly coloured by what he said he had been told, which was that the deceased "was about to hurriedly come out of the vehicle". Under cross-

examination, Dr Sarangi admitted that the deceased could have also been trying to go elsewhere, such as the backseat of the car. There was no evidence as to how the injury to the right forearm would have been inflicted if the deceased had been shot in the left side whilst exiting the vehicle. There was also no evidence as to which injury had been inflicted first. Apart from the injury to the right arm, all the injuries were to the lower body of the deceased: lower left back, left thigh and left buttocks.

[61] None of the bullet wounds, the doctor said, had any gunpowder deposits, which, he said, would have been present around the entrance wounds, if any of the gunshots had come from an extremely close range (meaning an entrance wound within a few inches from the muzzle of the gun). There was also no contact wound, near contact wound, tattooing or stippling of gunpowder from an intermediate entry wound, which would have indicated that the gun had been fired from a very close range. He classified all the wounds as distant wounds, although, he said, in practicality, they were still from a close enough range. Nonetheless, he said, there could still be an abrasion around a wound which was a distant entry wound from two feet away, but in this case, there were none.

[62] A distant wound, if coming straight at a 90-degree angle to the body, would have left a circular wound, the doctor also said.

[63] The evidence was that two bullets had entered the car from outside, both of which went across the front passenger seat, one through the window, and one through the front left door. The one through the door created a circular entry hole 0.9 cm in size in the door. The wound to the deceased's back was 0.9 cm in size.

[64] Dr Sarangi's evidence, therefore, did not take the prosecution's case beyond speculation as to the shooter, as it did not positively support the prosecution's case that it was the appellant who had shot the deceased whilst they were seated in the car, or at all. Even though Dr Sarangi opined that the injuries were consistent with the shooter being to the right of the deceased, and that the injuries would have been sustained when

the deceased turned her back to the shooter, possibly to get out of the vehicle, the fact that the injuries were located to the left of her body was equally consistent with the shooter being positioned outside the vehicle, and to the left of the deceased as she moved to take cover.

[65] The deceased having been seated in the car and having moved, without direct evidence of how she moved and in what direction, left the evidence of the location of her wounds being equally consistent with her moving away from a shooter who was outside the vehicle as it was with her moving away from a shooter who was inside the vehicle. The fact that the wound was described as a distant wound made it more likely that the deceased was moving away from a shooter outside the vehicle than from one inside. The evidence from the police was that when there is a shooting, the natural instinct is to move and take cover. In the case of the deceased, who was seated, she would have had to raise herself up in order to move and take cover. There was no evidence as to her position when the shooting started, and in what direction she moved to take cover, in order to determine the direction from which she was shot. On the prosecution's case, the shooter was to the right in the driver's seat. On the defence's case, the shooter was outside the car, shooting from the right and moving to the left. The fact that all four of the deceased's injuries were distant wounds would have cast reasonable doubt on the prosecution's case that the appellant had shot the deceased from inside the car.

[66] The absence of gunpowder residue or contact wounds and the wounds being classified as distant wounds was evidence that could have supported the appellant's account that there was a shooter outside the vehicle. The evidence of the defensive wound, too, did not support an inescapable inference of the appellant's guilt, as, on each party's case, the deceased had come under attack. The fact that it was to her right arm would ordinarily support the view that the gunshot had come from the right. But in this case where, in order to support the prosecution's case, the deceased would have had to be moving at the time she was shot, the defensive wound could not have, one way or the other, pointed conclusively to who she was defending herself from.

[67] In respect of the forensic evidence regarding the vehicle involved in the incident, retired forensic analyst Miss Sherron Brydson, who examined the car, gave evidence as to her observations, which included the following:

i. eight holes to the left side of the vehicle (one in the front fender, two in the front windscreen, one in the left front door, three in the left rear window and one in the left rear fixed window);
ii. two holes in the dashboard panel;
iii. one hole in the middle of the upright part of the driver's seat that entered through the front and exited through the rear of the seat;
iv. one hole in the inner part of the right rear door with a dent on the corresponding outer part of the door;
v. a broken lower left front indicator lens;
vi. shattered left front and rear windows, as well as left fixed window of the cargo area;
vii. brown adhesive tape on the left front window;
viii. broken fragments of glass on the dashboard, left front passenger seat and floor, and on the rear seat;
ix. tears to the ceiling, the right rear door, and the upright part of the front and rear seats;
x. a broken interior door handle on the left front door with a part missing;
xi. missing parts of the inner aspect of the right rear door, including the winder and handle opener;
xii. that the clasp of the left front seat belt buckle was displaced;
xiii. that the clasp of the right front seat belt buckle was displaced (on the floor of "the left rear");
xiv. that the floor mats, trunk lining and rear seat headrests were missing;
xv. a bloodstained fingerprint on the outer handle of the left front door; and
xvi. that blood distribution was greatest on the floor in the rear of the car.

[68] Miss Brydson also observed pools of human blood in the console between the front seats and on the floor at the rear, under the right front seat of the car. There were some clots of blood with brown stains, drops, droplets and smudges on the left front door; clots of blood on the console, left front seat and the left central panel between the front and rear door, and on the right front running board; there were serosanguineous stains, brown drops, droplets and smudges on the driver's seat and on the front and rear door; and, there were brown drops, droplets and smudges on the outer part of the driver's door, a brown drop on the outer part of the right rear door, pale brown drops and smudges on the right rear part of the roof, brown stains on the right rear seat, rear flooring and front facing of the right rear seat. The latter also had clots, drops and droplets of blood.

[69] She concluded that "[p]art or parts of an injured individual was or were positioned towards the centre by the console area and rear of the motor vehicle, based on the blood distribution and pool of blood". She gave her opinion on what could possibly have caused the pattern of the distribution of the blood, if the deceased had been seated in the left front passenger seat when injured. She said that it was possible that the deceased had jumped over the middle of the car, which would have accounted for why the blood distribution tended towards the right of the rear.

[70] The appellant had said in his statement that the deceased had slumped over in the seat, and he drove with her head in his palm to the hospital. This would have accounted for the blood on the console of the car, but no opinion had been sought as to whether that could have accounted for the blood in the back of the car. However, this evidence of the blood distribution, whether viewed by itself or together with other circumstantial evidence, could not have provided proof of guilt beyond a reasonable doubt that it was the appellant who had shot the deceased. This is so especially since there was some evidence that the blood would have flowed from the front of the car into the back floor area of the vehicle, or part of the deceased's body could have leaned over to the rear. Also, the further evidence was that if she had jumped to the middle, the blood would

have drained and leaked to the right rear and that the seat of the car was made of leatherette, which would have caused any liquid to flow off and not be absorbed.

[71] Miss Bryson also concluded that several projectiles had come into contact with the left side of the vehicle. The evidence of the damage to the car, including all the bullet holes, was consistent with the appellant's assertion that the car had been fired upon. Ms Brydson's evidence was that the 0.9 cm hole made by the projectile entering the car, if it hit a person, could cause the same 0.9 cm entry wound in that person.

[72] The evidence of Det Cpl Lawrence (from the Scene of Crime Unit), who processed the scene, was that the nature of the bullet holes on the car indicated that they had all hit the car from outside of the vehicle, and that the car had come under attack.

[73] The evidence of the ballistics expert, retired Deputy Superintendent Carlton Harrisingh ('Deputy Supt Harrisingh'), was put into evidence through ballistics expert Sgt Miguel Bernard. From Deputy Supt Harrisingh's examination and assessment of 18 bullet components that were recovered from the scene (both inside and outside of the car), he determined that only 11 of them had come from the appellant's service pistol (five spent casings, three expended bullets and three bullet fragments). Of the remaining bullet components, five spent casings were from bullets fired from a firearm other than the appellant's, which was unknown. Two bullet fragments were in a condition which prevented them from being compared with any firearm. No bullet was recovered from the deceased's body to match the appellant's service pistol.

[74] At the end of the prosecution's case, there was no evidence to account for who had fired the second firearm and whose bullet had killed the deceased. In that regard, even if the jury were to accept the prosecution's case that the appellant had fired his service pistol that night, there was not sufficient evidence, capable of producing in a reasonable mind a conclusion of guilt. There was some evidence of bullet fragments from the appellant's service pistol being found in a shop to the left of the car. However, the prosecution placed no expert evidence before the jury as to the trajectory of those bullets

or to show that those bullets possibly or probably struck the deceased, exited her body, and landed in the shop. Furthermore, the uncontroverted evidence, which was read to the jury, of what the appellant said in his statement had occurred, was that he shot at an attacker who was at the left of his car.

[75] Furthermore, the evidence of Sgt Bernard was that, from his examination of the car and his findings, the damage to the car suggested three possibilities. These were that:

i. there had been one shooter who was moving whilst firing;

ii. there had been more than one shooter: one firing from the front of the car going from right to left, and the other firing from the back of the car going from left to right; or

iii. the vehicle was fired upon whilst it was moving.

[76] Sgt Bernard's evidence also contradicted Deputy Supt Harrisingh's evidence, in that Sgt Bernard concluded that one particular bullet hole, the one closer to the middle of the windshield, was made by a bullet coming from the inside of the vehicle, whereas Deputy Supt Harrisingh said that they had all entered the vehicle from outside.

[77] There was no evidence left to the jury from which it was properly open to them to infer that it must have been a bullet from the appellant's gun that had killed the deceased. At the end of the prosecution's case, the evidence taken at its highest in favour of the prosecution, was not evidence that was capable of "producing in a reasonable mind a conclusion of guilt". It was in a state of mere speculation, and we took the view that a jury properly directed could not properly exclude all competing hypotheses as being unreasonable. We, therefore, concluded that that evidence was insufficient to support a verdict of guilty, in that, all the pieces of evidence, taken together, could not support an inference of guilt beyond a reasonable doubt. The learned judge, therefore, ought to have acceded to the no case submission.

[78] Ground two, therefore, succeeded. Although that was sufficient to dispose of the appeal, we did go on to consider the remaining grounds on which substantial submissions were made.

Issue 3 - whether the learned judge failed to adequately and fairly address the issue of self-defence in his directions to the jury, and undermined the appellant's defence by being biased in his summation (grounds 3 and 8)

A. Submissions

[79] In respect of the appellant's defence, Mrs Reid submitted that the learned judge failed to adequately place the defence before the jury, by failing to define and explain the law on self-defence, and by making comments that undermined the appellant's defence. Counsel pointed to the learned judge's comments at pages 1002 and 1003 of the transcript, where the learned judge said he had to address self-defence because the appellant had put it forward. Counsel also complained that, in discussing self-defence, the learned judge stated that he would not go into it, which counsel said was a grave error. This, she said, was especially so because the appellant's case was that he had fired his gun, but had done so in self-defence. Self-defence was, therefore, raised on the evidence and, as such, a live issue. The jury would have also needed to be guided as to how to treat with the possibility that the appellant had fired his weapon in self-defence but the bullets accidentally struck the deceased. This, she said, the learned judge did not do.

[80] These failures, it was submitted, would have tainted the minds of the members of the jury and did not properly leave open to them the option of a not guilty verdict on the basis that the appellant had been acting in self-defence when the deceased was accidentally shot.

[81] Counsel also complained that the learned judge further undermined the defence by making sarcastic comments and analogies that weakened the defence, and conducted his summation in a way that was favourable to the prosecution's case. In particular, counsel noted the judge's commentary at pages 956 to 957 of the transcript, in which he

compared the case to the movie, "The Matrix", which, given the nature of that movie, seemed to suggest that the appellant's defence was incredulous. It was submitted that the learned judge further cast doubt on the defence, at page 952 of the transcript, by giving the analogy of 'what he had learned in primary school that came in a bag'.

[82] Counsel further complained that the learned judge derided the way in which the appellant had given answers during his question and answer session with the police, rather than explain to the jury that the appellant had a constitutional right to silence. Counsel also pointed to page 955 of the transcript, where, she said, the learned judge commented "sarcastically" on the "incredulity" of the appellant's account that he was turning anti-clockwise in the car, telling the jury that there was no evidence that the steering wheel had been taken out of the car.

[83] Counsel, therefore, submitted that the failure of the learned judge to fairly sum up the case was fatal to the conviction.

[84] The cases of **R v Lancelot Webley** (1990) 27 JLR 439, **R v Abraham** (1973) 57 CR App R 799 and **Palmer v R** (1971) 16 WIR 499, were relied on for these submissions.

[85] Counsel for the Crown, however, submitted that the learned judge did, in fact, leave the issue of self-defence to the jury, and, based on the circumstances of the case, adequately directed the jury on it in accordance with the law. Counsel pointed to the learned judge's directions at pages 1002 to 1003 of the transcript, and asserted that the learned judge gave the requisite directions as set out in the Supreme Court of Judicature Criminal Bench Book at pages 262 to 264. The case of **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22, at para. [19], was also relied on for the principle that the concept of self-defence is a simple common-sense concept for which no special words are required to explain. Counsel further cited the case of **Sophia Spencer v R** (1985) 22 JLR 238.

[86] Counsel for the Crown highlighted that, after having explained the concept of self-defence to the jury, the learned judge recounted the substance of the appellant's unsworn statement, at pages 1008 and 1009 of the transcript, especially the fact that the appellant was saying that his car had been "shot up" and that he had tried to ward off the attack.

[87] In relation to the complaint regarding the learned judge's use of the words "which I won't go into" in his directions on self-defence, counsel for the Crown submitted that this was taken out of context and was a misinterpretation of what the judge had said. The learned judge said those words, it was submitted, in relation to the question of the amount of force used by the appellant in defending himself and the fact that the appellant had used a deadly weapon.

[88] Overall, counsel for the Crown submitted that self-defence was negatived on the evidence, and pointed to the following in that regard:

> 1. "The ballistic evidence of the spent casing found on the outside of the vehicle which was fired from the Appellant's firearm.
>
> 2. The bullet hole in the driver's seat which contradicts the Appellant's evidence that he was inside the vehicle.
>
> 3. The evidence of the witness Mr. Johnson, that he saw no one after the vehicle drove off, which further contradicts the Appellant's version that there was a lone gunman which [sic] ran from the scene by going in the direction of downtown.
>
> 4. In his unsworn statement the Appellant said that there were attackers, which deviates from his initial report that there was a lone gunman."

[89] Consequently, it was contended, the learned judge correctly advised the jury, at page 1013 of the transcript, that they could give only one of two verdicts – guilty or not guilty of murder - and that if they accepted the appellant's account that he had acted in self-defence, the verdict would have to be one of not guilty.

[90] In relation to the complaint that the learned judge made biased comments, counsel for the Crown, whilst admitting that the learned judge did, in fact, make the comments attributed to him, maintained that his summation was balanced and "showed no features of bias or prejudice to cause any miscarriage of justice". Counsel submitted that the learned judge was entitled to make those comments, and the words he used did not convey that the appellant was guilty, nor did it bolster the prosecution's case. The members of the jury would have been entitled to accept or reject the judge's comments, as he had advised them they could do. With particular reference to the comments about the Matrix movie and the steering wheel, it was submitted that the context in which these were made simply called on the members of the jury to closely examine the evidence in light of the assertions that had been made by the appellant in his written statement to the police and in his evidence in court. In respect to the comment about the three things in the bag, it was submitted that this comment was so vague that it was impossible for it to have caused any prejudice. It was denied that the learned judge derided the appellant's answers made in the question and answer session, and was submitted that the learned judge merely outlined same, and did not ridicule the character of the appellant.

[91] Thus, it was argued, these grounds had no merit. The case of **Jermaine Mckenzie v R** [2020] JMCA Crim 9 was relied on for these submissions.

B. Analysis and disposal of issue 3 (grounds 3 and 8)

[92] A trial judge has a duty, where the defendant raises the defence of self-defence, or where it otherwise arises on the evidence, to fully, fairly and accurately put that defence to the jury. No particular form of words is required. However, the judge must make it clear to the jury what the concept means in law as it relates to the facts of the case before him. The judge must also make clear to the jury that the defendant has no obligation to prove his defence, and that the burden is on the prosecution to negative self-defence. That is, the prosecution must prove beyond a reasonable doubt that the accused did not act in self-defence (see **Ronald Webley and Rohan Meikle v R**, at paras. [18] and [19], and **R v Lancelot Webley**.)

[93] At pages 1002 to 1003 of the transcript, the learned judge outlined the appellant's defence in the following way:

> "He is putting forward, through his statement, that he came under attack. In other words, he was defending himself from an attack from another person. So, he is asking you to say that he was acting in self-defence of his life and the lady's life, from the attack of another person.
>
> **But, let me say this to you, because he put it forward, so I have to address it**. A person who is attacked or believed that he is about to be attacked, may use such force as is necessary to defend himself, and if that is the case, he is acting in lawful self-defence, and he is entitled to be found not guilty. But you have to look at the whole picture of how the case unfolded.
>
> It is for the prosecution to make you feel sure that the accused was not acting in lawful self-defence. It is not for the accused to proof [sic] that he was, because the law is that it is not for the accused to prove his innocence.
>
> The law is that a person only act [sic] in lawful self-defence, if in all the circumstances he believes that it was necessary for him to defend himself, **the amount of force, which I won't go into, because it was a deadly weapon that was used. And you recall the Prosecution's case and what the various experts are saying, the circumstances and everything, showing that this lady was shot in the back. He said he came under attack. It is a matter for you. But I will not say much more about that, as far as the self-defence is concerned**." (Emphasis added)

[94] It can be seen, therefore, that the learned judge outlined to the members of the jury what the appellant's defence was, what it meant in law, that if they accepted it they would have to find him not guilty, and that it was the prosecution's duty to make them

feel sure that the appellant had not acted in self-defence. We, however, could not help but feel that these directions were given in a way that seemed to undermine the appellant's defence. It is true that the judge must address the defence if the accused puts it forward. However, it was unnecessary for the learned judge to say this to the jury, as it would have given the impression that he was doing it unwillingly and notwithstanding that he did not believe it. Even more so because those directions were given after previous unfortunate comments made by the learned judge that could have only served to undermine the defence. Mention was made about the degree of force used to repel the attack without the learned judge going into the required directions regarding the use of such force only as is necessary. Instead, the learned judge positively stated that he would not go into it because a deadly weapon was used. This is not the law. It was unfair to the appellant and amounted to a misdirection. It is not the law that the use of a deadly weapon is excessive force in every circumstance, but the learned judge would have left the jury with the impression that because a deadly weapon was used, it was a foregone conclusion that it amounted to an excessive use of force.

[95] Furthermore, the learned judge's reference to the circumstances of the case and the fact that the deceased had been shot in the back, juxtaposing it, as he did, with the appellant's claim that he had come under attack, may have given the jury the impression that the appellant was saying he had come under attack from the deceased, but that it could not have been so because the deceased was shot in the back. This, too, was unfair, as it was not the appellant's case at all, and it too amounted to a misdirection.

[96] The circumstances of this case required a carefully tailored direction from the learned judge in respect of the appellant's account of how he came to have acted in self-defence and the defence of the deceased, even if the jury were to accept that the deceased had died from a bullet fired by the appellant. The dismissive manner in which the learned judge dealt with the issue was unfair to the appellant.

[97] Concerning Mrs Reid's complaint about the comments made by the learned judge, which served to undermine the appellant's defence, we considered them in turn and the

possible effects they may have had on the appellant's right to a fair trial. At page 952 of the transcript, whilst in the middle of recounting the appellant's unsworn statement about the attack on his car by a lone gunman, the learned judge made this curious comment:

> "When I was at primary school I learned things three things that come into a bag, I found five, the speller and the spoken words came in a bag, one going forward."

[98] For our part, we could not discern what the learned judge was referring to or what caused him to say this. However, what is clear is that it could have possibly been a subliminal message to the jury that something was not quite right with the appellant's defence.

[99] Having outlined the appellant's statement to the police about what had happened on the night in question, at pages 955 to 957 of the transcript, the learned judge made the following comments:

> "Mr. Foreman and members of the jury, you saw the pictures of the car. There is nothing in this car to say that the steering was out of the car. The steering wheel was still in that car. I am sure many of you have driven in a car and you saw the steering, where the driver sits, the distance between them.
>
> In this caution statement he said he turned anticlockwise in the seat…Because he is shooting through that window (indicates) so anticlockwise would be this direction so (indicates), or this direction? A matter for you.
>
> You will notice that there is a hole in the seat. He didn't say he leave the seat, you know, he didn't say he leave the seat. A matter for you to decide where he was when that hole went through that seat, from across there and through that seat and straight into the back door. No injury at all was on him, not even a scratch. These are my comments, if you don't agree with them throw them into the sea.

> The gun pointed at him, he said pointed at him, and he saw nozzle and whatever flash, or whatever that gun is. I watched a few movies myself. And I still visit the movies at times. One movie comes to mind.
>
> And I remember one movie, the Matrix, and I say no more. That's all I will say. Very interesting movie. My comments you are the judges of the facts, matter for you."

[100] These comments were made whilst the learned judge was recounting the appellant's unsworn statement as to how and why he had felt it necessary to discharge his firearm at the gunman to save his and the deceased's life. The reference to the steering wheel not being in the car was a direct reference to the appellant's statement that he was turning anti-clockwise in the car whilst firing at the gunman. Having referenced the statement, the learned judge then told the jury it was a matter for them. He did not, however, say that it was a matter for them to determine whether it was possible for the appellant to turn anti-clockwise in the car with the steering wheel still in it. The implication of his statement to the jury was that it was not possible to turn anti-clockwise in the car, with the steering wheel in it.

[101] The learned judge's comment regarding watching a few movies came directly after he recounted the appellant's statement that the gunman had pointed his gun at him and fired. Furthermore, the movie "The Matrix", which the learned judge specifically referenced, is a very popular science fiction movie, the theme of which is an alternate reality, which is not likely in a real-world scenario. The immediate reference to the movie, "The Matrix", was unfortunate, and was designed to give the jury the impression that the learned judge himself was of the view that the appellant's account of what took place was a work of fiction: a made-up story just like a movie. If the members of the jury had seen it or had known what it was about, it more than likely would have had the effect of conveying to them that the learned judge considered the appellant's account not only to be one of fiction, but one which was not possible in real life.

[102] With these, what we could only, at best, describe as dismissive comments, the learned judge undermined the appellant's account of what had occurred. The effect of this error, we think, could not be cured by the judge telling the jury it was a matter for them, that those were his comments, and that if they disagreed, they could "throw them into the sea".

[103] Counsel for the appellant also complained about several of the learned judge's other comments, which by themselves were innocuous, but which, when taken together, may have had a devastating effect on the appellant's case. At page 959 of the transcript, the learned judge made comments whilst treating with the question and answer document. He pointed out to the jury that the appellant had said "absolutely nothing" in his statement about speaking to Corporal Porter ('Cpl Porter') (the first officer on the scene), even though Cpl Porter had said in his evidence that he had seen and spoken to the appellant at the hospital that night about the incident, and that the appellant had told him where the scene was. The learned judge made the point that the appellant had mentioned two other officers but not Cpl Porter, to which defence counsel objected that the appellant mentioned the other officers in a particular context, and there would have been no need for the appellant to mention Cpl Porter in that context. But the learned judge persisted with the point, without directing the jury on what he considered to be the evidential significance of the omission, although, in our view, nothing at all turned on it.

[104] At pages 962 to 963 of the transcript, the learned judge recounted the appellant's question and answer session, compared his answer to the question whether he had been in an intimate relationship with the deceased with what the appellant had said in his statement to the police in that regard. In his question and answer session, he had said that they were intimate "to the point" that they would talk on the phone and hang out but that they did not have a sexual relationship, whereas, in his statement, he had said that the two had had an intimate relationship. Having recounted this, the learned judge

quipped, "I am trying to think what is the meaning of intimate". This, by itself, could be viewed as harmless musing by the learned judge.

[105] Further, when recounting the evidence of ballistics experts, Sgt Bernard and retired Deputy Supt Harrisingh, the learned judge juxtaposed that evidence with the other evidence that cast doubt upon the defence. Of Sgt Bernard's evidence, the learned judge said, at page 999 of the transcript:

> "And he said in his opinion, if a person is in that driver's seat at the position of that hole, that person would have been shot. Take into consideration the steering is there. And the casings would fall to the right of the shooter, when outside. He said the spent casings of a person firing from the driver's seat would fall inside the vehicle. You recall that Dr. Sarangi told you that this is a defensive wound? You recall that Doctor Sarangi told you that the person was trying to get out of the car why they got so many shots in the back? You recall the person told you that fragments was [sic] found in the shop, the J. Albert shop? You recall that the expert said that those fragments match his gun? Matter for you. You forget that the Doctor said all the wounds were perforated, meaning it went through and through? Matter for you."

[106] It is important to make two observations here. The first is that in that passage, the learned judge stated aspects of the evidence as though they provided an inescapable inference of guilt when that was not necessarily so. In mentioning Sgt Bernard's evidence that a person seated in the driver's seat would have been shot, the learned judge failed to mention Sgt Miller's evidence that self-preservation would cause the person in that seat to dodge the bullet so that it could pass and go into the seat. It is to be recalled that the bullet went through the backrest of the seat. The appellant had said he was turning in an anti-clockwise position in his seat, and firing to the left side of the car. The evidence was that the front passenger windows were down and the attack on the car was mainly on the left side. It was not at all impossible then that the appellant could have avoided being shot, especially in light of the fact that Sgt Bernard also said that the trajectory of

the bullet in the driver seat was from outside the left passenger door, through the driver seat back rest, and into the right passenger door. Even though Sgt Bernard had said that he expected the casings to fall inside the vehicle, he accepted that they could have been ejected outside the driver's window depending on the position the appellant was in inside the car, as well as the position of the muzzle of the gun.

[107] As stated before, the defensive wound was not indicative of who had injured the deceased. The pathologist said the shooter was to the right of the deceased and sought to explain the wounds to the left by saying the deceased could have been shot whilst trying to exit the car or climb over to the back of the car. Although that was his opinion, his evidence of where the injuries were on the deceased was not inconsistent with an attack from a gunman outside the car to the left of the deceased, who was then shot on her left side, whilst trying to move. This is so especially since the evidence was that there were bullet holes to the left side of the car where the deceased was seated.

[108] The learned judge was clearly asking the jury to infer that the bullet fragments found at the shop were the ones that went through the deceased and killed her. Whilst this was one inference that could have been drawn from the evidence, it was not an inescapable inference, as there was evidence of another shooting which could have resulted in injuries to the deceased. There was no direct evidence which leaned in one direction more than the other. Furthermore, since the defences of self-defence and accident were live, the learned judge was duty bound to point out to the jury that even if they were to infer that the bullet fragments found in the shop (two of which were identified as coming from the appellant's firearm) were the bullets that had struck the deceased, they still had to decide, based on the evidence, whether the appellant was returning the fire from the gunman to repel the attack when it accidentally caught the deceased who was in the car and, who was, perhaps, also trying to take cover.

[109] The second observation is that the learned judge did not point out to the jury the weaknesses in the prosecution's case. Although he recounted the evidence, the learned judge did not identify as a weakness in the prosecution's case, the fact that the appellant's

car had been fired on and that five spent casings recovered were fired from a firearm that could not be linked to the appellant. Nor did he make any comment in regard to it. The learned judge further failed to direct the jury on the possible significance of the absence of gunshot residue, stippling or abrasions on the deceased's wounds and the fact that the wounds were described as distant wounds by the pathologist, even though the prosecution's case was that the appellant had shot the deceased at close range whilst they were both seated in the car. He did not make any comments regarding these matters but simply summarised the evidence as the witnesses had given it.

[110] At the conclusion of the case for the defence, the learned judge gave his charge to the jury, noted at page 1013 of the transcript, as follows:

> "Mr. Foreman and your members, it is now your time to deliberate and to come up with the verdict in this case. The verdict can only be one of two: He is either guilty of murder or not guilty of murder.
>
> I have told you all the law necessary to apply to the case. I have told you, if you believe his story, that's the end of the matter. If you don't believe his story, you will have to go back to the Crown's case and look at the various pieces of evidence to say whether he is guilty or not, because it is the Crown who brought him here. The Crown is relying on circumstantial evidence. You have to look at the Doctor's evidence; you have to look at the various pieces of exhibits; you have to look at the whole picture."

[111] Although the learned judge said "if you don't believe his story, you will have to go back to the Crown's case and look at the various pieces of evidence to say whether he is guilty or not, because it is the Crown who brought him here", the learned judge did not remind the jury that even if they accepted that it was the appellant who had shot the deceased, they would still have to consider whether, when he did so, he shot her accidentally whist defending himself and her from an attack by a third party. This was so especially in the light of the fact that there was evidence on the prosecution's case that

the car had been fired on from the outside using another unidentified firearm, and that it was the duty of the prosecution to negative self-defence.

[112] The important question in dealing with this issue is whether, in substance, the accused had a fair trial (see **Rupert Crosdale v The Queen** [1995] 1 WLR 864, at page 871). In summarising the requisite principles emanating from its previous decision in **Byfield Mears v The Queen** [1993] 1 WLR 818, the Privy Council stated the following:

> "…[A] defendant does not receive a fair trial if the judge places an unfair and unbalanced picture of the case (including, in particular, the defence case) before the jury."

[113] In **Mears v The Queen**, in dealing with the issue of whether the trial judge had, by his comments, rendered the appellant's trial unfair by putting forward an unfair or unbalanced picture of the facts, the Board noted that even where a trial judge has not directly usurped the jury's function by removing an issue from its consideration, a judge may still render a trial unfair by making comments that leave the jury little real choice but to follow the judge's views. In such a case, the damage is not remedied by simply telling the jury that it is a matter for them. Their Lordships said, at page 822:

> "Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in *Reg v. Gilbey* (unreported), 26 January 1990:
>
> 'A judge…is not entitled to comment in such a way as to make the summing up as a whole unbalanced…It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'
>
> Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence

> may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings…However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views."

[114] Their Lordships, at page 823, then went on to consider, whether there had been, as stated by Lord Sumner in **Ibrahim v The King** [1914] AC 599, at page 615:

> "something which…deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course…"

[115] Their Lordships concluded that the judge's comments in **Ibrahim v The King** "went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting" (see page 823 of **Mears v The Queen**).

[116] We were also reminded of the words of Lord Lane CJ in **Fraser Marr** (1989) 90 Cr App Rep 154, where he said the following:

> "It is, however an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge. **Indeed it is probably true to say that it is just in those cases where the cards seem to be stacked most heavily against the defendant that the judge should be most scrupulous to ensure that nothing untoward takes place which might exacerbate the defendant's difficulties**." (Emphasis added)

[117] In this case, we took a similar view and concluded that the learned judge's comments "went beyond the bounds of proper judicial comment", that, borrowing the words of the Lord Chief Justice in **Fraser Marr**, the appellant's case, however, "unattractive it may have been" was not given the "balanced treatment and consideration" due to every criminal defendant, however heinous the crime. The comment regarding the Matrix movie was particularly egregious and went beyond the proper bounds of judicial comment. The comment struck at the very core of the appellant's defence and would effectively have neutralised it. It would have been virtually impossible for the jury to ignore the import of it, bearing in mind the various other comments made by the learned judge. We disagreed with the Crown that the summation was balanced and "showed no features of bias or prejudice to cause any miscarriage of justice". We, therefore, found that grounds 3 and 8 had merit.

Issue 4 - whether the learned judge erred in failing to give a direction on causation (ground 4)

A. Submissions

[118] Counsel Mrs Reid submitted that, where there is uncertainty in the case, as there was in this case, the learned judge erred in not giving the jury a simple direction on causation to the effect that the appellant's action might not have been the sole cause of the deceased's death.

[119] Counsel for the Crown submitted that the learned judge sufficiently and effectively addressed the issue of causation to the jury by explaining the requisite ingredients of the murder charge at pages 863 to 865 of the transcript. This was buttressed by his directions to the jury as to how to deal with circumstantial evidence, as well as his recount of all the bits of circumstantial evidence the prosecution was relying on, as compared to the appellant's unsworn statement and evidence of his character witness.

[120] As a result, it was argued, the learned judge did not need to say more, and the case of **R v Pagett** (1983) 76 Cr App Rep 279, could be distinguished.

B. Analysis and disposal of issue 4 (ground 4)

[121] At page 863 of the transcript, the learned judge did, in fact, direct the jury as to the requirement in law for there to be a causal link between the appellant's actions and the death of the deceased. At pages 863 to 865, the learned judge said:

> "Now, what is murder? Murder is the unprovoked killing of another person, that is another human being, without lawful justification or excuse, with the intention of killing or causing serious bodily harm, deliberately to cause death and from which death, in fact, resulted. To establish the offence of murder, the prosecution has to satisfy you, and to make you feel sure of these ingredients that I am going to tell you.
>
> Just like a cake being baked, you can't just throw the water into the oven and it turn cake. You need the flour and all the other ingredients…So the ingredients of a murderer [sic]…the first ingredient that the accused inflicted the injury which caused bodily harm or death to the deceased. That's the first ingredient, that the deceased died as a result of that injury or bodily harm. That the accused inflicted this injury voluntarily and deliberately, that is to say consciously, and under no duress or compulsion on the part of no one. That the accused did so with the intention of killing. That the killing was unprovoked. That the killing was without lawful excuse, that is to say the killing was not because of a result of accident, or acting in self-defence."

[122] Apart from the unnecessary reference to baking a cake with water, we found nothing wrong with these directions. However, the fact is that, on the prosecution's case, outside of the purest of speculations and suspicions, no direct causal link was established between the actions of the appellant and the death of the deceased. It was not sufficient for the learned judge to tell the jury to look at the doctor's evidence, look at the various pieces of exhibits, look at the whole picture without indicating what the various strands of the evidence were that could possibly form that whole picture of guilt. At the close of

the prosecution's case, there was no evidence from which it could have been conclusively determined that there was no other way the deceased could have been injured other than by the bullets from the appellant's gun. This the learned judge failed to point out to the jury.

[123] This ground, therefore, had merit.

Issue 5 - whether the learned judge erred in his directions to the jury on circumstantial evidence (ground 5)

A. Submissions

[124] In relation to ground 5, Mrs Reid submitted that the learned judge failed to show the jury that the circumstantial evidence either "lined up in one direction only", or what pieces "fit together" so as to establish the guilt of the appellant. Counsel reiterated that the prosecution's case was based on suspicion and speculation, and did not meet the criminal standard of beyond a reasonable doubt. She again pointed to the various circumstances that she said created "lurking doubt", and argued that the learned judge failed to point out these weaknesses in the prosecution's case whilst being at pains to point out things in the evidence that discredited the appellant's case.

[125] Counsel for the Crown, however, submitted that the learned judge did indicate to the jury that there were no eyewitnesses, that the case depended on circumstantial evidence, and that they would have had to draw inferences. It was submitted that the learned judge then went on to give adequate directions on the law relating to circumstantial evidence, and to outline the various pieces of circumstantial evidence the prosecution was relying on to prove its case. He then fully outlined the appellant's defence. The learned judge also directed the jurors on how to decide what evidence to accept and reject at page 856 of the transcript, counsel said.

[126] The case of **Sophia Spencer v R**, at page 244, was relied on in respect of what is required of a judge in giving a summation, with which, it was submitted, the learned judge in this case complied.

B. Analysis and disposal of issue 5 (ground 5)

[127] It is true that the learned judge did, in fact, point out to the members of the jury that there were no eyewitnesses to the murder and that the prosecution was relying on circumstantial evidence from which they would have had to draw the reasonable inference of guilt. At page 867 of the transcript, the learned judge explained the concept of circumstantial evidence as follows:

> "The Prosecution in this case has called a number of witnesses, but none of the witnesses could say that they saw him actually pull the trigger. No witness could do that.
> **So, what the prosecution is asking you to do is to draw a reasonable inference**. And as such, the legal term is one that they call circumstantial evidence…Simply put, what the Crown is saying to you, is when you add up every little piece, piece here, piece there and put them all together, it points in one direction. That is what they are asking you to say, that is what they are asking you. But they call it this big word, circumstantial evidence.
>
> So, the Prosecution is relying…on evidence of various circumstances presented to you relating to this crime. **What the Crown is asking you to draw is a reasonable inference**. In other words, what the Crown is asking you to say, all the evidence adduced by them, **that is the Prosecution, demonstrated an array of circumstances that leads to one and only one conclusion** – that is what the Crown is asking – **and only one conclusion against the defendant, that he is guilty**. That when you look at all the surrounding circumstances, you find such **a series of undesigned and unexpected coincidence that are reasonable**. **That a reasonable person would find that their judgment is compelled in one conclusion**…
>
> Remember that…the circumstances must be thoroughly construed and examined, because such evidence may be fabricated, may cause suspicion in another or others. **So all the circumstances relied**

> **on must point to one direction and one direction only.** If the circumstantial evidence falls short of that standard, it does not satisfy that test. What the Crown is saying or asking or putting forward is that when this young girl, 17 years of age, Shanakaye Clarke, got shot to the right hand and shot into the back, they are asking you to say that this man did it, that is what they are saying, based upon all the circumstances.
>
> Circumstantial evidence may sometimes be conclusive but must always be narrowly examined. **As I have said…reasonable inferences and inescapable evidence; they must be inescapable**." (Emphasis added)

[128] In truth, this summation on circumstantial evidence is not the most elegantly worded, but there is no particular form of words or formula for directing a jury on circumstantial evidence (see **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 and **Melody Baugh-Pellinen v R**). However, considered as a whole, this direction was barely adequate.

[129] The learned judge made no mention of what the jury ought to have done if the prosecution's evidence had left gaps, or if it was equally as consistent with innocence as it was with guilt. Although the jury is entitled to draw inferences, they may only do so from proven facts. They are not entitled to speculate to fill the gaps in the prosecution's case. The learned judge did not advise them of this, nor did he point out to the jury the weaknesses in the evidence.

[130] This ground had merit.

Issue 6 - whether the learned judge failed to effectively direct the jury on the forensic evidence (ground 6)

A. Submissions

[131] Under this ground, counsel for the appellant complained that the learned judge simply regurgitated the forensic evidence, rather than explaining the legal implications of the fact that no gunpowder residue, burning, or marking on the deceased's body was found, relative to the prosecution's case that the shooting had taken place inside the car. In such a case, she said, it would not have been possible for the appellant to have fired on the deceased in the car, without there being some sort of gunpowder residue, burning or marking. Also, counsel pointed to the forensic evidence with regard to bullet holes in the car, as well as spent shells found outside the car that, she said, clearly indicated that there was shooting from outside into the car. Further, she argued, the bullets and spent shells found indicated that two different firearms were fired during the incident, only one of which had been issued to the appellant. These points, she said, the prosecution failed to account for, and the learned judge failed to direct the jury on.

[132] Counsel for the Crown submitted, however, that the fact that the learned judge reminded the jury of the evidence of the pathologist regarding the absence of gunpowder residue, muzzle contact or other markings, as well as the fact that there were bullet fragments and spent casings that did not match the appellant's firearm, was sufficient compliance with his duty. This was so, it was submitted, because it was done in the context of the learned judge having directed the jury as to their duty as the ultimate finders of fact in the case, and that they were not bound to follow any opinion expressed by the attorneys or the judge. Counsel also relied on the fact that the learned judge reminded the members of the jury that the burden of proof was on the prosecution and that even if they disbelieved the appellant's account, they were to go back to the prosecution's case to examine if the evidence was sufficient to find the appellant guilty.

[133] Counsel for the Crown further submitted that it was not the prosecution's duty to provide an explanation for every aspect of the evidence, and that it was a matter for the

jury to resolve the issue of the other spent shells that were found on the scene. Thus, it was asserted, the learned judge was not required to go any further than he did with the forensic evidence.

B. Analysis and disposal of issue 6 (ground 6)

[134] In his summation, the learned judge repeated the evidence of the experts, including the pathologist, without pointing out any weaknesses in the evidence. Where he made comments, these were made with regard to the appellant's defence. With respect to the five spent shells that came from the unknown gun, the learned judge made no comment and did not assist the jury as to how to deal with such evidence, which was not in keeping with the prosecution's case that the appellant had deliberately shot the deceased with intent to kill and without lawful justification, and that there had been no opportunity for anyone else to have done so. The prosecution was unable to, and did not attempt to explain, the clear evidence that another gun had been fired at the scene, and the fact that the appellant's car had been fired upon. We did not accept that the prosecution had no duty to account for this evidence, which formed part of its own case, and we found that the failure to do so was a serious weakness which the learned judge was duty-bound to point out to the jury. It is impossible to say that the jury must have resolved this inconsistency in the prosecution's own evidence, when no basis was provided by the prosecution on which the jury could have done so.

[135] The learned judge treated similarly with the evidence of Dr Sarangi in his summation, by simply repeating the evidence, and repeatedly reminding the jury that the deceased had been shot in the back whilst trying to escape from the car. The learned judge did not comment on the possible implications of the evidence that there was no gunshot residue, stippling, or abrasion on the deceased's wounds, which made it likely that the shooting had not occurred from a close range, and which could have lent credence to the appellant's account.

[136] This case was based purely on circumstantial evidence, and in the light of the fact that the prosecution's case was that the only person who could have shot the deceased

was the appellant, the jury would have had to exclude all hypotheses consistent with innocence as not being reasonably open on the evidence. The prosecution provided no basis upon which the jury could have excluded the hypotheses that someone else had fired into the car that night and killed the deceased, so that the jury could reasonably conclude the appellant was guilty beyond a reasonable doubt.

[137] By the time the learned judge sought to hand the case over to the jury, the evidence remained in the state it was at the close of the prosecution's case, as to how the deceased had been killed. Not having acceded to the no case submission at the end of the prosecution's case, the judge could have, and should have, withdrawn the case from the jury to avoid a perverse verdict. Fatally, however, not having withdrawn the case, the learned judge did not address the inherent weaknesses in the prosecution's case, and in that regard, he erred as a matter of law.

[138] This ground, we found, had merit.

Issue 7 - whether the learned judge entered the arena, resulting in an unfair and biased summation (ground 9)

A. Submissions

[139] Counsel for the appellant submitted that the learned judge had, throughout the case, "descended into the arena" on too many occasions, asking numerous questions, and effectively taking over from the prosecution. In doing so, she argued, the learned judge became both prosecutor and arbitrator. The risk, counsel said, was that a jury seeing that would have sided with the learned judge. The way in which the learned judge acted, she contended, was damaging and prejudicial to the appellant, rendering the trial unfair, and resulting in a miscarriage of justice. Counsel relied on the authority of **Jones v National Coal Board** [1957] 2 All ER 155 for the law on this point. She also cited **R v Hulusi and Purvis** [1973] 58 Cr App Rep 378 and **R v Perks** [1973] Crim LR 388.

[140] Although counsel for the Crown accepted that the learned judge in this case did ask several questions, she submitted that those questions were for the purpose of

clarifying the evidence for the jurors, in order to assist them with understanding the evidence in the case. Counsel cited the case of **Randeano Allen v R** [2021] JMCA Crim 8, where the three circumstances of judicial interference, which it was said, would give rise to the quashing of a conviction were set out. Counsel contended that the interventions by the learned judge in this case did not fall into any of those categories. In that regard, it was submitted that the learned judge's interventions did not (1) invite the jury to disbelieve the evidence; (2) prevent the appellant from advancing his defence; and (3) restrict the presentation of the appellant's case in the way he had wanted. Counsel pointed to the interventions of the learned judge in relation to the examination of at least seven witnesses, and the nature of some of the questions asked by the judge, in an attempt to illustrate her point that the learned judge's questioning had done no harm. This she did, notwithstanding her admission that the illustrations of the interventions were not exhaustive.

B. Analysis and disposal of issue 7 (ground 9)

[141] A trial judge is permitted to intervene in the examination of witnesses to ask questions in order to clarify evidence and to do what is necessary to maintain order and the fairness of the trial. What a trial judge is not allowed to do is to descend into the arena and act as an advocate. The extent to which interventions are permissible by the trial judge has been examined in numerous cases from this court.

[142] The following dicta of Lord Denning in the civil case of **Jones v National Coal Board**, at page 159, has been accepted by this court as an accurate general statement of the law, on the particular issue of the boundaries of judicial interference:

> "…**it is for the advocates, each in his turn, to examine the witnesses**, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other; see *R v Cain* ((1936), 25 Cr App Rep 204); *R v Bateman* ((1946), 31 Cr App Rep 106); and *Harris v Harris* (8 April 1952, The Times, 9 April 1952) by Birkett LJ especially. **And it is for the advocate to state his case as fairly and strongly**

> **as he can, without undue interruption, lest the sequence of his argument be lost**; see *R v Clewer* ((1953), 37 Cr App Rep 37). **The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well**." (Emphasis added)

[143] In the case of **Carlton Baddal v R** [2011] JMCA Crim 6 (applied in **Ronald Webley and Rohan Meikle v Regina**), Panton P, at para. [17], stated the following as to what the law expects of a trial judge in this regard:

> "…[It] is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (***Jones v National Coal Board*** [1957] 2 All ER 155 at 159G)."

[144] In **Lamont Ricketts v R**, at para. [30], F Williams JA summarised the law relating to interventions to be gleaned from the various authorities as follows:

> "…(i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up

> issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication."

[145] In **Randeano Allen v R** [2021] JMCA Crim 8, F Williams JA contrasted the trial judge's interventions with the interventions in **Peter Michel v R** [2009] UKPC 41. In the latter case, the Commissioner was said to have asked questions that were damaging to the defence which the prosecution could never have asked. The questions were described as generally hostile, and amounted to cross-examination. The Privy Council, in describing the characteristics of the interruptions by the Commissioner, said the following at para. 12:

> "By his questioning the Commissioner evinced not merely scepticism but sometimes downright incredulity as to the defence being advanced. Regrettably too, on occasion the questioning was variously sarcastic, mocking and patronising."

[146] F Williams JA, in **Randeano Allen**, concluded that the interventions in that case were nowhere near the level of those in **Michel v R,** and that, objectively speaking, whilst some of the interruptions were unnecessary, the trial judge did not cross the line so as to render the trial unfair.

[147] F Williams JA found differently in **Lamont Ricketts v R**, however, for after an examination of the trial judge's interference in that case, he concluded, at para. [29], that:

> "The interventions, by their frequency, detailed nature and content, also manifest, in our view, a line of questioning that, given the issues in the case, amounted or came close to cross-examination of the witness by the learned trial judge. The very real danger existed that the jury might have perceived the judge to have been viewing the evidence in a particular way and that might have influenced their own approach to the case. We see the interventions as having the cumulative effect of raising the possible perception that the learned trial judge favoured one side and further creating considerable doubt that the appellant received a fair trial."

[148] However, even where a judge has erred in that regard, this does not automatically indicate bias, nor does it automatically mean that the conviction should be quashed. The pertinent question is whether the interventions were of such a nature as to cause the defendant to not receive a fair trial (see **Michel v R,** at para. 18, and **Lamont Ricketts v R**).

[149] A conviction will be quashed on account of improper interventions by a trial judge if they fall into one of the three categories listed in **R v Hamilton** (unreported), United Kingdom, English Court of Criminal Appeal, judgment delivered 9 June 1969 (applied in **R v Hulusi and Purvais**). In **R v Hamilton**, as cited in the latter case, Lord Parker CJ said:

> "…[T]he interventions which give rise to a quashing of a conviction are really threefold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury… where the interventions have made it really impossible for Counsel for the Defence to do his or her duty in properly presenting the

> defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[150] In the instant case, a perusal of the transcript revealed that the learned judge, throughout the trial, intervened in the examination-in-chief and cross-examination of several of the prosecution's witnesses, in a manner in which it could be said was excessive. Although the learned judge asked many questions for the purpose of clarifying the evidence, which he was permitted to do, on many occasions, the impression was left that the learned judge took over from the prosecutor in seeking to elicit the evidence from the witnesses before the prosecutor got the chance to ask questions in keeping with its case. It began with the evidence of the mother of the deceased, where he asked several questions, including standard questions usually asked of such witnesses who identify the body of a deceased person, which the prosecutor had omitted or forgotten to ask. It continued in the evidence of Mr Johnson, where the learned judge asked 19 questions, which were substantive questions for the prosecution, regarding what the witness saw and heard.

[151] Further examples of the learned judge's intervention can be seen during the examination-in-chief of Det Sgt Etham Miller, to whom he asked over 40 questions, despite the prosecution's failed attempts to take back control, often interrupting the prosecution's line of questioning. He also intervened in the cross-examination of Det Sgt Etham Miller to ask questions of his own. The learned judge later recalled Det Sgt Etham Miller for the sole purpose of asking him 26 questions on what the appellant had told him, his examination of the car, and what he had found in the car, most of which had already been answered in examination-in-chief and in cross-examination. The learned judge also questioned Det Inspector Smalling, asking him 103 questions in examination-in-chief (rejecting counsel's attempt to regain control at question 29), and eight in cross-examination, as well as Cpl Porter, to whom he asked 26 questions in examination-in-chief, nine in cross-examination, and two in re-examination. With regard to Ms Brydson,

he intervened and asked 19 questions, commented on her answers in cross-examination, and asked 11 questions in re-examination about the bullet hole in the driver's seat rest.

[152] During the pathologist's evidence, the learned judge intervened, taking the doctor off track, so much so that the prosecution had to ask for permission to have the doctor continue after the learned judge's eighth question took him off track. By the eleventh question, the learned judge had taken the doctor on a path to a supposition based on what he had been told by the police. The learned judge had to immediately declare that he would not allow that evidence. However, at the end of the cross-examination, the learned judge asked the doctor about the injury to the deceased's hand, which the doctor said was a defensive wound. The learned judge asked the doctor where he would have placed the shooter based on the position of that injury. The doctor's evidence was that he would have placed the shooter to the side. The learned judge then asked "from the right side?", to which the doctor, of course, said yes. The doctor had never said before that the shooter would have been to the right side of the deceased for that injury to be inflicted. The evidence, at page 132 of the transcript, was that the wounds would have been sustained when the deceased turned her back to the gun or the shooter, including the injury to the hand, which he described as injury number two. He added that this was possibly when the deceased, "for some reason", was trying to exit the vehicle. The doctor repeated the evidence, at pages 136 to 137 of the transcript, where he said that whether the deceased was going out of the vehicle or going to the back seat, her injuries would have been likely inflicted when she turned her back to the shooter.

[153] The learned judge's question to the doctor and his leading of the evidence from the doctor that the shooter was to the right of the deceased when she sustained the defensive wound would have been totally devastating to the appellant's case, in circumstances where that had never been the evidence of the doctor previously.

[154] In the instant case, the interventions were numerous, and in some instances, were clearly an annoyance, to both the defence and the prosecution, often taking them off track. In the examination of Cpl Lawrence's evidence, the learned judge indicated his

interest in where the bullet fragments had been found, asking 40 questions about it. At page 389 of the transcript, it can be seen where the prosecution attempted to regain control by asking the learned judge if he had any more questions, failing which they would resume viewing the pictures, which was what the prosecution was engaged in when the learned judge interrupted. At page 400 of the transcript, the learned judge again interrupted the flow of evidence to ask about the space between the driver's seat and the steering wheel, which in our view was an attempt to discredit the appellant's evidence that he was turning anti-clockwise whilst shooting at the assailant. After the witness was cross-examined, the learned judge went on to ask questions of the witness to repeat evidence that had already been given.

[155] We did not accept Mrs Reid's contention that the questions, in their entirety, particularly fell into any one of the above categories in the cases, to warrant the conviction being overturned. The appellant was able to present his defence in his own way. Counsel was able to cross-examine in the appellant's defence, despite the learned judge's interventions, and it was not the interventions themselves (as opposed to the learned judge's comments made in the summation) that invited the jury to disbelieve the defence.

[156] However, those are not the only bases for which a conviction may be quashed due to excessive interventions. In **Michel v R**, the Privy Council stated that there was another principle in play. This is that, when looked at in the round, the accused person simply did not get a fair trial. The Board put it this way, at para. 27:

> "There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor. This wider principle is not in doubt. Perhaps its clearest

> enunciation is to be found in the opinion of Lord Bingham of Cornhill speaking for the Board in Randall v R [2002] 2 Crim App R, 267, 284 where, after remarking that 'it is not every departure from good practice which renders a trial unfair' and that public confidence in the administration of criminal justice would be undermined "if a standard of perfection were imposed that was incapable of attainment in practice," Lord Bingham continued:
>
> '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 as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.'"

[157] In this case, we were of the view that the interventions were not only excessive and disruptive, but a number of the questions were designed to shore up the prosecution's case and discredit the defence. These interventions, accompanied with the other errors made by the learned judge, particularly his comments undermining the defence and the unbalanced way in which he summed up the case, would likely have negatively impacted the appellant's right to a fair trial.

[158] We found this ground had some merit.

Issue 8 - whether the learned judge failed to give a good character direction and derided the good character of the appellant (ground 10)

A. Submissions

[159] Counsel for the appellant submitted that, although the appellant did not give evidence, he put his character in issue, in his statement from the dock, by speaking of his involvement in the community, his police work, and his relationship with the deceased when she was alive. The issue of good character was also raised, she said, during the

appellant's cross-examination and through the evidence of his character witness. Counsel complained that the learned judge merely regurgitated the evidence of the appellant's character witness.

[160] Counsel also submitted that, by using suggestive words and expressions in his commentary, the learned judge inferred his approval of the credibility of the prosecution's witnesses, thus usurping the role of the jury as judges of the facts. The cases relied on for this ground included **R v Moustakim** [2008] EWCA Crim 3096, **Leslie Moodie v R** [2015] JMCA Crim 16, **Regina v Vye**, **Regina v Wise**; **Regina v Stephenson** [1993] 1 WLR 471, **R v Aziz**, **Regina v Tosun**, **Regina v Yorganci** [1996] AC 41, **R v Fraser Marr**, **Mears v R** (1993) 97 Cr App Rep 239, **R v Landy and others** (1981) EWCA Crim J0112-4, and **R v Bryant** [2005] EWCA Crim 2079.

[161] Counsel for the Crown, however, submitted that the learned judge did, in fact, give a good character direction on propensity, as was required of him by law, given that the appellant did not give sworn evidence. It was pointed out that the learned judge did indicate to the jury that the appellant had a good character, which meant that he was less likely to have committed the offence. It was submitted that, in giving these directions, the learned judge did not use any "unacceptable" words, nor did he dilute the direction in any way. Regarding the statement made by the learned judge that "persons of good character" can do bad things, it was submitted that this statement did not prejudice the good character direction that the judge gave, nor did it discredit the appellant. **Ronald Webley and Rohan Meikle v R** was relied on for this submission.

[162] Counsel sought to distinguish the case of **R v Moustakim**.

B. Analysis and disposal of issue 8 (ground 10)

[163] The appellant raised the issue of his good character in his unsworn statement from the dock and through questions put to some of the witnesses by his counsel during cross-examination. The result was that the learned judge gave directions on the appellant's good character in relation to propensity only, as he was obliged to do.

[164] At pages 1001 to 1002 of the transcript, the learned judge said as follows:

> "Mr. Foreman and your members, throughout some of the cross-examination by his counsel, questions were asked of his good character. He is putting his good character before you, this is the law I am telling you. And the good character before you, this is the law I am telling you. And the good character consists of two portions, credibility and propensity to do something. But, he did not take the stand, so I am leaving only the propensity, because you did not get to see him under cross-examination.
>
> So, what he is saying and asking you to say, is that because of his good character, he would not be of propensity to do this act, that is what he is asking you to say. **But, let me say that a person of good character do [sic] bad things too. I say no more**." (Emphasis added)

[165] We did not agree that the learned judge derided the character of the appellant by these words, and Mrs Reid did not point to any other transgression of the learned judge in this regard. We did, however, agree that the words used could have had the effect of diluting the good character direction, to which the appellant was entitled.

[166] The important question is "whether the words and the phraseology that he used, did communicate the sense of what the good character direction was intended to convey" (see **Ronald Webley and Rohan Meikle v R**, per Brooks JA (as he then was) at para. [38]). We did not believe that they did so for three reasons. Firstly, for the direction to be effective, the judge should have made an explicit positive direction to the jury to take the appellant's good character into account. What the learned judge said in this case seemed to give with one hand and take back with the other. Secondly, the comment by the learned judge that "a person of good character do [sic] bad things too. I say no more", would have had the effect of watering down any positive impact the direction could have had, especially since the learned judge, having said this, did not go on to remind the jury that his good character is something they should take into account.

[167] Thirdly, the learned judge couched the direction in terms of "what [the appellant] is saying and asking you to say". Then he repeated "that is what [the appellant] is asking you to say". By couching it in those terms, the effect of the direction would have also been diluted, similar to the case of **Moustakim**, because it would have come across not as a direction in law from "the judge himself" but as just an assertion from the accused person. In **Moustakim**, the trial judge had directed the jury as to the accused's good character 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." (see para. [10])

[168] The Court of Appeal of England and Wales, at para. 15, found that these directions were inadequate for the following reasons:

> 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."

[169] In this instant case, the learned judge's direction falls squarely within reasons 1, 3 and 4 of the list set out above.

[170] This ground, we found, had merit.

Conclusion

[171] The instant case was one based on circumstantial evidence, in which, at the close of the prosecution's case, the state of the evidence was such that it did not point conclusively in one direction to an inescapable inference of the appellant's guilt beyond a reasonable doubt. There was no direct evidence linking the cause of death of the deceased to the actions of the appellant, since there was no forensic or any other evidence showing who fired the fatal shot. The closest the evidence came was the finding of a bullet in a building on the left side of the road, which had come from the appellant's service pistol. However, this proved nothing ultimately, as the appellant's defence was that he was fired upon and he returned fire at the attacker, who was to his left. There was evidence on the prosecution's case that the appellant's car had been fired upon from the left side.

[172] It further could not have properly been inferred from the evidence, beyond a reasonable doubt, that a bullet from the appellant's service firearm had killed the deceased, as the evidence of spent casings from another firearm on the scene, that could not be linked to the appellant, meant that there was a possibility that the deceased had been killed by the person who had fired that weapon. The prosecution failed to provide

any explanation to account for the presence of those spent casings. The prosecution also failed to negative self-defence and defence of another, as well as accident. The learned judge, therefore, not only erred in not acceding to the no case submission but also in not withdrawing the case from the jury at the close of the prosecution's evidence.

[173] The learned judge made additional errors which were equally grave. He rendered the trial unfair by "ridiculing" the appellant's defence before the jury, making comments that undermined the defence, by summing up the case in an unbalanced way in favour of the prosecution, and by descending into the arena during the examination of the witnesses with innumerable interventions. He further erred in his directions to the jury on causation, circumstantial evidence, forensic evidence and good character, to the detriment of the appellant.

[174] Therefore, we found that grounds 2, 3, 4, 5, 6, 8, 9 and 10 had merit. For those reasons, we made the orders we did, which are listed at para. [9].