JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 61/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

WAYNE HAMIL v R

Hugh Wildman for the applicant

Miss Sophia Thomas and Miss Shanique Farquharson for the Crown

20 May 2019 and 25 March 2021

FRASER JA (AG)

[1] This is an application brought by Mr Wayne Hamil for leave to appeal against his conviction and sentence. He was convicted on 30 June 2016, in the Trelawny Circuit Court, for wounding Saint O'Brian Downie with intent to cause him grievous bodily harm. Mr Hamil was sentenced to pay a fine of $1,000,000.00 or serve three years' imprisonment at hard labour, and given one month to pay. During the hearing the court was advised that the fine has been paid.

[2] The applicant's first application for leave was refused by a single judge of this court on 17 August 2018. That application has now been renewed before the court. Following

oral arguments in this matter, written submissions were filed on 20 October and 23 November 2020.

[3] It will be necessary to first recount the proceedings at trial, before treating with the grounds of appeal advanced on behalf of the applicant.

The proceedings at trial

The prosecution's case

[4] The primary facts on the case for the prosecution came through the evidence of the complainant, Saint O'Brian Downie and his father Altimont Downie. The complainant testified that, on 24 March 2014, he was driving his car through the Hopewell square in the parish of Hanover. As he was doing so, he saw in the square, the applicant who was then a constable of police and also District Constable (D/C) Jolly, both of whom he knew before. The complainant outlined that the applicant came out in front of his car, causing him to have to brake suddenly. The applicant then came to his car door and beat his hand on it and told him, among other things, that he was "ready to fight this morning". The complainant stated that he drove off, turned around and went back through the square. At the square he told D/C Jolly to, "Tell the officer to ease off because he always see me and trouble mi". The applicant could have heard when he said this.

[5] He indicated that the applicant then said, "You want stop and see what mi do you?" As he continued to drive, the applicant chased the complainant's car and used his baton to hit the complainant's right elbow. The complainant stopped his car. The applicant opened the car door and dragged the complainant out of his car. The applicant then hit

at the complainant with the baton and both of them fell to the ground. The applicant tried to pull his service revolver. The complainant related that his feet and the applicant's feet got in a tangle and the applicant called out to D/C Jolly to come and shoot him, the complainant. D/C Jolly came and pulled him away and other persons pulled away the applicant. The complainant then stated that the applicant pulled his firearm from his waist. While D/C Jolly was still holding the complainant, the applicant fired one shot in the air and then fired four shots at the complainant. He got two shots, one to his upper right leg and the other to his lower left leg. He indicated his father was present when he got shot. The complainant denied being the aggressor.

[6] The complainant's father testified that he was driving immediately behind his son, the complainant, on the morning of the incident, when he saw the applicant and D/C Jolly whom he knew before. He indicated that the applicant ran towards the complainant's car and used his baton to hit the complainant on his hand (indicating his elbow). The complainant then stopped the car. The applicant opened the door and held the complainant (indicated his front collar). The applicant then took the complainant out of the car and tried to hit him again with the baton. He further narrated that the applicant and the complainant "grabbed up" and fell to the ground. He heard the applicant call for D/C Jolly to shoot the complainant. D/C Jolly went and held the complainant and he held the applicant, while the applicant was on the ground sitting and he stood over him. He then outlined that while the complainant was being held by D/C Jolly, the applicant took out his gun, fired one shot in the air and then turned the gun to the complainant and fired four shots.

[7] Apart from the evidence of the complainant and his father, the other significant evidence for the prosecution came from Mr Albert Morris, a senior investigator from The Independent Commission of Investigations (INDECOM). Mr Morris conducted an investigation into the matter soon after the incident and recorded a statement from the applicant. In that statement, the applicant said that he knew the complainant well as a robot taxi driver who was always in conflict with the police. He indicated that he and D/C Jolly were on duty in Hopewell square, when he stopped the complainant's car and told him he was not wearing his seat belt. The complainant was verbally abusive to him and then sped off. Shortly after, the complainant returned to the square spouting a lot of expletives.

[8] The applicant further stated that he went over to where the complainant had slowed his car and told him to stop the vehicle. He then struck the complainant with his baton on his right hand that was resting on the window ledge. The complainant stopped the vehicle, came out and punched him, the applicant, twice in his face and held him around his throat. He also held the complainant around the throat. Relating the complainant's ongoing actions at that time, the applicant said, "I was been fed by his fist in my face". The applicant further outlined that he shouted out for D/C Jolly, and both himself and the complainant fell to the ground. He continued to hold onto the complainant who persisted in punching him to his face.

[9] The applicant stated that he felt like water was running down his face and tasted blood in his mouth. He told D/C Jolly to fire two shots from his gun but D/C Jolly continued

to hold onto the complainant's hand. The applicant indicated he felt scared and alone. Therefore, he pulled his service pistol and fired two shots in the air. He further stated that after he fired the shots, the applicant "launched" towards him. They were both on the ground and he was on his back. He said that it dawned on him that the complainant was not scared by the shots and was still coming at him. He pointed his service pistol in the direction of the complainant's lower body and fired one shot. The complainant was still coming at him. He then pointed his service pistol to the complainant's lower region and fired one more shot. The applicant stated that he realised the complainant was shot as the complainant tried to come at him again, but he could not get up.

[10] The applicant was subsequently charged by Mr Morris for wounding with intent. During Mr Morris' testimony, the statement given to him by the applicant was admitted into evidence.

The defence case

[11] The defence case was consistent with what the applicant said in the statement he gave to Mr Morris. In his sworn testimony, the applicant, who was the sole witness for the defence, said the complainant was the aggressor and that he was doing his duty as a policeman, when the incident occurred. He indicated that while he was trying to stop the complainant, the complainant was driving off his vehicle, so he tapped him on his arm to get him to stop. The complainant came out of his vehicle and attacked him, punched him twice in the face, grabbed his throat and he fell. There was a struggle and in order to defend himself and prevent his firearm being taken away, he fired a shot in

the air. He said that the complainant did not retreat or seem scared and came after him. Thereupon, he fired two shots to the lower part of the complainant's body.

Grounds of appeal

[12] At the hearing, counsel for the applicant advanced the following three grounds of appeal:

> "1. The learned trial judge erred by telling the jury that the statement given by Mr Hamil to Mr Morris of INDECOM was not evidence of the truth and thereby he had misdirected them in law and had eroded the defence of self-defence.
>
> 2. The directions to the jury on self-defence were inadequate.
>
> 3. The learned trial judge's direction on good character was flawed."

[13] After the hearing, through written submissions filed 22 October 2020, Mr Wildman, for the applicant, sought leave to advance the following further ground of appeal:

> "4. The charge brought by INDECOM was illegal and amounts to a nullity."

[14] Miss Thomas, for the Crown, responded to this ground in written submissions filed 23 November 2020. Based on the court's request to Ms Thomas, on 4 March 2021 copied to Mr Wildman, for further documentation, Ms Thomas, on 17 March 2021, provided the court with the original information and depositions relating to the proceedings against the applicant in the Lucea Resident Magistrate's Court (now Parish Court). Mr. Wildman in response to the court's request, on 4 March 2021 sought the court's leave to also rely on an additional authority, which he supplied.

[15] The grounds of appeal will be addressed in turn.

Ground one – The jury was misdirected on the effect of the applicant's out of court statement

Submissions

[16] Mr Wildman submitted that the direction given by the learned trial judge to the jury on the effect of the applicant's out of court statement was grossly incorrect, out of line with the authorities and constitutes a material misdirection, rendering the conviction liable to be quashed. The direction of which he complained is found at pages 69 (lines 14 – 25) – 70 (lines 1-8) of the transcript of the learned trial judge's summation. It is in the following terms:

> "Now, in the course of the evidence of Mr Morris a statement that was given by Constable Hamil that very day was read into evidence. What the defendant said in his statement is not evidence of the events that took place that day. It is what was said in Court is evidence. However, in that statement his evidence in this trial of the fact is that on the day in question, after the incident, he made a statement. It is also evidence as to his reaction because his attitude when the allegations were brought to him or when enquiries were being made of the incident some four to five hours afterwards, it is part of the general picture you have to consider, and you may take into account in assessing the genuineness and consistency of the self-defence. It is not evidence, it is only the facts stated in Court is evidence and that is what you have to consider."

[17] Counsel contended that the applicant's statement was an extra judicial mixed statement and therefore relevant and admissible as evidence of the truth of his assertion that he acted in self-defence. Counsel argued that the direction of the learned trial judge to the contrary was wrong and that it was for the jury to decide, given the applicant's explanation of the shooting, if they found he acted in self-defence. The cases of **R v Storey and Anwar** (1968) 52 Cr. App. R. 334, **R v Newsome** (1980) 71 Cr. App. R.

325, **R v Duncan** (1981) 73 Cr. App. R. 359, **R v Donaldson et al** (1977) 64 Cr. App. R. 59, **R v Sharp** [1988] All ER 65, **Western v Director of Public Prosecutions** [1997] 1 Cr. App. R. 474 and **Alexander Von Stark v The Queen** [2000] 1 WLR 1270 were cited in support of his submissions.

[18] Ms Thomas, for the Crown, submitted to the contrary. She contended that the learned trial judge gave sound directions to the jury with respect to the extra judicial statement given by the applicant. She maintained that the statement was purely exculpatory or self-serving, and was only admissible to show the reaction of the applicant when first taxed with incriminating facts. She argued that while it could be used by the jury to assess the consistency of the applicant's defence, it was not evidence of the truth of its contents. She relied on Blackstone's Criminal Practice 2005 Part F16.15 at pages 2227 -2228 and the cases of **Barberry et al** (1976) 62 Cr. App. R. 248, **R v Storey and Anwar** and **R v Donaldson et al** in support of her submissions.

[19] She also submitted that in relation to the case of **Western v Director of Public Prosecutions**, relied on by counsel for the applicant, it was noteworthy that 1) in his statement, the appellant both admitted that he was a part of a fight as well as posited that he had not struck the first blow and 2) the only evidence that could raise self defence came from his statement, as there were no witnesses to the start of the fight and he did not give evidence at the trial. That was to be viewed, she argued, in contradistinction to the instant case where the applicant did not admit to doing anything wrong, as he maintained that he was carrying out his lawful duties when the complainant was shot;

thus, she reiterated the view that the applicant's statement was self-serving. Further she pointed to the fact that, unlike in **Western v Director of Public Prosecutions**, the applicant gave sworn evidence which was consonant with his earlier statement. Therefore, counsel contended, even if the court were to find that the statement was mixed, the applicant was not prejudiced by the learned trial judge's indication that the statement could only be used by the jury to assess the consistency of the applicant's defence, especially since at all material times, the judge reminded the jury that the applicant maintained throughout, that he was acting in self defence.

Analysis

[20] The main questions for the determination of the court on this ground, are:

1) whether the applicant's statement is mixed or wholly exculpatory; and

2) if the statement is mixed, was the applicant prejudiced by the learned trial judge's treatment of the statement, in the context of the facts of this case?

[21] Those questions have to be determined against the background of how the law classifies and assesses such statements. The common law that applies to Jamaica on the classification and effect of out of court inculpatory, mixed and wholly exculpatory statements given by an accused, is codified in England and Wales under the Police and Criminal Evidence Act 1984 (PACE). It is accurately stated in Part F16.5 of Blackstone's Criminal Practice 2005, relied on by counsel for the prosecution. Excerpts from that Part state:

> "If such a statement is wholly adverse to the accused, it may be admitted as evidence of the truth of the facts contained in it under PACE 1984, s.76…If it is a mixed statement, i.e. a statement containing both inculpatory and exculpatory parts such as 'I killed X. If I had not done so, X would certainly have killed me there and then', the whole statement is admissible…However, if the statement is purely exculpatory or self-serving, it is not admitted as evidence of the facts stated in it; it 'is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts'…"

[22] The case of **R v Storey and Anwar**, referred to by both parties, demonstrates the application of the law in a case where the statement is wholly self-serving. In that case cannabis resin was found by the police in the flat of the accused S, a call-girl. She told the police that it was owned by her eventual co-accused A. A, who was found in the lavatory in the flat, made no comment when the police told him what S had indicated. A further small amount of cannabis resin was found on A for which he also gave no explanation. Later at the police station, S dictated a voluntary statement to the police indicating that the cannabis was brought to the flat against her will by A who, she thought, had come there for 'other business'. She indicated she was in the process of arguing with him when the police arrived. In commenting on the status of S's statement which was considered to be wholly exculpatory, Widgery L.J. said at page 337:

> "We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is

> evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial."

[23] The statement in **R v Storey and Anwar** was wholly exculpatory as nowhere in the statement did S admit custody and control of the cannabis or an intention to possess it. **R v Storey and Anwar** was applied in **R v Barbery et al**, a case in which Barbery was convicted of being part of an affray at a café. After the incident, Barbery gave a voluntary wholly exculpatory statement to the police in which he denied being involved in the affray. On appeal, one of the complaints was that the judge had failed to remind the jury of this voluntary statement. It was held that, as Barbery had made a voluntary statement in which he denied involvement in the affray, and had not given evidence to that effect, the trial judge was under no duty to remind the jury of that statement as it was not before the court as evidence of the truth of its contents. The statement in **R v Barbery et al** was wholly exculpatory, as the accused did not admit in any way to participating in the affray.

[24] **R v Storey and Anwar** was considered and explained in **R v Donaldson et al** where, D having been charged with handling stolen goods among other offences, gave a statement to the police, partly admitting and partly denying that charge. At trial, the Crown relied on the statement. D did not give evidence. The jury were directed that the statement was only evidence to the extent that it might constitute an admission. He was convicted. On appeal it was held that when the Crown adduces a statement relied upon as an admission, it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon

the passages relied upon by the prosecution as an admission. It is for the jury to decide whether the statement viewed as a whole constitutes an admission. The English Court of Appeal, therefore, found that the jury had been misdirected, but as the verdict was not affected by the error, upheld the conviction on the basis that no miscarriage of justice had occurred.

[25] In **R v Pearce** (1979) 69 Cr. App. R. 365, it was made clear that the reference in **R v Storey and Anwar** to the reaction of the accused 'when first taxed' did not limit the application of the principle recognised in that case, to statements made on the first encounter with the police. Therefore, the Court of Appeal of England and Wales held that self-serving voluntary statements made to the police by the defendant two and three days after he had been arrested, should have been admitted in evidence. Accordingly, it was wrong for the trial judge to have only admitted the contents of the defendant's interview conducted in between those two sets of voluntary statements, which contained some admissions. Lord Widgery LCJ, writing on behalf of the court, noted at page 368 that:

> "It has been the practice to admit in evidence all unwritten and most written statements made by an accused person to the police whether they contain admissions or whether they contain denials of guilt. The only exception which readily comes to mind is the exclusion of any admission of a previous conviction."

[26] Later, at page 369-370, after indicating that the case could be disposed of within the principles outlined in **R v Storey and Anwar** and **R v Donaldson et al**, he summarised the guiding principles as follows:

> "(1) A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted. With this exception a statement made by an accused person is never evidence of the facts in the statement.
>
> (2) (a) A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. The reference in STOREY to the reaction of the accused 'when first taxed' should not be read as circumscribing the limits of admissibility. The longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements. (b) A statement that is not in itself an admission is admissible if it is made in the same context as an admission, whether in the course of an interview, or in the form of a voluntary statement. It would be unfair to admit only the statements against interest while excluding part of the same interview or series of interviews. It is the duty of the prosecution to present the case fairly to the jury; to exclude answers which are favourable to the accused while admitting those unfavourable would be misleading. (c) The prosecution may wish to draw attention to inconsistent denials. A denial does not become an admission because it is inconsistent with another denial. There must be many cases however where convictions have resulted from such inconsistencies between two denials.
>
> (3) Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible."

[27] It should be noted that, as will be seen in later cases, the exception identified by Lord Widgery at principle 1, now includes statements which are either wholly or partially adverse to the accused. Also in this jurisdiction, while it is certainly true that as noted by the Lord Chief Justice the practice is to admit all unwritten statements of the accused made to the police, it is not the case that most written statements are also admitted in circumstances where they are not at least partially inculpatory.

[28] In **R v Newsome**, a wholly exculpatory statement composed on legal advice and dictated by the accused to a solicitor, 13 hours after the alleged offence and after several interviews, was ruled inadmissible by the trial judge. The accused was convicted and appealed against the judge's ruling. It was held on appeal that, as the statement was self-serving and revealed nothing relevant about the attitude of the accused, coloured as it was by the circumstances surrounding its creation, the appeal should be dismissed.

[29] The law, as it stands today, on how mixed statements should be assessed, was perhaps first comprehensively stated in **R v Duncan**. In that case, in both an oral interview and a written statement, the latter given after he was provided with the services of a solicitor, the accused confessed to strangling his live-in girlfriend to death. The accused said he did not know why he had attacked her but suggested that he may have lost his temper when she teased him. The accused neither gave evidence nor called any witnesses on his case. The trial judge declined to leave the issue of provocation to the jury on the basis that, as the accused's statements were self-serving, they could not be evidence of the facts. He was convicted of murder. On appeal, it was held that, in so far as the judge's ruling was based on the reasoning that exculpatory remarks were inadmissible in evidence of their truth, he was in error. However, as the appellant could not explain the reasons for his actions, but merely attempted to rationalise his behaviour, there was no evidence of provocation by anything the victim said or did; thus the appeal would be dismissed.

[30] In a classic explanation of how juries should be directed to assess mixed statements, Lord Lane CJ stated at page 365 that:

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight."

[31] Earlier at page 364, in discussing the logic behind the manner in which the court held mixed statements should be treated, he narrated the example cited in Part F16.5 of Blackstone's Criminal Practice 2005. He said:

> "Suppose a prisoner had said 'I killed X. If I had not done so, X would certainly have killed me there and then.' If the judge tells the jury that the first sentence is evidence of the truth of what it states but that the second sentence is not; that it is merely something to which they are entitled to have regard as qualifying the first sentence and affecting its weight as an admission, they will either not understand or disregard what he is saying. Judges should not be obliged to give meaningless and unintelligible directions to juries."

[32] In **R v Hamand** (1986) 82 Cr. App. R. 65, H, aggrieved by his belief that L, a pedestrian, had struck his car, alighted from his car and pursued L. Having caught up with him, H punched L resulting in L becoming and remaining unconscious. There were no witnesses to the punch other than H and L. H made oral and written statements to the police that L was holding a carrier bag, and raised it, thereby causing him to believe

that L was going to hit him, so he struck first. On a charge of causing grievous bodily harm, contrary to section 20 of the Offences Against the Person Act, the prosecution relied on H's oral and written statements. At the end of the prosecution's case, the trial judge ruled that H had a case to answer. He also ruled that self-defence did not arise on the prosecution's case for the jury's consideration, as the exculpatory aspects of H's statements were not evidence. The judge stated that H would have to give evidence of those elements of the statements for them to become evidence.

[33] Having been convicted of inflicting grievous bodily harm, H appealed, contending that the judge's ruling on the status of the exculpatory parts of his statements, had eroded his choice whether or not to give evidence. It was held, applying **Duncan**, that, as H's statements were partly inculpatory and partly exculpatory, the excuses formed part of the evidence of the case, although the exculpatory statements might not carry as much weight as the admissions. Accordingly, as the judge's ruling had breached the fundamental principle that a defendant should not be deprived of a free choice whether to give evidence or not, and as it could not be said that H's giving evidence had not worked to his prejudice, the conviction was deemed unsafe and unsatisfactory and quashed.

[34] In 1987, in the case of **R v Sharp**, the House of Lords was finally able to weigh in on the issue of the effect of mixed statements. The facts of **Sharp** are important for the final analysis on this point. The appellant was seen by the police dressed in a tracksuit running in the opposite direction from where a burglary was recently committed. He

entered a car and drove away. The police pursued him but he managed to escape. The car was later found abandoned. When it was examined, glass particles were found on the driver's seat. Subsequently, the tracksuit was also found to have glass particles. Both sets of particles were indistinguishable from samples of glass taken from the burgled house. Two days after the incident, the appellant went to a police station and gave a voluntary statement in which he admitted being in the area at the time of the burglary but denied being the burglar. His innocent explanation was that he had been involved in a minor accident which caused a small part of his car to fall off and he had been running looking for it. He also denied escaping from the police.

[35] The trial judge, in directing the jury, treated his statement as mixed, in that his indication that he was in the area at the time of the burglary was an admission and therefore evidence of the fact that he was there, but the exculpatory parts which explained his reason for being there, the judge said, were not evidence of those facts related. Based on this erroneous direction, which was contrary to the law as laid down in **R v Duncan** and **R v Hamand**, the Court of Appeal allowed his appeal. The Court of Appeal then refused the Crown leave to appeal to the House of Lords, but certified for the consideration of the House of Lords, a point of law of general public importance that was involved in the decision to allow the appeal. The question certified was:

> "Where a statement made to a police officer, [amended by Lord Havers to 'a person'], out of court by a defendant contains both admissions and self-exculpatory parts, do the exculpatory parts constitute evidence of the truth of the facts alleged therein?'

[36] The headnote reflects that the House held that, in such a situation, the whole of the statement constitutes evidence of the truth of the facts it asserts and the judge should direct the jury that both the incriminating parts and the excuses or explanations must be considered in determining where the truth lies, although where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true, whereas the excuses do not carry the same weight. The dictum of Lord Lane CJ in **R v Duncan** was approved. Lord Havers, who wrote the leading judgment and with whom the other Law Lords agreed, stated at page 71 that:

> "I cannot improve on the language of Lord Lane CJ in R v Duncan and will not attempt to do so. It is in my opinion rightly decided and should be followed."

[37] Subsequently in **R v Azziz** [1996] AC 41 the House of Lords further considered the relevant principles in applying, following and clarifying the scope of **R v Sharp**. Writing for the House Lord Steyn stated at page 50 that:

> "[T]he principle as enunciated in *Sharp* is that both the inculpatory and exculpatory parts of a mixed statement are admissible as evidence of their truth. So far as the exculpatory parts of a mixed statement are concerned an exception to the hearsay rule is involved. It is necessary to explain the scope of the exception. *Duncan* was concerned with mixed statements made to the police. But *Sharp* made clear that the principle cannot be so confined. It applies to all mixed statements tendered by the Crown. Contrary to the submission of counsel for the Crown, *Sharp* does not warrant the introduction by a defendant of a mixed statement as part of his case: *Blackstone's Criminal Practice*, 5th ed. (1995), pp. 2114-2115."

[38] Particularly relevant in the resolution of this ground is the case of **Western v Director of Public Prosecutions** which applied **R v Duncan** and **R v Sharp**. In that

matter, two men, the appellant and H were seen by the police fighting in an alleyway. The police had not seen the start of the fight and were unaware who had struck the first blow. Both men were arrested. Interviewed in the presence of his step-father and solicitor the appellant admitted hitting H, but alleged that it was in self-defence as H had hit him first. The appellant was charged for breaching the Public Order Act 1986. At trial he did not challenge the evidence of the police officers or give evidence, but asserted that the contents of his interview raised the issue of self-defence. The justices, in convicting the appellant, declined to rely on the interview for the truth of its contents, on the basis that it was a self-serving exculpatory statement. On appeal, it was held that the justices were wrong as it was a mixed statement and based on the interview, they should have considered his assertion that he had acted in self-defence. Critically, in response to the prosecution's submission that the test of whether a statement is "mixed" depends not on its contents but on whether the prosecution seeks to rely on any admissions in it, Butterfield J stated at page 484 that:

> "I consider that whether a statement is mixed or not should not depend upon the accident of circumstance of what other evidence is available to the prosecution but upon an examination of the statement itself."

[39] In **Alexander Von Stark v The Queen**, the relevant facts for our purposes, are that after the killing of the deceased in his hotel room, the appellant, when arrested, said he had killed the deceased. He also handed over the knife he said he used to do so. Subsequently, he gave a written statement under caution in which he stated that he and the deceased had been taking drugs in his room when he suddenly had a knife in his

hand, and he did not know exactly what had happened, but he remembered seeing her on the ground and thinking she was dead. He was charged with murder. The prosecution relied on both statements at trial. The appellant made an unsworn statement in which he did not say that he had not killed the deceased or mention taking cocaine, but he said that he did not know what had happened. The judge withdrew from the jury, the issue of manslaughter, based on lack of intent due to drug intoxication on the basis that the unsworn statement was inconsistent with the defendant's previous statements. The defendant was convicted of murder.

[40] On appeal, this court upheld the conviction, on the basis that in his unsworn statement, the defendant had presented a defence inconsistent with his caution statement, therefore the judge had not been obliged to leave the exculpatory part of the caution statement as an issue to be determined by the jury. On further appeal to the Judicial Committee of the Privy Council, the Board allowed the appeal and substituted a verdict of manslaughter. Applying **R v Duncan**, the Board held, among other things, that the statements made by the appellant on arrest and his cautioned statement strongly indicated that he had killed the deceased in a drug intoxicated state in which he lacked the specific intent required for murder and which, if believed, would require that he be convicted only of manslaughter; that even if the defendant's unsworn statement was inconsistent with those earlier statements, the judge should have left to the jury the alternative verdict of manslaughter on the basis of cocaine intoxication and had erred in failing to do so.

[41] Counsel for the applicant had relied on this case for the submission that, if it was important to leave the exculpatory parts of a mixed statement to the jury for their consideration of the truth of those parts when to do so could possibly raise a conflict with other parts of the defence case, it was even more important that the exculpatory parts of the applicant's statement, which were consistent with the sole defence advanced by him, should be placed before the jury for the truth of their contents and not just to show consistency in the defence.

[42] The review of the law has clearly shown that where an out of court statement given by a defendant is wholly exculpatory, as in **R v Storey and Anwar** and **R v Barbery et al**, it is not receivable in evidence in proof of the truth of its contents. It is however "evidence showing the reaction of the accused when first taxed with the incriminating facts … which forms part of the general picture to be considered by the jury at the trial". Where however the statement is mixed as in **R v Donaldson et al, R v Duncan**, **R v Hamand**, **R v Sharp**, **Western v Director of Public Prosecutions** and **Alexander Von Stark v The Queen**, "the whole statement, both the incriminating parts and the excuses or explanations must be considered by [the jury] in deciding where the truth lies".

[43] The cases of **R v Sharp** and **Western v Director of Public Prosecutions** demonstrate that a voluntary statement made by a defendant contains incriminating parts when it confirms or supports in some material particular an aspect or aspects of the case that need(s) to be proven by the prosecution, even if those parts do not constitute a full

admission of the offence, or the defendant proffers in another section of the statement, an innocent explanation of those incriminating parts. Thus, in **R v Sharp**, the fact that in his statement the defendant placed himself in the vicinity of where the burglary occurred, was helpful to the prosecution even though by his innocent explanation, he sought to portray his presence as merely coincidental with, not confirmative of, the prosecution's case.

[44] Whether or not a statement contains some inculpatory material will depend on the nature of the charge, the facts of the case and the contents of the statement. That is why in **R v Sharp**, admission of 'coincidental' presence in the vicinity of a burglary was correctly viewed as an admission, but admission of 'unremarkable' presence at a café in **R v Barbery et al** was not sufficient to qualify as an admission, where the accused denied involvement in the affray which occurred while he was there.

[45] In **Western v Director of Public Prosecutions**, the appellant admitted to being in a fight, which was the substance of the charge he faced, even though he raised self-defence by saying he did not strike the first blow. The fact that the statement was held to be "mixed" in that case is significant, as there was ample evidence from the police officers that they had witnessed a fight; a fact which was unchallenged by the defence. Hence the prosecution did not need or gain anything substantial in particular, by the appellant's admission that he was in a fight. Nevertheless, the statement having been received in evidence on the prosecution's case, on appeal that admission was rightly acknowledged as being inculpatory, making the statement which also contained his

allegation of self-defence "mixed". It was therefore susceptible to being assessed as a whole by the tribunal of fact, to determine where the truth lay. Importantly in this regard, the case emphasised that, "whether a statement is mixed or not" does not "depend upon what other evidence is available to the prosecution but upon an examination of the statement itself".

[46] It is however very important to note that not every admission in a statement that also contains exculpatory material, qualifies that statement to be regarded as "mixed", and therefore admissible for the truth of its contents. In **R v Garrod** [1996] EWCA Crim 1149, one of the issues on appeal was whether the trial judge had erred in ruling that the contents of an interview given by the appellant were wholly exculpatory and hence not evidence of the facts contained therein. The Court of Appeal of England and Wales upheld the ruling of the trial judge on the basis that the admissions made by the appellant during the interviews were insignificant. In delivering the judgment on behalf of the Court of Appeal, Evans LJ stated that:

> "[I]t is almost impossible to conceive of any series of answers -- i.e. something more than a bare denial -- which cannot be regarded as containing some admissions of relevant fact as well as a statement of innocence and denial of guilt (the so-called 'exculpatory' part of a mixed statement). The question is how to identify the kind of interview which contains enough in the nature of admissions to justify calling it a 'mixed' rather than an 'exculpatory' statement."

[47] After referring to the oft quoted passage from **R v Duncan** outlined at paragraph [30] supra, he answered the question he had posed in this fashion:

> "We would hold that where the statement contains an admission of fact which are [sic] significant to any issue in the case, meaning

> those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt, then the statement must be regarded as 'mixed' for the purposes of this rule. This is little, if any, different from paraphrasing the use of the word 'incriminating' in the passage in Duncan which we have already quoted."

[48] Similarly, in **R v Papworth and Doyle** [2008] 1 Cr. App. R. 36, where the appellants challenged their convictions on the basis that the trial judge failed to give a "mixed" statement direction in relation to interviews given by them, it was held dismissing their appeals, that, none of the admissions, either alone or cumulatively, had come anywhere near satisfying the test in authority. Thus, as they had not in interviews accepted either that they acted with any dishonesty or any ingredient of the offences charged, fairness to them had not required a mixed statement direction. In arriving at its decision the court applied the cases of **R v Azziz** and **R v Garrod**. It is useful to outline the reasoning of Hooper LJ writing on behalf of the Court of Appeal of England and Wales, at paragraphs 14 and 15 of the judgment. He said:

> "14. When applying the *Garrod* test to interviews or statements, judges should bear in mind that the rule that the exculpatory parts of a mixed statement are evidence of the facts contained therein, is based on considerations of fairness to the Defendant and simplicity for the jury. To the extent to which at the close of all the evidence, the prosecution place significant reliance on the incriminating parts of an interview, the more likely it is that the jury should be told that the parts which explain or excuse those incriminating parts are also evidence in the case.
>
> 15. The admission in interview of an ingredient of the offence will often constitute a significant admission for the purposes of the *Garrod* test, but not necessarily. The fact that a Defendant on trial for murder accepted in interview that the victim was dead is not likely to be a significant admission. Likewise, in the absence of an admission of an ingredient of the offence, it will be more difficult to

> conclude that the admissions which were made convert the statement into a mixed statement."

[49] In **R v Shirley** [2013] EWCA Crim 1990 the complaint was also that the defendant's conviction was tainted by the trial judge's failure to direct the jury that the interviews given by the applicant constituted evidence of the facts they contained. Applying **R v Papworth and Doyle** and **R v Garrod** it was held that a statement which contained matters that might amount to an admission, as well as exculpatory parts was not automatically a "mixed" statement. It was only to be characterised as such, if the admissions or inculpatory parts were significant in relation to the prosecution's case as it was conducted at trial. Thus as the admissions relied on by the prosecution were very limited and insignificant in relation to the case against the defendant, the appeal was dismissed.

[50] Unfortunately, we did not have the benefit of the submissions and exchange between counsel and the bench in the instant case, after which the learned trial judge ultimately ruled that the statement was wholly exculpatory and therefore only admissible to show the reaction of the applicant. However, given that counsel for the Crown at trial took the posture adopted, it seems clear that the prosecution did not proffer the statement as an admission, but likely adduced it pursuant to the principles outlined in **R v Pearce.** It also may well be, that the learned trial judge's decision was influenced by the view that the nature of the admission in the overall context of the statement and the case, was unhelpful to, and not being relied on by the prosecution, and therefore inconsequential.

[51] Whatever the true basis or bases for the decision at trial, this court is left with the fact that, in arguments before us, the Crown maintained that the statement is wholly exculpatory and the defence contends that it is mixed. In resolving this dichotomy of views, it should first be acknowledged that there remains some tension between aspects of the dicta in the case of **Western v Director of Public Prosecutions** and the principles outlined in the subsequent cases of **R v Garrod**, **R v Papworth and Doyle** and **R v Shirley**. In **Western v Director of Public Prosecutions** it was stated that the determination of whether a statement was mixed or not should be resolved by examining the statement itself and ought not to be based on what other evidence is available to the prosecution. That suggests that the court in **Western v Director of Public Prosecutions** saw the decisive factor in whether or not a statement was mixed as internal to the statement itself; and not the significance of any inculpatory admissions or the reliance the prosecution sought to place on them — the main principles gleaned from the trilogy of cases, **R v Garrod**, **R v Papworth and Doyle** and **R v Shirley.**

[52] However, on closer analysis, it appears that no real "tension" or conflict will be apparent in most cases. It is the internal examination of a relevant/questioned statement that will determine whether or not it contains admissions: **Western v Director of Public Prosecutions**. Necessarily though, it is the overall context of the case that will determine whether the admissions have significance. Then in turn, it is the degree of significance of the admissions which will influence whether the prosecution places any, and if so, what level of reliance on those admissions. If there is little significance relative to the proof of the offence, naturally there would normally be no reliance or only very minimal reliance.

If, on the other hand, the admissions are significant, the prosecution would obviously place reliance on the admissions in that statement, if it chose to make the statement a part of the prosecution's case: **R v Garrod**, **R v Papworth and Doyle** and **R v Shirley**.

[53] It would also seem to flow as irrepressible logic, that if the prosecution adduces in evidence a statement that contains significant admissions as well as exculpatory parts, it should properly not be open to the prosecution to contend that the admissions are not being relied on for the truth. That is the likely hurdle encountered by the prosecution in the case of **Western v Director of Public Prosecutions,** in relation to which the learned editors of Blackstone's Criminal Practice 2021 Part F18.98 state that:

> "The prosecution resisted the appeal precisely on the grounds that the interview was not a mixed statement unless the prosecution relied on the admission. The appeal was allowed because there was nothing within the stated case to suggest that the prosecution had *not* relied on the admission: on the contrary the circumstances suggested it was highly likely that they had."

[54] On the facts of the instant case, the applicant admitted shooting the complainant but maintained that it was in self-defence. He therefore admitted the fact of shooting the complainant. His admission also raised the possible reasonable and inescapable inference that he intended to cause the complainant grievous bodily harm by so doing. Clearly, this amounted to admissions of ingredients of the offence of wounding with intent charged. Following the principles outlined in the cases of **R v Papworth and Doyle** and **R v Shirley**, that would make those admissions significant. The observations made by Blackstone's in relation to the case of **Western v Director of Public Prosecutions** seem to be apposite here, at least indirectly. The prosecution having adduced the

statement which on its face contained such a major admission, this court is of the view that it would not be proper for the learned trial judge to decline to give a mixed statement direction because the prosecution indicated it was not relying on the statement for its truth. The nature of the statement internally viewed and the objective significance of the admission are determinative of its designation. The twin requirements of fairness to the applicant and simplicity for the jury in helping them to assess the statement, demanded such a conclusion.

[55] Also of note is that the facts of the instant case bear clear similarity to the example of a "mixed" statement crafted by Lord Lane CJ in **R v Duncan** — "I killed X. If I had not done so, X would certainly have killed me there and then". The nature of such an admission contains the very essence of the offence, the proof of which would be established, if the tribunal of fact rejects the exculpatory parts of the statement and accepts those parts which contain the admission. It would not be only a possibly insignificant admission as in the example cited in **R v Papworth and Doyle** where it was said that in a murder case, the admission by the defendant that the deceased is dead may not be a significant admission, even though it is an admission in relation to an ingredient of the offence. It would not be significant, if the death of the deceased and the defendant's knowledge of that death, were not in issue in the case.

[56] The nature of the admission in the instant case — the very essence of the offence charged, should the explanatory justification be rejected by the tribunal of fact — yields the irresistible conclusion that the applicant's statement was "mixed", having both

inculpatory and exculpatory parts. Being mixed, the entire statement, both inculpatory and exculpatory elements were admissible as evidence of the truth of the facts they contain. It would then be for the jury to have considered and determined where the truth lay. It was therefore a misdirection for the learned trial judge to tell the jury that the statement was not evidence of the events that took place, but could only be used as evidence of the applicant's reaction when the allegations were brought to him; and to assess the genuineness and consistency of his assertion that he acted in self-defence.

[57] As is already apparent, the fact that the applicant in this case gave evidence supporting his previous statement while in **R v Donaldson et al**, **R v Duncan, R v Sharp** and **Western v Director of Public Prosecutions,** the respective defendants did not testify, does not affect the classification of the applicant's statement as "mixed". That fact however falls to be considered in relation to the effect of the learned trial judge's misdirection, in the overall context of the evidence before the jury and the entire summation. In **R v Donaldson et al**, the fact that the learned trial judge only directed the jury that they could rely on the inculpatory parts of the statement and not on the exculpatory parts was held, on the facts of that case, not to be a fatal misdirection as the verdict of the jury was unaffected by that error, even though the defendant had not testified.

[58] Similarly, in **R v Gijkokaj** [2014] EWCA Crim 386, where the defendant also did not testify at trial, the misdirection that a body of interview evidence could only be used as evidence of reaction, despite the fact that the prosecution had relied on the inculpatory

parts of the statement, was held not to amount to a material misdirection given the judge's overall treatment of the defence case.

[59] It should be emphasised here that in the instant case there is no indication that the prosecution relied on the inculpatory parts of the statement at trial and indeed on appeal the Crown sought to characterise the statement as wholly exculpatory. Also the learned trial judge did not in his directions refer to the statement as containing an admission or indicate to the jury that they should rely on the admission within the statement as evidence of truth. However, the fact is the statement did contain both an admission and exculpatory explanation and the jury should have been properly guided as to how to treat both.

[60] Counsel for the Crown argued forcefully that, as the applicant gave sworn evidence in the instant case in essentially the same terms as the statement and the learned trial judge repeatedly emphasised the applicant's reliance on the defence of self-defence which was consistent with the statement, the proviso should be applied as the misdirection did not affect the outcome. Though Crown Counsel did not advert to **R v Donaldson et al** or **R v Gijkokaj** to support her argument, conceivably it could be suggested that the applicant, having testified in his trial, was in a better position than the defendants in those cases. Hence, subject to the particular circumstances of these two cases, if the verdicts in **R v Donaldson et al** and **R v Gijkokaj** were unaffected by the error, *a fortiori*, this court should find that the verdict in the instant case was similarly insulated; especially since the learned trial judge did not suggest to the jury that the

statement contained inculpatory material which was evidence of truth, but exculpatory material which was not.

[61] We also observe that it was not suggested by the defence that, as in **R v Hamand**, the applicant's decision to testify was tainted by the encroachment on his free choice whether or not to give evidence, occasioned by the nature of the judge's ruling. In actuality however, that possibility cannot be wholly ignored, especially in a context where in Jamaica, defendants still have the intermediate choice of making an unsworn statement, which sits in between the two stark options of remaining silent or testifying on oath.

[62] Contrary to the position adopted by the Crown, counsel for the applicant maintained that the misdirection was material requiring the conviction to be quashed, as he had never seen a case of this nature where the appropriate direction had not been given, and the proviso was applied. We have contemplated very carefully the conclusion to which we should arrive in relation to this ground. Given that ground two also relates directly to the treatment of the issue of self-defence by the learned trial judge, and that there are also two other grounds to consider, it is prudent to delay pronouncement on the effect of the misdirection identified under this ground. This is in the event, there are considerations of cumulative prejudice to the defence of the applicant, that later come into play.

Ground two - The directions to the jury on self-defence were inadequate

Submissions

[63] In relation to this ground, counsel for the applicant contended that the learned trial judge failed to direct the jury in keeping with the principles enunciated by the Judicial Committee of the Privy Council in the case of **Palmer v R** [1971] AC 814, now accepted as a standard direction. He pointed to page 38 of the transcript where the learned trial judge directed the jury thus:

> "Now, if you believe the accused, Hamil, he would be entitled to be found not guilty. If the Defence's case and what Mr Hamil said, leaves you in state of doubt so that you cannot be sure that is what happened; equally, he is entitled to be found not guilty because the prosecution has the burden of proof. If you reject the Defence's case, you cannot convict him on that rejection alone. You have to turn to the prosecution's case to see if you are satisfied so that you feel sure. It is only if you accept that Saint O'Brian Downie and Altimon Downie are speaking the truth, if you are satisfied so that you feel sure that they are truthful and reliable to the extent that this was an unprovoked assault by a police officer on Mr Downie, who shot Mr Downie, without acting in self-defence. Only if you are sure of that, then you can enter a verdict of guilty."

[64] Counsel submitted that the learned judge was under a duty to explain to the jury that if a man is under attack and honestly believes force is needed to repel his attacker, then as long as he uses reasonable force he is not guilty of an offence. In those circumstances, the existence of a specific intent to repel and injure the attacker is not inconsistent with the defence of self-defence. Counsel relied on the authority of **R v Esmelda White** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 46/1987, judgment delivered 17 December 1987.

[65] Relying on the case of **Vince Edwards v R** [2017] JMCA Crim 24, counsel also advanced that the summation was deficient, in that the learned trial judge failed to direct the jury on the statutory defence available to the applicant pursuant to section 13 of the Constabulary Force Act, which if accepted, was a complete defence that was additional to the common law defence of self-defence.

[66] In her response, Ms Thomas submitted that the failure of the learned judge to direct the jury that the specific intent to do grievous bodily harm was not inconsistent with self-defence did not detract from the conviction. She argued that the learned trial judge gave careful and detailed directions to the jury on the issue of self-defence. She pointed to sections of the transcript at page 24 lines 6-25, page 25 lines 1-25, page 26 lines 1-26, page 27 lines 1-25, pages 28 lines 1-25, and page 29 lines 1-25.

[67] Regarding the complaint that the learned trial judge did not direct the jury on the statutory defence available to him under the Constabulary Force Act, counsel advanced that there was no need for the learned trial judge to read out section 13. Further she contended that, when the summation was viewed as a whole, the directions given to the jury were adequate to cover both the necessary directions under common law and pursuant to section 13.

[68] Counsel also argued that a judge should not have a fixed formula when directing a jury but his directions must be tailored to assist the jury in applying the law to the facts. She cited the case of **McGreevy v DPP** [1973] 1 WLR 276.

Analysis

[69] In **Palmer v R** Lord Morris of Borth-y-Gest, delivering the judgment of the Judicial Committee of the Privy Council, outlined the essential directions that a trial judge was required to give regarding the issue of self-defence. At pages 831-832 he stated:

> "In their Lordships' view **the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary**. **But everything will depend upon the particular facts and circumstances. Of these a jury can decide.** It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have a [sic] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. **Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence**. If there has been no attack then clearly there will have been no need for defence**. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only**

> **done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence**." (Emphasis supplied)

[70] Two years later, in the case of **McGreevy v Director of Public Prosecutions**, this time a case dealing with circumstantial evidence, Lord Morris again highlighted that a summation should not be formulaic, but tailored to fit the circumstances of the particular case. At page 507 he stated that:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful."

[71] In his complaint, counsel for the applicant isolated one short passage dealing with the learned trial judge's directions on self-defence at page 38 of the transcript. However, the learned trial judge gave extensive directions on self-defence from page 24 line 3 through to page 30 line 19 of the transcript. He told the jury that self-defence was a complete defence and that, therefore, if they found the applicant was or may have been acting in self-defence, they would have to find him not guilty. They were directed that, if using reasonable force, a person injures another in defending himself against an attack or threatened attack, that was lawful. The jury was also reminded of the accused's contention that he was under attack, being punched, when he fired first in the air and then at the lower body of the complainant; at a time when he was scared that the

complainant was going to dispossess him of his firearm and then "that would be the end of him".

[72] Going into more detail, the learned trial judge alerted the jury to three important matters they had to carefully consider. Firstly, that self-defence only arises if the applicant was under attack or threatened with attack and they found it was necessary for him to defend himself. They were directed that the defence would not arise if the applicant was the aggressor or was acting in retaliation or revenge. However, they were also told that, if the accused had been the initial aggressor but the complainant's response was out of proportion, making it necessary for the applicant to defend himself, the applicant would still be acting in self-defence. They were therefore advised to consider all the circumstances of the case to decide whether, at the time the applicant inflicted the injury, it was or may have been necessary for the applicant to use force to defend himself or he honestly believed there was that necessity.

[73] Secondly, the jury was directed that if they found the applicant was entitled to defend himself, the defence only applied if he used reasonable force in response. In determining that issue, they were told that they should consider all the circumstances of the case, as well as the fact that in the heat of the moment, a person cannot be expected to weigh precisely the amount of force required in response. All the contentions of the applicant that he was subjected by the complainant to a rain of blows and still reacted with restraint in the manner in which he fired were placed before the jury at this point.

Thirdly, the jury were told that the burden was not on the applicant to prove self-defence, but on the prosecution to disprove it beyond reasonable doubt.

[74] Then, in the review of the evidence of the applicant, all his contentions alleging persistent aggression by the complainant and that he, in response, was acting in self-defence, were highlighted to the jury. It was also specifically stated by the learned trial judge that it was accepted by both sides that during the incident, the applicant fired in the air. He commented that firing a round in the air is usually "a warning shot to say keep back". He further pointed out that the applicant maintained that despite the "space" created by this first shot, the complainant kept coming at him.

[75] At the end of the summation, the learned trial judge left the case to the jury on the basis that they first had to determine if they accepted or were left in a state of doubt by the defence case, in which the applicant said he was a policeman doing his duty who was attacked and had to defend himself; if so, they should acquit. It was only if they rejected that defence, that they could go on to review the prosecution's case to determine if it made them feel sure; if so, they could convict.

[76] It is however true, as contended by counsel for the applicant, that the learned trial judge did not specifically tell the jury in as many words that, "the existence of a specific intent to repel and injure the attacker is not inconsistent with the defence of self-defence". However, **Palmer v R** and **McGreevy v Director of Public Prosecutions** make it clear that no particular formula of words is required, once the members of the jury are adequately instructed on the applicable law and are guided concerning the

application of the law to the facts. The extensive directions given to the jury could not reasonably have left them in any doubt, that, if they found the applicant was or may have been under attack or threatened attack, and despite his firing in the air, the complainant still kept coming at him — the applicant's firing at the lower body of the complainant with intent to repel and injure him, would be the very essence of self-defence.

[77] The applicant is however on firmer ground, regarding his complaint that the learned trial judge omitted to treat with and direct the jury on the statutory defence available to him under the Constabulary Force Act.

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

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

[79] **Vince Edwards v R** was a case in which a policeman was charged for murder in respect of a killing that he alleged had occurred in the discharge of his duties as well as in self-defence. Brooks JA (as he then was) noted that, in such a case, the trial judge had a responsibility both to direct the jury on the common law defence of self-defence as well as the statutory defence under section 13, which applies where the killing occurred in the lawful execution of the policeman's duties.

[80] In **Vince Edwards**, while the trial judge had directed the jury on section 13, it was held that the directions were insufficient. At paragraphs [65] – [66], Brooks JA explained the court's decision on that point. He stated:

> "[65] [A]lthough the learned trial judge's direction properly addressed the essentials of section 13 of the Constabulary Force Act, it was inadequate not to have instructed the jury on the application of their findings on that issue. The learned trial judge was required to direct the jury that if upon their examination of the case as a whole, they found that Mr Edwards acted in accordance with his duties as a police officer, which resulted in the death of the deceased man, and that the force used was reasonably justifiable, then the killing is justified not merely by virtue of the law of self-defence, but because of the duty imposed upon him by statute, and thus they ought to acquit Mr Edwards of murder. Further, it was incumbent on the learned trial judge to have directed the jury that there was no duty on Mr Edwards to retreat (see R v Simmonds (1965) 9 WIR 95 at pages 99-100). This is because it is Mr Edwards' statutory duty 'to keep watch by day and by night, to preserve the peace, to detect crime, [and to] apprehend' and so a section 13 defence is afforded to him where a person's death resulted from the use of reasonably justifiable force, in the legal execution of his duty.
>
> [66] The learned trial judge's directions were inadequate to convey those directions…"

[81] Apart from passing references to the applicant being "on duty", the learned trial judge did not place the required significance on the fact that the applicant was acting in the discharge of his duties, when he became embroiled in this altercation and fired wounding the complainant. Whereas in **Vince Edwards**, the trial judge left the statutory defence for the jury's consideration but fell short by failing to guide the jury in its application to the facts, in the instant case the defence was not addressed at all by the learned trial judge. Also, when the customary inquiries were made by the learned trial judge at the end of the summation, neither prosecuting counsel nor defence counsel (who appeared below) pointed out that omission. Therefore, section 13 was not mentioned, neither was the separate defence it affords brought to the attention of the jury, even indirectly. In **Vince Edwards**, where the directions on the statutory defence

under section 13 were partially deficient, that was one of the factors which led to the conviction in that matter being overturned. In the instant case, as the applicant has been totally deprived of that statutory defence open to him, it is manifest that this ground must succeed.

Ground three - The direction on good character was flawed

Submissions

[82] Counsel for the applicant advanced that the directions of the learned trial judge on good character were flawed and fell short of the guidance given by the Judicial Committee of the Privy Council in **Linton Berry v R** (1992) 41 WIR 244. He contended that the learned trial judge was under a duty to tailor make his directions on good character in keeping with the issues of critical importance in the case. In that regard, the complaint was that the learned trial judge failed to emphasize the credibility limb of the good character direction resulting in the jury not being able to properly assess the evidence given by the applicant that he was acting in self-defence. Counsel also relied on the cases of **R v Vye, R v Wise, R v Stephenson** [1993] 3 ALL ER page 241, **R v Aziz** [1996] 1 A.C. 41 and **Jagdeo Singh v The State** (2005) 68 WIR 424.

[83] In her response to this ground, counsel for the Crown submitted that the learned trial judge sufficiently covered the good character direction in respect of the applicant. She noted that the applicant having given sworn evidence, the jury were directed on both limbs of the good character direction in keeping with established principles which began in **R v Vye, R v Wise, R v Stephenson** and have been approved in cases such as **Leslie Moodie v R** [2015] JMCA Crim 16, **Tino Jackson v R** [2016] JMCA Crim 13 and others.

She argued that the fact that the learned trial judge did not spend a great deal of time on the issue of the good character direction did not detract from the conviction. This especially, as the learned trial judge reminded the jury of the sworn evidence of the applicant and emphasised that he had no previous convictions, an unblemished record in the police force and had received several accolades during his tenure as a policeman.

Analysis

[84] The impugned directions are set out at pages 57 – 58 of the transcript. They read:

> "In his testimony the accused man told you, he gave testimony, that he is a man of good character. He has no previous convictions, but he has also spoken to you about many positive qualities that he has. He said he has been a model policeman, second runner up of Top Cop in Hanover in 2010; 2011, 3rd runner up as Top Cop in Hanover and he later became the Top Cop for Area One which includes Westmoreland, Hanover, St James and Trelawny and they never had any disciplinary action against him. He said he is a peacemaker. A man for civilians. He said many police don't like him and he does not like the use of guns.
>
> Now, good character cannot be provided as a defence to a criminal charge, but it is evidence which you should take into account in his favour in the following way. In the first place he has given sworn evidence and as with any man of good character, his good character supports his credibility. This means that is a fact to take into account in deciding whether you should believe his evidence. In the second place, his good character may mean that he is less likely than otherwise might be the case to commit this crime. Now, so it is not a defence, but it is something you can take into consideration in assessing his credibility and also in consideration in assessing whether or not somebody like him would do such an offence."

[85] In **Leslie Moodie v R** Morrison JA (as he then was) stated at paragraph [125] that:

> "It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly, a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or she is charged..."

[86] In that case, Morrison JA also mentioned in passing the Trinidadian case of **Teeluck (Mark) and John (Jason) v The State** (2005) 66 WIR 319. **Teeluck (Mark) and John (Jason) v The State** contains a useful summary of the principles relevant to good character directions, the outline of which is annotated by reference to a number of cases, including some relied on by counsel on both sides in the instant case. At paragraph 33, Lord Carswell, writing on behalf of the Board of the Judicial Committee of the Privy Council, outlined the following propositions:

> "(i) When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: **Thompson v The Queen** [1998 AC 811 following **R v Aziz** [1996] AC 41 and **R v Vye** [1993] 1 WLR 471.
>
> (ii)The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: **R v Fulcher** [1995] 2 Cr App R 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial: **R v Kamar**, The Times, 14 May 1999.
>
> (iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction,

> that he is less likely to commit a crime, especially one of the nature with which he is charged.
>
> (iv) Where credibility is in issue, a good character direction is always relevant: **Berry v The Queen** [1992] 2AC 364,381; **Barrow v The State** [1998] AC 846, **Sealy and Headley v The State** [2002] UKPC 52, para34.
>
> (v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses **Barrow v The State** [1998] AC 846,852, following **Thompson v The Queen** [1998] AC 811,844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: **Thompson v The Queen**, ibid."

[87] The seeming inflexibility of the outcome suggested in **Teeluck (Mark) and John (Jason) v The State**, where a good character direction is deficient, was tempered in the case of **R v Campbell** (2010) 77 WIR 323. At pages 350 – 351, paragraphs 42 – 43, Lord Manse delivering the opinion of the Judicial Committee of the Privy Council stated:

> "[42] …The absence of a good character direction is by no means necessarily fatal. In *Balson v The State of Dominica* [2005] UKPC 2, (2005) 65 WIR 128, 'the nature and coherence of the circumstantial evidence' 'wholly outweighed' any assistance that such a direction might have given (at [38]). In *Brown v R* [2005] UKPC 18, (2005) 66 WIR 238, [2006] 1 AC 1, the nature of the offence charged (motor manslaughter) made such a direction of less significance than with other offences. In *Singh v The State* [2005] UKPC 35 at [25], (2005) 68 WIR 424 at [25] the Board said:
>
> > 'Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.'
>
> [43] In *Bhola v The State* [2006] UKPC 9, (2006) 68 WIR 449 (a case of alleged demanding of money with menaces where the

appellant denied any involvement), Lord Brown said, in giving reasons for the Board's decision:

> 'The appellant relies heavily on the series of propositions set out in para [33] of the Board's advice in *Teeluck and John v The State* [2005] UKPC 14, 66 WIR 319 at 329 and 330 and certainly it is right to say, as para [33(iv)] of *Teeluck*'s case does, that 'where credibility is in issue, a 'good character' direction is always relevant'. But the trilogy of cases examined above suggests that the statement in para [33(ii)] of *Teeluck*'s case, that the direction—
>
> 'will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a 'good character' direction could not have affected the outcome of the trial,'
>
> needs to be applied with some caution. In *Teeluck*'s case itself, of course, the appellant's credibility was said to be 'a crucial issue' to the extent that the Board was unable to conclude 'that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given' (para [40]). So too in [*Singh*'s case]. But the Board reached a different conclusion in *Balson*'s case (2005) 65 WIR 128 and in *Brown*'s case (2005) 66 WIR 238 and their lordships have no doubt that the Court of Appeal were right to have done so in the present case too. The cases where plainly the outcome of the trial would not have been affected by a 'good character' direction may not after all be so 'rare'.'
>
> A similar caution appears in *Simmons v R* [2006] UKPC 19, (2006) 68 WIR 37 (a murder case)."

[88] The brief review of cases above discloses that, while it is important to give both limbs of the good character direction where an accused has given evidence and put his good character in issue, the absence of such a direction is not fatal where "the outcome of the trial would not have been affected by a 'good character direction'". The complaint in the instant case is not however that there was no good character direction. The issue

taken is that the credibility aspect of the directions was not sufficiently emphasised. It should be noted here, that, in the cases of **Linton Berry v R** and **Jagdeo Singh v The State**, relied on by the applicant, the trial judge in each case failed to direct the jury that the evidence of the previous good character of the respective defendants was relevant to the assessment of their credibility.

[89] In the instant case, we are unable to agree with counsel for the applicant. The learned trial judge reminded the jury of the applicant's unblemished criminal and disciplinary records. Further, he highlighted that the applicant's overall record was not just unblemished, it was punctuated by commendations. All in a context where he additionally pointed out that the applicant considered himself a peacemaker; a man for civilians; not liked by "many police"; and a person who eschewed the use of guns. Against that background, the learned trial judge gave the jury both limbs of the good character direction. He then correctly instructed them that while it was not a defence, they should use the applicant's good character to assess his credibility and "whether somebody like him would do such an offence".

[90] It is true that in relation to the overall directions, the learned trial judge did not go on to tell the jury, as is sometimes done, that, "[h]aving regard to what you know about this defendant, you may think that he is entitled to ask you to give (considerable) weight to his good character when deciding whether the prosecution has proved his guilt beyond reasonable doubt". However, in the context of this case, we find that the directions on both credibility and propensity were adequate and not likely to compromise the way in

which the jury assessed the evidence given by the applicant, that he was acting in self-defence. If we had not come to this conclusion, we would have been prepared to say that this was not a case where any deficiency in the directions plainly affected the outcome of the trial. This ground accordingly fails.

Ground Four - The charge brought by INDECOM was illegal and amounts to a nullity

Submissions

[91] Counsel for the applicant submitted that, in light of the decision by the Judicial Committee of the Privy Council in the case of **Commissioner of the Independent Commission of Investigations v Police Federation & Others** [2020] UKPC 11 (**INDECOM** case), the charges brought by **INDECOM** through Mr Albert Morris were a nullity and can be set aside *"ex debito justitiae".* He further argued that the Circuit Court had irregularly assumed jurisdiction over charges that did not exist in law and hence this court should set aside the trial and conviction of the applicant. Apart from the **INDECOM** case, counsel also relied on the cases of **Strachan v The Gleaner Company Limited & Anor** [2005] 1 WLR 3204, **Benjamin Leonard MacFoy v United Africa Company Limited** [1962] AC 152 and **Neill v North Antrim Magistrates' Court** [1992] 1 WLR 1220.

[92] In response, counsel for the Crown conceded that in light of the decision in the **INDECOM** case, the initiation of the criminal process was flawed. However, she contended that, as the trial of the applicant was taken over by the Director of Public Prosecutions, any defects or abnormalities present at the beginning of the criminal

process, would have been cured. Counsel also argued that, although the applicant was arrested and charged by a person or body not authorised in law to carry out such a function, the applicant had submitted himself to the jurisdiction of the court, which also operated to cure any inherent defect in the initiation of the criminal process. Further, counsel advanced that once evidence is admissible, the court is not concerned with how it was obtained. Therefore, counsel maintained that the issue of nullity did not arise where the Director of Public Prosecutions presented a case with relevant and admissible evidence on which the Circuit Court returned a verdict of guilty. Counsel relied on section 94 of the Constitution of Jamaica and the cases of **Kuruma Son of Kaniu v The Queen** [1955] AC 197, **Herman King v The Queen** (1968) 12 WIR 268 and **Marc Wilson v R** [2014] JMCA Crim 41.

Analysis

[93] The foundation for this ground is the fact that Mr Albert Morris, acting in his official capacity as a senior investigator of INDECOM, by information taken out on 30 April 2014 arrested and charged the applicant on 6 May 2014, for wounding with intent committed on 24 March 2014. That he was acting in his official capacity when so doing is clear from the fact that 1) the information and complaint laid by Mr Morris against the applicant has his assigned number beside his name; and 2) in his deposition given on 19 June 2015 he a) identifies himself as a senior investigator employed to INDECOM with duties that included investigations concerning incidents relating to the security forces, and b) stated that he was authorised to prosecute matters in the Resident Magistrate's Court by virtue of the statute which established INDECOM.

[94] The record of the Preliminary Examination (PE) also reveals that on 13 April 2015, prior to commencing the PE, an order was made and signed by the learned Resident Magistrate for the parish of Hanover, for a PE to be held into the charge, with a view to commit the applicant to stand his trial at the Hanover Circuit commencing 15 June 2015. The PE was however not completed until 19 June 2015 at which time, the learned Resident Magistrate having found that "…the evidence is sufficient to put the accused **Wayne Hamil** upon trial for an indictable offence beyond my jurisdiction", signed a committal for the applicant to "stand and take his trial at the forthcoming session of the Hanover Circuit Court commencing at Lucea on the 2nd day of November 2015".

[95] In the **INDECOM** case the Judicial Committee of the Privy Council considered whether the statute creating INDECOM (the 2010 Act), other statutory provisions or the common law, conferred an express or implied power on the Commission to arrest, charge or prosecute, in respect of an offence which has been the subject of investigation by the Commission (an incident offence). Concerning the express power, Lord Lloyd-Jones writing on behalf of the Board, at paragraph 27 stated in respect of 2010 Act that:

> "Nothing…therefore, considered singly or cumulatively, can be read as conferring on the Commissioner, the Commission or its staff, the power to arrest, charge or prosecute officers or officials for an incident offence."

[96] In respect of the implied power of prosecution, Lord Lloyd-Jones said this at paragraph 43:

> "In summary, therefore, a power to prosecute for incident offences is not an incident of, ancillary to or consequential upon the Commission's statutory function, nor does the Commission require

> such a power in order to be able effectively to discharge its statutory function which, the Act makes clear, is an investigative function. It would not facilitate the discharge of that function or in any way enhance the fulfilment of the Commission's duties. There is nothing in the 2010 Act to suggest that it was intended that the Commission should perform any function in relation to the prosecution of incident offences. As a result, the implication of the powers contended for becomes an impossibility. For these reasons the Board considers that the Court of Appeal was correct in its conclusion that the Commission, and the Commissioner and Commission officials in their official capacity have no power to prosecute in respect of incident offences."

[97] The Board therefore agreed with this court that the Full Court in the **INDECOM** case, erred when it held, among other things, that in respect of actions in their official capacity, the 2010 Act gave the Commissioner of INDECOM and the Commission's investigative staff the power of arrest.

[98] In **Strachan v The Gleaner Company Limited & Anor**, the two issues for the determination of the Judicial Committee of the Privy Council were 1) whether a judge of the Supreme Court had power to set aside a default judgment after damages had been assessed; and 2) if a judge of the Supreme Court did not have that power, was his order setting aside a default judgment a nullity, which another judge of the Supreme Court had jurisdiction to set aside. The Board having determined the first question in the affirmative, it was not strictly necessary to decide the second. However, given the importance of the issue, the Board gave guidance on the point. The Board first established that the context in which this second question was being considered was that the validity of the proceedings themselves was not in issue. Thus, within otherwise valid proceedings, the only query was "whether an order of a judge of the Supreme Court made without

jurisdiction is a nullity…and can be set aside by a judge of co-ordinate jurisdiction". The Board held that in such a circumstance, only the Court of Appeal would have the power to set aside the decision of the judge of the Supreme Court.

[99] One of the main discussion points relating to this second question was the distinction between a proceeding which is a nullity, which in effect means it never existed, and a proceeding which is irregular and entitles a party as a matter of right to have it set aside. At paragraphs 26 to 28 Lord Millett, who delivered the opinion of the Board, stated that:

> "26 *In re Pritchard, decd* [1963] Ch 502, 520 Upjohn LJ observed:
>
> > 'part of the difficulty is that the phrase 'ex debito justiciae' had been taken as equivalent to a nullity, but, with all respect to Lord Greene MR's judgment in *Craig v Kanssen*, it is not. The phrase means that the [defendant] is entitled as a matter of right to have it set aside.'
>
> Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the Court and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served. None of them is an example of a case where an order has been made in proceedings which have been properly begun and continued. *In re Pritchard* itself was an example of the second class; the proceedings had never been started at all. According to Danckwerts LJ, at p 527, the originating process had no more effect to commence proceedings than a dog licence.
>
> 27 In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge

> of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it is [sic] has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.
>
> 28 An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."

[100] Then at paragraph 32 he outlined that:

> "The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow* case 20 Ch D 137) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; not [sic] does a judge of co-ordinate jurisdiction have power to correct it."

[101] Counsel for the applicant contends that the charge laid by Mr Morris on behalf of INDECOM was a nullity based on the decision in the **INDECOM** case. Is it as counsel argued that the Supreme Court, "presided over charges that were illegally brought by the Crown" and that, "the charges had no life and no prosecution founded on them could have life"? If the charge was not wholly without effect, following the reasoning in

Strachan v The Gleaner Company Limited & Anor, another possibility is that it continued in being unless and until it was declared invalid. It is in this latter situation, that the issue of it being set aside *ex debito justitiae* would arise.

[102] Actually, there are a number of separate considerations that have implications for the validity of the trial of the applicant. The proceedings need to be examined in two stages. Firstly, what transpired before the learned resident magistrate and then secondly, the trial in the circuit court. A criminal charge for an indictable offence triable in the Circuit Court is first laid on information in the Petty Sessions Court, pursuant to section 9 of the Justices of the Peace Jurisdiction Act (JPJA). It is on the basis of the laying of an information that a defendant may be summoned to appear before the court, or a warrant issued for the defendant to be brought before the court (see sections 2, 3, 4 and 9 of the JPJA).

[103] The role and effect of an information in commencing criminal proceedings was examined on appeal in the seminal case of **R v Hughes** (1879) 4 QBD 614, considered by a full bench of 10 judges of the Court for the Consideration of Crown Cases Reserved (Court of Criminal Appeal in England). In that case Hughes, a constable, was indicted for perjury allegedly committed before justices at the hearing of a charge he brought against S, for assaulting and obstructing him in the discharge of his duty. S was brought up on a warrant illegally issued, as there had been no written information on oath to support the warrant. S did not dispute the jurisdiction of the justices to hear the case and he was convicted and sentenced.

[104] It was contended in Hughes' trial that the proceedings against S were invalid and hence no perjury could have been committed during them. It was held by majority, with only one dissent, that they were valid. The case established that when a defendant is before justices who have jurisdiction to try the case they need not inquire how he came there, but may proceed to hear and determine the matter. **R v Hughes** has stood the test of time. It has been considered, approved and applied in several cases over the years. From research conducted, it appears that it was applied most recently in England, in the case of **Director of Public Prosecutions v Park** [2002] All ER (D) 37 (Jun).

[105] In the instant case, on the basis of the law as it had been declared by the Full Court in the **INDECOM** case, all parties involved, including the learned Resident Magistrate, would have accepted that Mr Morris acting in his official capacity had the authority to lay the information against the applicant. The subsequent rulings of this court and the Board, showed that to be incorrect. However, on the authority of **R v Hughes,** the fact that, viewed in retrospect, Mr Morris was not clothed with the authority to lay the information it was thought he had, does not affect the jurisdiction the learned Resident Magistrate did have to handle the case against the applicant, when he came before her.

[106] At the time the charge under consideration was laid, by virtue of section 64 of the Judicature (Resident Magistrate's) Court Act, the responsibility to hold a PE to determine whether a criminal offence beyond the jurisdiction of the Magistrate was disclosed, was placed on the magistrate. PE's were subsequently abolished by the Committal

Proceedings Act 2013, which came into force on 1 January 2016. The discussion however necessarily proceeds on the law as it was in 2015. Section 272 of the Judicature (Resident Magistrate's) Court Act, outlined how a magistrate assumed jurisdiction to conduct a PE. It has subsequently been amended to address the new committal proceedings process. At the time the instant case was before the learned Resident Magistrate, however, section 272 provided:

> "On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court."

[107] The case of **R v Monica Stewart** (1971) 12 JLR 465 demonstrated that the making of an order under section 272 is what clothes the magistrate with jurisdiction in indictable matters. In that case the Resident Magistrate omitted to sign an order for trial on indictment. The order was made orally and the Clerk of Courts preferred a signed indictment based on the oral order, upon which a plea of guilty was received and the appellant convicted and sentenced. It was however held on appeal that the proceedings were a nullity. The decision in the headnote reads:

> "The provisions of s. 272 of the Judicature (Resident Magistrates) Law, Cap. 179, which required the resident magistrate to hold an inquiry to ascertain whether the offence charged in the information against an accused person is within his jurisdiction, to make an order for trial to be endorsed on the information and to sign the order, must be strictly complied with and non-compliance with any

of those provisions renders any trial on indictment relating to the charge laid in the information a nullity."

[108] At page 468 B – E, Edun JA, delivering the judgment of this court, stated that:

> "To resolve the problem in this case it is necessary to clarify that the word 'jurisdiction' meaning the authority of a court or judge to deal with a person who has been brought up before him on a process of the court, is distinguishable from "jurisdiction" meaning the power of the court or judge to entertain an action, petition or other proceedings.
>
> The meaning of 'jurisdiction' in the former sense has been considered in many cases. Thus, an irregularity or illegality in the mode of bringing a defendant before the justices, if not objected to at the hearing, does not affect the validity of the conviction: *Gray v Customs Commissioners* [(1884), 48 J.P. 343 D.C.]. In *R. v. Hughes* [(1879), 4 Q.B.D. 614], where a defendant was arrested on a warrant issued without information on oath, made no objection to the justices hearing the case, but went into his defence when the case was heard out, the court held this cured the irregularity. Where, however, a defendant appeared and protested against the hearing upon an informal summons, a conviction was quashed: *Dixon v. Wells* [(1890, 25 Q.B.D. 249]. Similarly, no objection to jurisdiction can be taken where, for example, the defendant has been described in the information or complaint by a wrong name: *Dring v Mann* [(1948), 112 J.P. 270].
>
> We turn next to consider the meaning of 'jurisdiction' in the latter sense, that is, the power of a court or judge to entertain an action, petition or other proceedings."

[109] In relation to this latter meaning of "jurisdiction" Edun JA concluded thus, at page 469 E – F:

> "In the instant case, we are of the view that the words in s. 272 of the Judicature (Resident Magistrates) Law, Cap. 179:
>
> 'the magistrate shall, after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction…make an order…'

> constituted the condition precedent which the resident magistrate had to comply with before assuming any jurisdiction at all.
>
> There is no evidence in the instant case which can prove in the manner stated by s. 272 that is, by an endorsement on the information signed by the magistrate, that she had fulfilled that condition precedent before deciding to hear and determine the case against the appellant. The case of *R. v. Williams* [(1958) 7 J.L.R. 129] correctly states the law on the interpretation of s. 272 of the Judicature (Resident Magistrates) Law, Cap. 179."

[110] In **R v Joscelyn Williams et al** (1958) 7 JLR 129 the Resident Magistrate commenced a trial on indictment having failed to sign the order for indictment. Days later during the trial, he signed and ante-dated the order to the date he commenced hearing evidence in the matter; indicating that he had previously made the order but through inadvertence had not signed it. He overruled an objection that the trial was consequently a nullity. The appellant having been convicted, on appeal it was held the trial was a nullity. Semper J, writing for the then Court of Appeal, stated at pages 132 - 133 that:

> "In the present appeal we have come to the conclusion that it would not be right, in all the circumstances, that an order for trial on indictment should be made by word of mouth and sometime after the indictment is presented following such verbal order that the same be endorsed on the information and signed by the Resident Magistrate. In our opinion a Resident Magistrate acting under section 272 must comply strictly with the provisions of that section. It is that section which gives him jurisdiction, after such inquiry as may seem to him necessary, to make an order either for the trial of an accused person by indictment or the taking of a preliminary investigation in the charge preferred against him. It is this order of the Resident Magistrate that empowers the Clerk of the Courts to act under section 274 of the law and prefer his indictment against the person named and on the day named in the order for the offence or offences which the Resident Magistrate acting under section 273 may order the accused person to be tried for."

[111] Later at pages 133 to 134 Semper J concluded:

> "Finding as we do, we are of the opinion that the appeal must be allowed and that the proceedings relating to the order for trial, indictment and conviction be accordingly set aside and annulled. While we do not here order a new trial, the proceedings being declared a nullity, it will be a matter for decision by the Clerk of the Courts whether he will now ask for an order on the information charging the appellants so that proceedings may be taken against them *de novo* either under section 274 by way of indictment or by way of a preliminary investigation."

[112] As recently as January of this year, **R v Joscelyn Williams et al** and **R v Monica Stewart** were considered, approved and applied by this court in **Michael Francis v R** [2021] JMCA Crim 6.

[113] The cases of **R v Monica Stewart** and **R v Joscelyn Williams et al** are clearly relevant to the events as they unfolded in the instant matter. Based on our examination of the original information and depositions supplied to the court, the learned Resident Magistrate fully complied with section 272 of the Judicature (Resident Magistrates) Act, by signing an order endorsed on the information for a PE to be held, in the terms previously outlined. No submissions were made by counsel for the applicant on this ground, challenging the conduct of the PE itself. The challenge was aimed at the role played by Mr Morris and its effect, in light of the subsequent decision of the Board in the **INDECOM** case. However, Mr Wildman in correspondence sought leave to also rely on the case of **Neill v North Antrim Magistrates' Court and anor**, and indicated that it relates to the illegality of the PE where it is based on illegal evidence.

[114] In that case the issue for determination before the House of Lords was whether a committal was a nullity when the committal was based on the incorrect admission by the magistrate of "double hearsay" evidence, on the basis of which the only two statements

as to fact were themselves admitted; in a context where the relevant statute only allowed "first-degree" hearsay evidence to be admitted. Without the inadmissible evidence there was insufficient evidence to ground the committal against the applicant, though there was adequate evidence against other co-defendants based on admissions they had made. The Queen's Bench Division held that the statements were inadmissible but that the applicant's committal could not be quashed. On appeal to the House of Lords it was held that, while relief should not be granted as a matter of course, there had been a material irregularity in the conduct of the committal as a result of which the applicant had suffered real prejudice. Hence *certiorari* would be granted to quash the committal in respect of the charges that were dependent on that evidence.

[115] It should be immediately noticed that the cited case is wholly distinct from the instant case in which there is no concern about insufficiency of evidence. The instant challenge relates solely to the initial commencement of proceedings by an INDECOM investigator, which earlier analysis has demonstrated had no continuing significance after the learned resident magistrate had assumed jurisdiction over the matter, and made and signed an order for a PE to be held.

[116] It is useful to note in passing that, even if there had been some irregularity in the actual conduct of the PE, which has not been alleged and is not apparent based on the court's perusal of the documents supplied, such irregularity would not necessarily have affected the ultimate validity of the PE. In **Tiwari (Leslie) v The State** (2002) 61 WIR 452 which considered **Neill v North Antrim Magistrates' Court and anor**, the issue

for the determination of the Judicial Committee of the Privy Council was whether the failure of the magistrate who conducted the PE to comply with the legislative requirement to ask the accused if he wished to call any witnesses, and if yes, to have the testimony of any such witness taken, signed and authenticated in the same way as a deposition of a prosecution witness, rendered the subsequent conviction of the accused after a trial in the High Court a nullity.

[117] It was held that, in considering the effect of procedural breaches in a PE, the particular circumstance of a breach had to be examined, as not every breach would necessarily render a subsequent conviction a nullity. Hence, as the appellant had a full opportunity to call witnesses in his defence at his trial and was nonetheless found guilty by the jury, it was not in the interests of justice to quash the conviction on the ground that there had been a failure to comply with the aforementioned procedural requirements at the committal hearing.

[118] The overriding principle of promoting the interests of justice by ensuring that trials are not lightly stymied where there is sufficiency of evidence, was perhaps nowhere more clearly highlighted than in the celebrated case of **Brooks (Lloyd) v Director of Public Prosecutions** (1994) 44 WIR 332. In that case the Resident Magistrate having conducted a PE found that no prima facie case had been made out due to significant weaknesses in the credibility of the main witness. Accordingly, she discharged the appellant. The Director of Public Prosecutions disagreed with the decision. He successfully applied to a Judge of the Supreme Court under section 2(2) of the Criminal Justice

(Administration) Act for a voluntary bill of indictment charging the same offence. The appellant challenged the decision in the Full Court alleging among other things that it was an abuse of the process of the court for the Director and/or a judge to direct or consent to the preferment of an indictment when the proposed defendant had been discharged at the PE. The Full Court and the Court of Appeal dismissed his challenge. His appeal to the Judicial Committee of the Privy Council was also dismissed.

[119] It was held on that point, that: 1) the decision of the magistrate had been based on the lack of credibility of the prosecution witnesses and, although lack of credibility would not normally (except in the clearest case) have resulted in a finding that there was no prima facie case, the decision in all the circumstances was understandable and was unlikely to have been upset on an application for *certiorari*; 2) such a criterion was however not conclusive of an abuse of process on the part of the Director of Public Prosecutions and the appellate tribunal must itself decide whether or not there had been such an abuse and in so doing balance the interests of the community and those of the proposed defendant; and 3) the Board with the advantage of having the decisions of the Full Court and the Court of Appeal available to it, being satisfied that due respect had been paid to the decision of the magistrate, and that the Director and the judge had approached the matter with the greatest circumspection, was satisfied that it would not be an abuse to allow the appellant's trial to proceed.

[120] In the instant case, there being no issue that there was clear sufficiency of evidence on the basis of which the learned Resident Magistrate committed the applicant

to stand and take his trial in the Circuit Court, the committal of the applicant is unassailable.

[121] It having been established that the proceedings before the learned Resident Magistrate were valid, it is also manifest that the proceedings that followed in the Circuit Court are free from any procedural taint. The prosecution of the charge against the applicant was on an indictment preferred by Crown Counsel for the Director of Public Prosecutions (DPP) consequent on the valid committal of the applicant from the Resident Magistrate's Court. The prosecution did not proceed on the information laid by Mr Morris. As is well known, section 94 of the Constitution of Jamaica vests the DPP with the power to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the laws of Jamaica. It also empowers the DPP to take over and continue criminal proceedings instituted by another person or authority and to discontinue at any stage before judgment, any criminal proceedings instituted or undertaken by the DPP or by any other person or authority.

[122] The limited role of the information laid by Mr Morris in this case has been analysed, guided by the principles in **R v Hughes.** Also, it has been repeatedly emphasised that the trial of the applicant proceeded on a document other than that which the applicant challenges as being a nullity, or at the very least irregular and subject to being set aside *ex debito justitiae*. Those two factors provide a significant point of distinction between the instant case, and a section of the analysis in the case of **Benjamin Leonard MacFoy v United Africa Company Limited**, relied on by counsel for the applicant. In that case,

the issue was whether a statement of claim filed in the legal vacation was a nullity and void, or merely irregular and voidable depending on the circumstances. The court ultimately held that it was voidable and not void and indicated there was no basis on the facts to interfere with the exercise of discretion of the court below, not to set aside the default judgment obtained on the statement of claim. At page 160, Lord Denning, who delivered the opinion on behalf of the Board of the Judicial Committee of the Privy Council, said:

> "The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void."

[123] The critical point in the instant case is that the trial of the applicant did not proceed on that initial charge laid by Mr Morris. It proceeded, after a valid PE, on a valid indictment preferred by Crown Counsel on behalf of the DPP — the individual constitutionally charged with prosecuting crimes before the courts of Jamaica. It was not a situation, therefore,

as in **Benjamin Leonard MacFoy v United Africa Company Limited**, that subsequent steps taken would collapse, based on the ruling in the **INDECOM** case. This is so, as the process which was followed did not depend on the validity of the information laid by Mr Morris.

[124] The issue raised by counsel for the applicant on this ground is also not one concerning illegally obtained evidence. The Board in the **INDECOM** case was at pains to point out that the true remit of INDECOM is that of an investigative agency conducting investigations into incident offences. The limitation identified by the Board is that INDECOM officers were not directly or indirectly empowered by the 2010 Act to lay charges in relation to, or prosecute incident offences in the name or on behalf of INDECOM. Exercising his investigative powers, it was therefore perfectly permissible for Mr Morris to have collected the statement from the applicant that was received in evidence and to take other investigative steps. The concern about illegally obtained evidence is therefore not live. Accordingly, there is no need to pray in aid the cases of **Kuruma Son of Kaniu v The Queen** and **Herman King v The Queen**, to justify the reception of evidence on behalf of the prosecution, in the applicant's trial.

[125] In summary this then is the position. The applicant was validly committed to the jurisdiction of the Circuit Court. There he was arraigned on an indictment preferred by Crown counsel on behalf of the DPP. The Circuit Court heard evidence that was relevant and admissible in law, on the basis of which the jury reached a verdict adverse to the applicant. We are therefore of the view that the trial was based on valid process and was

not undermined by any possible inherent defect in the initiation of the original criminal process. Accordingly, this ground fails.

The outcome of the appeal

[126] At the conclusion of the discussion on ground one, pronouncement on the effect of the applicant's success on that ground was deferred. If ground one had been his only ground of success, it would not have been sufficient for the conviction to be overturned, given that 1) he testified in largely similar terms to his out of court statement; 2) the learned trial judge repeatedly emphasised the applicant's contention that he was acting in self-defence to counter the complainant's persistent aggression; and 3) the learned trial judge did not suggest that the statement contained an admission that could be used for its truth, but that the exculpatory allegation of his acting in self-defence could not. Those factors combined, minimised the prejudice caused by the error made by the learned trial judge, in his classification of the applicant's statement and resultant directions concerning how the statement was to be assessed.

[127] The applicant was however also successful on ground two. As the outcome on ground two discloses that the applicant was wholly deprived of a defence (the statutory defence under section 13 of the Constabulary Force Act), the court cannot contemplate applying the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act to sustain the conviction. His success on ground two, therefore requires that the appeal must be allowed and the conviction and sentence overturned.

Should there be a retrial?

Submissions

[128] In brief submissions counsel for the applicant submitted that this would not be an appropriate case for a retrial to be ordered. He highlighted that the incident generated a lot of tension in the community which is why the case had to be transferred to the parish of Trelawny for trial. Counsel for the Crown, in a contrary submission, argued that if the proviso could not be applied, this was a fit and proper case for a retrial to be ordered. She maintained that in relation to the case of **Dennis Reid v The Queen** (1978) 16 JLR 246, on which she relied, "all the boxes were checked", justifying the course for which she advocated.

Analysis

[129] Where this court decides that a conviction should be quashed, section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers the court to order a new trial, "if the interests of justice so require". In **Dennis Reid v The Queen**, the Judicial Committee of the Privy Council outlined factors that should be considered in coming to a decision whether or not to order a retrial. From the headnote, three significant considerations are: 1) "what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case"; 2) that "[a] distinction must be made between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it

had been induced by some misdirection or technical blunder"; and 3) that where "…the verdict has been set aside because of the inadequacy of the prosecution's evidence…to order a new trial would…give the prosecution a second chance to make good the evidential deficiencies in its case and this amounted to an error of principle".

[130] Apart from those three key considerations, it is necessary to have regard to the several other factors identified in this case, as also relevant to the decision. Lord Diplock, writing for the Board, noted that there were two extreme situations where either the evidence was insufficient to justify a new trial being ordered or so strong that the proviso should be applied to uphold the conviction. In respect of the majority of cases that will fall between those two extremes, he outlined the following considerations that should guide the assessment of whether a retrial should be ordered. At pages 251 to 252 he said:

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

> new trial and, if this were so, it would be a powerful factor against ordering a new trial.
>
> The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery'. This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk Kin v Regina* (1955) 39 H.K.L.R. 49 at p. 60."

[131] Lord Diplock was also careful to indicate that the factors he outlined were not exhaustive and that "the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances".

[132] With those factors and caution in mind, examining their application in some of the cases determined by this court will be instructive.

[133] In **Jason Collins v R** [2018] JMCA Crim 41 the applicant was convicted for the offence of murder committed 16 November 2011. He was sentenced on 8 May 2015. On appeal the trial was held to be a nullity as the majority verdict of 9:3 was taken before

the minimum statutory period of two hours had elapsed. There were some concerns about the quality of evidence. However, given the guidance on that point in **Dennis Reid v R** and the fact that the trial having been a nullity there had been no trial, a retrial was ordered in the interests of justice on 20 June 2018, almost seven years after the date of the offence.

[134] In **Elio Delgado v R** [2017] JMCA Crim 34 the appellant was arrested on an information dated 7 August 2012, in relation to allegations of indecent assault committed between 2005 and 2010. The appellant was convicted on indictment in the Parish Court on 26 May 2015. The conviction was overturned as a result of a failure to amend the indictment to reflect the evidence that was led. This issue could also have been rectified if the parish judge had specified on which alleged facts a prima facie case had been made out. The appellant had been on bail during the trial and remained on bail during the hearing of the appeal. A retrial was ordered on 26 September 2017.

[135] In **Pauline Gail v R** [2010] JMCA Crim 44 a conviction for unlawful wounding was overturned five years after the date of the commission of the offence due to unfairness in the trial as the learned Resident Magistrate declined the appellant an adjournment to secure representation of her choice. A retrial was not ordered as the appellant had already served four of the six months' sentence imposed by the court when the appeal was heard.

[136] In **Clive Mullings v R** [2013] JMCA Crim 53 the offence of wounding with intent took place on 10 August 2006. The trial was held 8 - 9 June 2009, and on 10 June 2009, the appellant was sentenced to six years' imprisonment at hard labour. The appeal was

heard and disposed of on 12 November 2012 in the appellant's favour on the basis that the directions on self-defence were woefully inadequate. By then the appellant had already served over three years of the sentence imposed on him. No retrial was ordered.

[137] In **Vernaldo Graham v R** [2017] JMCA Crim 30 the appellant was convicted on 19 June 2013 for a murder committed on 25 March 2006. The appeal was allowed and a judgment and verdict of acquittal entered on 10 June 2017, as 10 years had passed since the commission of the offence and the quality of the identification evidence from the sole eyewitness was poor.

[138] In **Dwayne Green v R** [2016] JMCA Crim 35 the appellant was convicted of burglary and larceny (count 1) and wounding with intent (count 2) on 17 February 2011 and sentenced to 12 and 15 years imprisonment at hard labour respectively on the two counts. On appeal, the conviction was overturned as this court found that the learned trial judge omitted to provide the jury with appropriate assistance when they first returned after retirement. At the time of the consideration of whether there should be a retrial, the appellant had been in custody for five years. There is no indication in the judgment how long since the offences had been committed. On 6 October 2016 a retrial was ordered.

[139] Finally, in **Radcliffe Levy v R** [2019] JMCA Crim 46 the appellant was convicted of murder of the mother of his child. The conviction was overturned as the learned trial judge gave inaccurate directions on the appellant's exercise of his right to silence. The evidence against the appellant was strong. 12 years elapsed from the date of the offence

to the hearing of the appeal. The court found there was heightened public interest in this type of offence in communities, evidenced by the fact that at the time of the offence the appellant was accosted by a crowd. A retrial was ordered.

[140] There is no issue of evidential insufficiency in the instant case. The conviction is being overturned because of a technical deficiency in the summation. The public interest would seem to be served by the ordering of a new trial, as this is a case of wounding with intent by a policeman in circumstances where it is alleged that he used excessive force. That is a live ongoing concern in our Jamaican society, even as there has been some indication that such alleged incidents have been decreasing, coincident with, if not caused by the work of INDECOM. Though counsel for the applicant submitted that the tension in the parish of Hanover which led to the case being transferred to the parish of Trelawny for trial was a factor that should influence the court not to order a retrial, in **Radcliffe Levy v R**, heightened public interest in the offence for which the appellant was charged, was identified as a factor supporting the ordering of a retrial.

[141] There is also no indication that the applicant's defence would be compromised in a new trial, as he was the only witness to fact called by the defence. The seven-year time period which has elapsed since the incident occurred, would tend against the ordering of a new trial. However, as noted in **Vince Edwards v R**, relying on **R v John Mitchell** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 74/1996, judgment delivered 31 January 2000, that is not definitive of the point. Indeed, in some of the cases reviewed, based on all the circumstances, retrials were ordered despite the

fact that time periods of seven years or greater, had elapsed between the time of the offence and the date the retrial was ordered.

[142] Of vital importance also is the fact that the applicant was on bail prior to trial and received a non-custodial sentence. He therefore has not been subject to incarceration, which in some cases has militated against a retrial being ordered, where a significant portion of the initial sentence has been served by the time of contemplation whether there should be a retrial. In fact, the nature of the court's finding means that the applicant will have to be refunded the fine which he paid.

[143] Weighing all the relevant factors in the balance, we are of the view it is appropriate that a new trial be ordered.

Disposition

[144] With apologies for the delay in the delivery of this judgment, this is the order of the court:

i) The application for leave to appeal is granted;

ii) The hearing of the application is treated as the hearing of the appeal;

iii) The appeal is allowed;

iv) The conviction is quashed and the sentence set aside;

v) The fine of $1,000,000.00 paid by Mr Wayne Hamil (the applicant) is to be refunded to him forthwith; and

vi) The case is remitted to the Circuit Court for retrial at the earliest possible time.