[2020] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 94 & 95/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

LEONARD LINDSAY & TYRONE FINDLAY v R

Debayo Adedipe for the appellant Leonard Lindsay

Norman Godfrey instructed by Brown, Godfrey and Morgan for the appellant Tyrone Findlay

Miss Cheryl-Lee Bolton for the Crown

16, 17 November 2017 and 2 December 2020

SINCLAIR-HAYNES JA

[1] The appellants, Messrs Leonard Lindsay and Tyrone Findlay, were tried and convicted in the Manchester Circuit Court between 19 and 21 November 2014 by M Gayle J and a jury, for the murder of Tony Richards. Both were serving as Detective Constables in the Jamaica Constabulary Force at the time of the offence. They were sentenced on 21 November 2014 to 25 years' imprisonment at hard labour with the requirement to serve 12 years before being eligible for parole.

[2] Aggrieved by their convictions and sentences, notice and grounds of appeal were filed on the appellants' behalf. On 26 November 2014, the following grounds of appeal were filed on behalf of Mr Findlay.

> "(a) The verdict is unreasonable and cannot be supported by the evidence.
>
> (b) The Learned Trial Judge erred in law when he failed to uphold the No Case Submission made on behalf of the Appellant as regards:
>
> (i) The failure of the Prosecution to Negative Self Defence.
>
> (ii) The credit of the sole eye witness being destroyed in cross-examination."

[3] He later sought and was granted leave to argue the following additional grounds of appeal.

> "(c) The Learned Trial Judge failed to adequately direct the jury as to the application of the law on self-defence to the evidence and thereby deprived the Appellant of a fair trial.
>
> (d) The Learned Trial Judge failed to leave to the jury the statutory defence available to the police officers acting in the course of their duties pursuant to section 13 of the Constabulary Force Act and section 14(2) of the Constitution (predating the 2011 amendment of the Charter of Rights).
>
> (e) The Learned Trial Judge failed to direct or sufficiently direct the jury on the issue of common enterprise in light of the fact that the Appellant and his colleague were obeying a lawful order and pursuing a lawful assignment given by his superior officer.
>
> (f) The Learned Trial Judge failed to direct the jury that where there are admitted inconsistencies, they may only be resolved through the mouth of the witness and left unresolved no positive finding against the Appellant may be made upon them."

[4] On 27 February 2017, the following grounds of appeal were filed on behalf of Mr Lindsay:

> "i. The learned trial judge erred in law when he refused to uphold the no case submission made on behalf of the appellant, Leonard Lindsay.
>
> ii. The learned trial Judge erred in law in that he failed to give adequate directions to the jury on self defence especially having regard to the circumstances in which the Appellant was dispatched to the beach and the recovery by the police of a gun and a knife (on the crown' s own case).
>
> iii. The learned trial Judge erred in law in that he failed to give adequate directions on joint enterprise/ common design.
>
> iv. The learned trial Judge erred in law in that he failed to direct the jury that they ought to assess the case against Leonard Lindsay separately.
>
> v. The verdict against the appellant Leonard Lindsay is perverse/not supported by the evidence particularly because on the evidence he was present at the scene pursuant to an official assignment, he did not do or say anything to the deceased, and his actions were focused on the other complainant at the scene."

[5] We heard the matter on 16 and 17 November 2017. On the latter date, we allowed the appeal, quashed the convictions, set aside the sentences and entered judgments and verdicts of acquittal. We promised to provide the reasons for our decision and this is a fulfilment of our promise. We apologise for the delay in providing our reasons.

The Crown's case

Roshane Dixon's evidence

[6] Roshane Dixon was the sole eyewitness. It was Mr Dixon's evidence that on 1 January 2010, at about 7:30 pm, he and his cousin, Odane Johnson ("Odane"), left their place of work at the Little Ochi Restaurant in Alligator Pond, Manchester, where he was employed as a chef. They were dressed in the company's uniform, black pants and a white shirt which exhibited the restaurant's logo.

[7] As they both walked along the beach in the Alligator Pond area, he observed Tony Richards ("the deceased"), o/c lawyer, whom he knew as a mason, with several men "shubbing" (hauling) a boat onto the shore. It was his evidence that he had known the deceased all his life.

[8] The boat was onshore when he and Odane reached it. The deceased stopped pushing the boat and spoke with him and Odane. Whilst speaking with the deceased, the other men who were pushing the boat left. Castro (the owner of the boat), Mr Dixon, Odane and the deceased remained. They spoke for a while and eventually Castro and Odane left and he and the deceased remained in conversation.

[9] During his conversation with the deceased, two men walked past them. He described one as tall and slim and the other as short with a little "built". The men walked a distance of about three chains, then turned and headed towards them. At approximately six feet distance from them, the men shouted: "Police freeze!" Both men were armed with guns but were dressed as civilians.

[10] At that juncture, Mr Dixon sat on the bow or point of the boat, and the deceased stood beside him at approximately less than an arm's length away. The men having identified themselves as police officers, searched him and the deceased. During the search, their arms were held up.

[11] A knife was found on him and the "short" police officer (Mr Lindsay) asked him the reason he had the knife. He explained that he was a chef and it was used to peel the vegetables at his job. He further explained that it was kept in a plastic shield in his pocket, because he took it to work with him daily. He also indicated to Mr Lindsay that he was wearing his work shirt.

[12] He and the deceased were instructed by the appellants to empty their pockets. In compliance, Mr Dixon removed two cellular phones from his pocket and held them in his hand. The appellants enquired if they had money. He told them he had none and the deceased told them that he had $800.00, which he gave to the "tall" police officer (Mr Findlay).

[13] After handing over the money, the deceased attempted to put his hands in the air but Mr Findlay instructed him to "put them down" and he complied. Mr Findlay, notwithstanding fired three shots at the deceased, who consequently fell on his back.

[14] Referring to Mr Dixon, Mr Findlay instructed Mr Lindsay, to "bun him, bun him". At that juncture, Mr Lindsay pointed his gun at Mr Dixon, who was not standing straight and ordered him to "stand up straight". In compliance, he "slightly straightened" and Mr

Lindsay fired two shots. He fell on his "belly" with the two phones in his hands and pretended to be dead. He was shot in his right arm and abdomen.

[15] Whilst on the ground, Mr Dixon heard one of the appellants speaking on a cellular phone. Approximately three to five minutes later, he heard the men discussing whether to leave the cellular phones in his hands or put them into his pocket. He then felt the cellular phones being removed from his hands and one placed into his pocket. Thereafter, he felt a knife being placed into his right hand. He remained motionless because he did not want the appellants to realize that he was alive.

[16] Whilst pretending to be dead, he heard voices he recognized. One voice was that of Annette Hamilton who was crying and expressing that he was dead. Miss Hamilton stooped and he spoke to her. Shortly afterwards, he turned onto his back and a police officer spoke to him. He and the deceased were taken to the Mandeville Hospital. He subsequently attended the deceased's funeral and saw his body interred.

[17] Under cross-examination, Mr Dixon denied having had a knife in his hand. He was adamant that the deceased was not in possession of a gun and he did not attack or threaten anyone. He further explained that there was no reason for him to rob anyone because he "worked".

Superintendent Beau Rigabie's evidence

[18] Superintendent Rigabie (Deputy Superintendent at the time of the incident) testified that he was in charge of operations in the Manchester Division at the material time. A "twenty-man detail" was assigned to cover festivities at Alligator Pond. The

appellants as part of the "detail" were attired in plain clothes and assigned to "roving patrol" within the zone.

[19] Consequent on a report of a robbery, he summoned the appellants and briefed them that two young men were robbed by four men on the beach of two cellular phones and $700.00. One of the young men showed them an injury on his side which he sustained during the robbery. Superintendent Rigabie described that injury as a circular bloodshot mark consistent with the nozzle of a gun.

[20] At approximately 8:30 pm, he assigned the appellants to the beach to search for two of four robbers who the young men said remained there. Approximately five minutes after, he received a call from Mr Findlay which caused him to immediately visit the Alligator Pond area. Upon his arrival he was handed a Taurus pistol bearing serial number TB75163 and a magazine with five 9mm rounds of ammunition. He was also shown two persons lying motionless beside a boat. An open blade knife was on the ground beside Mr Dixon. The Taurus pistol, magazine and bullets were given to Detective Corporal Morgan at the Mandeville CIB office.

[21] Under cross-examination, Superintendent Rigabie testified that he briefed the appellants of the risk involved and he feared for their lives, because one robber was alleged to be armed with a gun and another with a knife.

Annette Hamilton's evidence

[22] It was Ms Hamilton's evidence that on the night in question, she was operating a stall on Alligator Pond beach. At approximately 8:00 pm, she heard two loud explosions

which sounded like gunshots. She saw a crowd running down the beach and decided to follow. Having arrived at the scene, she stumbled upon the deceased's body on the sand. Thereafter, she saw Mr Dixon lying on his face with his hands outstretched.

[23] She pulled him up and removed a knife from under his hand. He spoke to her and thereafter she told his family and the crowd that he was alive. Ms Hamilton took the knife to her stall and later to her home, where she kept it with her other utensils for three or four days before handing it over to a police officer. She testified that she took the knife because she knew he used it to peel vegetables at his job.

The appellants' version of events

[24] On the night of 1 January 2010, Messrs Findlay and Lindsay were on duty as members of the Jamaica Constabulary Force and were stationed at the Mandeville Police Station. Armed with their Constabulary Force issued firearms and attired in plain clothes, they were dispatched on an assignment to Alligator Pond beach, in the parish of Manchester, by Deputy Superintendent Rigabie.

[25] Their mission was to search for two men, one armed with a gun and the other a knife, who had reportedly assaulted and robbed two young men of money and cellular phones, minutes before. They were given the description of the men, that was, one was taller than the other, and one was dark and the other was of a lighter complexion.

Mr Tyrone Findlay's evidence

[26] Mr Findlay testified that having walked past a number of couples on the beach; they sighted two men standing closely together beside a boat. Upon their approach, the

men pulled away from each other, stepped in front of Mr Findlay and Mr Lindsay and one of the men said, "Pussy hole don't move". One of the men was armed with a gun and the other a knife.

[27] Realising what confronted him, he became fearful for his life and that of his colleague. Instinctively, he pulled his firearm and fired three shots at the deceased. Having discharged his firearm, he heard another shot. He was not injured but he thought that Mr Lindsay had been shot. He noticed Mr Lindsay's left hand in the air holding his firearm and he enquired of him if he had been shot and was told he was not.

[28] It was Mr Findlay's evidence that he did not see the deceased's hands in the air. He denied that he instructed the deceased to put his hand down before shooting him. Mr Findlay also denied Mr Dixon's evidence that he had instructed Mr Lindsay to "bun him, bun him". That term, he said, was used by gunmen.

[29] In refuting Mr Dixon's claim, it was Mr Findlay's evidence that whenever a suspect is 'pat searched', it is unnecessary to request that they turn out their pockets. According to him, no cellular phones were in Mr Dixon's hand.

[30] Under cross-examination, concerning the description he was given by the young men of their assailants, his response was that Mr Lindsay was closer to the men than he was. Regarding the lighting, he said it was a full moon that night; and although it was not dark, it was not as bright as electric lights would have been.

[31] Mr Findlay was steadfast in his assertion that the men approached them armed with knife and gun, and he feared for his life and that of Mr Lindsay. He explained that he saw his life pass away and he thought about his wife and child.

Mr Leonard Lindsay's evidence

[32] Mr Lindsay testified that whilst walking along the Alligator Pond beach with Mr Findlay, they were accosted by two men whose appearance matched the description they had received of the robbers. The men jumped into their path, uttered expletives and brandished a knife and a gun at them. Fearing for their lives, while the men were about six feet away, he discharged his firearm.

[33] The deceased fell backwards and Mr Dixon fell on his stomach. Mr Findlay felt the deceased's neck for a pulse and he removed the gun from him. It was Mr Lindsay's evidence that he kicked the knife from Mr Dixon's hand. He then knelt close to him to check his pulse and he noticed that he was breathing and groaning. Mr Findlay telephoned Deputy Superintendent Rigabie and reported the matter. His estimation of the time which elapsed from the point in time they were accosted by the deceased and Mr Dixon, and the shooting occurred, was 10 seconds.

[34] Upon the arrival of Superintendent Rigabie at the scene, Mr Findlay handed over his gun and the gun he recovered from the deceased. A crowd gathered. The men were eventually placed into a jeep and transported to the hospital.

Daniel Powell's evidence

[35] Daniel Powell testified on behalf of the appellants. It was his evidence that he and his cousin Andrew Simpson were robbed by four men on the beach in Alligator Pond. The men approached them and one man placed a gun to his head while he was searched by two others. The gun was then "shoved into his side". The court was shown a scar on his side, which he said was caused by the gun. He was robbed of a cellular phone and $600.00. It was also his evidence that he identified the deceased in the morgue as the person who placed the gun at his head and Mr Dixon as one of the men who searched his pocket.

Whether the learned judge erred in refusing the appellants' no case submission.

[36] Grounds (b) and (f) of Mr Findlay's appeal and ground (i) of Mr Lindsay's appeal can conveniently be dealt with together. The issue in those grounds is whether the learned judge erred in calling upon the accused to answer at the end of the Crown's case.

[37] Upon the conclusion of the Crown's case, no case submissions were made on behalf of both appellants. Counsel, Messrs Godfrey and Adedipe, had urged the learned judge to find that the evidence of the sole eye-witness for the Crown, Mr Dixon, was so manifestly unreliable that a jury properly directed could not convict on it. Those submissions were, however, rejected by the learned judge.

[38] Displeased with the learned judge's ruling, it was the appellants' submission that the learned judge erred in rejecting the no case submissions which were advanced on their behalf.

Submissions on behalf of Tyrone Findlay

> (b) The Learned Trial Judge erred in law when he failed to uphold the No Case Submissions made on behalf of the Appellant as regards:
>
> (i) The failure of the Prosecution to Negative Self Defence.
>
> (ii) The credit of the sole eye witness being destroyed in cross-examination.
>
> (f) The Learned Trial Judge failed to direct the jury that where there are admitted inconsistencies, they may only be resolved through the mouth of the witness and left unresolved no positive finding against the Appellant may be made upon them.

[39] On behalf of Mr Findlay, it was Mr Godfrey's submission that the appellants ought not to have been called upon to answer the Crown's case. The nub of Mr Godfrey's complaint was that the Crown had failed to negative self-defence and Mr Dixon's credibility had been destroyed by cross-examination. Mr Dixon's evidence, counsel submitted, had been rendered so manifestly unreliable that the learned judge ought not to have called upon the appellants to respond.

[40] Mr Godfrey further submitted that the Crown's case was predicated upon the evidence of a sole eyewitness, whose evidence was riddled with inconsistencies and at the end of the Crown's case they remained unresolved**.** Any clarification of those inconsistencies, should have emerged from the mouth of the witness. Mr Dixon's evidence, he observed, "kept shifting like the waves in the fishing village". Mr Findlay, he submitted, ought not to have been called upon to answer the Crown's case which rested on the sole evidence of Mr Dixon.

[41] Counsel submitted that upon examination of the sequence of events, Mr Dixon's credibility had been seriously shaken. In support of that submission, Mr Godfrey directed the court's attention to Mr Dixon's evidence that: the appellants approached the deceased and Mr Dixon while they were seated on a boat; the shooting occurred at the boat; yet the deceased's body was found 20 feet away from the boat and Mr Dixon was found 10 feet away from the boat. No explanation was proffered for that anomaly, he posited.

[42] Counsel submitted that the incident occurred within a narrow window, therefore, whatever occurred within that time ought to have been consistent. He cited **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987 in support of his argument. It was counsel's submission that Mr Dixon's evidence was wholly unreliable and riddled with grave inconsistencies which went to the crux of the case. His evidence ought not to have been allowed to stand and the no case submission should have succeeded.

Submissions on behalf of Leonard Lindsay

(i) The learned trial judge erred in law when he refused to uphold the no case submission made on behalf of the appellant, Leonard Lindsay.

[43] In support of his contention that the learned judge ought to have upheld the no case submission, Mr Adedipe, on behalf Mr Lindsay, referred the court to Lord Parker's Practice direction, and submitted that at the end of the Crown's case, the elements of the offence charged had not been made out. He argued that the no case submission should have succeeded as there was no evidence that Mr Lindsay shot the deceased. The

evidence for the Crown, he argued, had been discredited by cross-examination and was so unreliable that no jury properly directed could reasonably convict on it.

[44] It is significant, he posited, that it was never alleged that Mr Lindsay had shot the deceased. Therefore, in the absence of credible evidence, he ought not to have been found guilty of the offence of murder. He indicated that it was the Crown's case, that Mr Lindsay was present at the scene in the performance of his lawful duties, on a specific assignment by the Deputy Superintendent. The uncontroverted evidence, Mr Adedipe argued, was that Mr Lindsay did not shoot the deceased, nor did he, in any way, aid in him being shot.

[45] Mr Lindsay only discharged his firearm in fear for his life after the deceased was shot. On neither account, that is, the Crown's nor the appellant's, could it reasonably have been found that Mr Lindsay either assisted or encouraged the commission of the offence for which he was found guilty, learned counsel argued.

[46] Mr Adedipe further contended that the main witness for the Crown, Mr Dixon, was most unreliable and contradictory. Mr Dixon's and Miss Hamilton's evidence regarding the placement of the knife on the scene, also contradicted Superintendent Rigabie's and Mr Lindsay's evidence.

The Crown's submissions

[47] It was, however, Miss Bolton's submission that a prima facie case had been made out against the appellants, thus the learned judge had properly rejected the no case submissions. According to Crown Counsel, Mr Dixon's evidence, which had not been

undermined under cross-examination, had negatived self-defence. His testimony which the jury accepted, was that Mr Findlay had, without reasonable and probable cause, shot at the deceased three times, thereby causing his death. In those circumstances, he could not have been acting in self-defence.

[48] Crown Counsel also directed the court's attention to Mr Dixon's evidence which explained the reason he was in possession of a knife that night and how the knife came to be out of his pocket. Those explanations ought to have been left to the jury to be assessed and accorded the weight they deemed appropriate, she submitted.

[49] Miss Bolton pointed to Mr Dixon's evidence that he did not see the deceased armed with any weapon that night nor did he see the deceased attack any of the appellants. She also pointed out that Mr Dixon maintained that stance under cross-examination.

[50] Crown Counsel, however, conceded that there were inconsistencies in Mr Dixon's evidence but submitted that they were not of a substantial nature which rendered his evidence wholly discredited. It was, therefore, for the jury to decide on the matter, she argued. In support of her submission, Crown Counsel directed the court's attention to the decision of this court in **Steven Grant v R** [2010] JMCA Crim 77, in which Harris JA said:

> "The question therefore is whether the evidentiary material before the Court was so insubstantial and weak that the case ought not to have been sent to the jury …
>
> Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence

> adduced by the prosecution does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements give rise to the test of a witnesses' credibility... The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited."

[51] In support of her argument, Crown Counsel also relied on the following, **R v Baker and Others** (1972) 12 JLR 902, **Mills v Gomes** (1964) 7 WIR 41, and the Guyanese case, **Kissoon and Singh v The State** (1994) 50 WIR 266. Reliance was also placed upon these cases by counsel for the appellants.

[52] It was Crown Counsel's contention that there was adequate proof of factual matter to be determined by the jury as to innocence or guilt of the appellants and thus there is no merit in this ground.

Law/Analysis

[53] Counsel's submission that the appellants ought not to have been called upon to respond to the Crown's case, because it was so riddled with inconsistencies and discrepancies that a jury properly directed would not have been able to arrive at verdict of guilt, did not find favour with the learned judge.

[54] The issue, therefore, was whether the learned judge erred in calling upon the appellants to answer the Crown's case. It is settled law that the evidence adduced by the Crown must sufficiently establish a *prima facie* case. Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227 is cited repeatedly as the correct test. The Chief Justice said:

> "A submission that there is no case to answer may be properly made and upheld: (a) when there is no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecutor is so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it…"

[55] Later, the English Court of Appeal case of **R v Galbraith** [1981] 1 WLR 1039 further clarified the test in the following oft cited paragraph:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[56] The Privy Council in **Taibo (Ellis) v R** (1996) 48 WIR 74 further advised that the criterion to warrant the removal of a matter from the jury's consideration is:

> "…[W]hether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed."

[57] The question for determination was, therefore, whether the Crown's evidence was so manifestly unreliable that a jury properly directed would have been unable to arrive at a verdict of guilt without irrationality.

[58] Mr Findlay's application that he ought not to have been called to answer the Crown's case ought not to have been conflated with Mr Lindsay's. The evidence adduced by the Crown in respect of Mr Findlay and Mr Lindsay was disparate and therefore were to be treated with separately.

[59] It was the Crown's burden to provide sufficient evidence that Mr Findlay committed the offence of murder. Regarding Mr Lindsay, the Crown's task was to establish a prima facie case that he was involved in a common design to commit murder.

[60] An important consideration for the learned judge in determining whether there was sufficient evidence against the appellants, was that the Crown's case was wholly dependent on the evidence of Mr Dixon, the sole eyewitness. Scrutiny of the discrepancies and inconsistencies on the Crown's evidence was necessary. The significant inconsistencies and discrepancies were:

(a) Miss Cassia Heath, a Crown witness, testified that at the material time, whilst walking along the Alligator Pond Beach, she saw the deceased and Mr Dixon sitting inside a boat. She spoke with the deceased for a little before she continued on her journey. Mr Dixon however failed to mention that he was inside the boat at any point, or that the deceased spoke to Miss Heath.

(b) Mr Dixon's evidence that upon being shot, he fell on his belly with two phones in his hands (one in each hand), was discrepant with his evidence at the preliminary enquiry that when he was shot he had nothing in his hands. Under cross-examination, when confronted with his previous statement, it was his evidence that he did not recall saying that. It was, however, Miss Annette Hamilton's evidence that she stooped by Mr Dixon, and only saw a knife under his right hand; he had nothing else.

(c) Miss Annette Hamilton's evidence that she saw Mr Dixon lying on his belly with a small kitchen knife under his right hand was inconsistent with her testimony under cross-examination. She was confronted with her statement to the police, dated 2 January 2010, that the knife was "in" Mr Dixon's hand, not "under" it.

(d) Mr Dixon's evidence was that he and the deceased were confronted and shot by the appellants beside a boat on which they were sitting, but the deceased's body was found 20 feet away from the boat and Mr Dixon, 10 feet away.

[61] The exercise of the learned judge's discretion cannot be faulted. Notwithstanding the discrepancies and inconsistencies, there was sufficient evidence on which a jury properly directed could have convicted. In our view, the inconsistencies and discrepancies in the Crown's evidence were not so significant to render the evidence taken as a whole

as manifestly unreliable. The strength or weakness of that evidence, however, was a matter for the jury, the arbiters of credibility.

[62] Having refused the no case submission, the jury then heard the appellants' evidence. The learned judge sufficiently directed the jury regarding the treatment of inconsistencies and discrepancies in the evidence. Confronted with two varying accounts of how the incident occurred, it was the jury's responsibility to determine the weight to be attributed to those inconsistencies and discrepancies. It was, therefore, entirely within the purview of the jury to assess the witnesses' credibility. Accordingly, these grounds lacked sufficient merit.

Whether the learned judge's directions on self-defence were insufficient.

Submissions on behalf of Tyrone Findlay

> (c) The Learned Trial Judge failed to adequately direct the jury as to the application of the law on self defence to the evidence and thereby deprived the Appellant of a fair trial.

[63] On behalf of Mr Findlay, Mr Godfrey submitted that the jury received no assistance from the learned judge as to the application of the law on self-defence to the evidence. He also relied on Privy Council case **Solomon Beckford v R** [1988] 1 AC 130 in support of that complaint. According to counsel, the learned judge's directions on self-defence were general and insufficient.

[64] Mr Godfrey also contended that it was the learned judge's duty to identify the evidence and aid the jury regarding its application to the law. That assessment could lead to the conclusion that the appellant was lawfully acting in self-defence.

[65] Counsel contended that the direction on self-defence ought to have been specific to the evidence, which would have provided the jury with a clear understanding of what constituted self-defence. Such a direction would have clearly explained and persuaded the jury that the force used by Mr Findlay might have been proportionate. Counsel submitted that the circumstances that night would have been tense when considered against the backdrop, that:

(a) the appellants were police officers sent on a mission by their superior;

(b) the appellants were briefed as to the nature of the assignment;

(c) Superintendent Rigabie was concerned for their safety; and

(d) Superintendent Rigabie cautioned them to be careful.

[66] Mr Godfrey postulated that the learned judge was expected to take those factors into consideration in directing the jury. His failure to do so, rendered his directions unsatisfactory and constituted a misdirection, which deprived Mr Findlay of a fair trial.

Submissions on behalf of Leonard Lindsay

> (ii) The learned trial Judge erred in law in that he failed to give adequate directions to the jury on self defence especially having regard to the circumstances in which the Appellant was dispatched to the beach and the recovery by the police of a gun and a knife (on the crown' s own case).

[67] It was Mr Adedipe's submission on behalf of Mr Lindsay that the learned judge failed to properly direct the jury on the issue of self-defence. Although the learned judge

identified self-defence as an issue to be resolved by the jury, his directions were inadequate. In support of that submission, counsel relied on **Solomon Beckford v R**, in which he indicated that the law of self-defence was accurately stated. The substance of the rule, counsel submitted, is that a person who is or honestly believes himself to be under attack is entitled to use reasonable force to repel that attack.

[68] Mr Adedipe also complained that although the jury were directed on the issue, the directions were given at the beginning of a lengthy trial several days before they retired and the learned judge failed to directly relate the defence to the evidence. The jury could not have been properly assisted with the summation as the learned judge, having rehearsed the evidence, failed to apply the directions to that evidence. Without the learned judge's assistance, the jury would have had difficulty in applying the directions to the evidence, he argued.

[69] The learned judge's summation, counsel pointed out, lasted several days. His directions on self-defence commenced at 3:40 pm on 14 November 2014. The weekend intervened and the learned judge continued on the following Monday. Counsel, Mr Adedipe, contended that the period between the learned judge's directions on self-defence and the jury's retirement on 19 November 2014 was lengthy.

[70] Mr Adedipe argued that the context was critical, in that:

(a) the incident occurred on a dark night on the beach;

(b) the appellants were assigned to search for armed men whom they had not seen before; and

(c) they were shown evidence of a gun mark on the side of the young man who had been robbed at gun point.

[71] In that context of danger, he submitted that the subjective test laid down by **Solomon Beckford v R** ought to have to have been applied, that is, "whether the accused honestly believed he was under attack?" Counsel opined that that reality ought to have been emphasized by the learned judge.

[72] Counsel posited that the circumstances in which the appellants were dispatched, and the knowledge that the men they were in search of were armed, would have created a heightened sense of apprehension. He pointed to the fact that on the Crown's own case, the men were armed with a knife and a gun. Superintendent Rigabie, the Crown's witness and the first officer on the scene, was handed a gun upon his arrival which allegedly belonged to the deceased. It was never alleged by the Crown, he further indicated, that the gun was planted.

[73] It was counsel's submission that that unchallenged evidence supported the veracity of the appellants' evidence. The jury, therefore, should have been told that the combination of circumstances could reasonably have put the appellants in fear of being attacked.

[74] It was counsel's contention that self-defence, which undoubtedly arose both on the Crown's case and on the appellants, was not negatived. Counsel further contended that there were areas of grave concern regarding the learned judge's directions on self-defence with respect to the appellant Lindsay. Although the learned judge correctly told the jury that it was not for the defence to prove self-defence and that, it was the Crown that bore the burden of disproving self-defence, he however failed to direct the jury's attention to the fact that self-defence was not negatived on the evidence before the jury.

[75] Counsel postulated that although the appellants bore no burden, the learned judge's summation must have left the jury with the impression that a verdict of acquittal could only have been entered if they believed the appellants, or disbelieved the Crown's witnesses. Counsel contended that the directions were inadequate because of the learned judge's failure to direct the jury that even if they disbelieved the appellants, if the Crown's evidence raised reasonable doubt, they should also acquit.

[76] Mr Adedipe argued that there was ample evidence which could have caused the appellants to have had an "honest belief" that they were being attacked by the deceased and Mr Dixon and so acted in self-defence. Those circumstances were, however, not highlighted by the learned judge. Counsel also directed the court's attention to the fact that:

(a) the deceased and Mr Dixon matched the description given to the appellants by the young men; and

(b) both the deceased and Mr Dixon were identified by the young men as the men who robbed them.

[77] Those facts were crucial to the assessment of self-defence and ought to have been weighed in favour of the defence. In reliance on the fact that Mr Lindsay was not charged with shooting the deceased, Mr Adedipe submitted that since self-defence was open to Mr Findlay, Mr Lindsay ought to have been absolved.

The Crown's submissions

[78] It was, however, Miss Bolton's submission that the learned judge's directions to the jury on the issue of self-defence were sufficient and in keeping with **Solomon Beckford v R**. The learned judge identified self-defence as a live issue from the commencement of the summation and repeatedly endeavoured to explain to the jury, that the Crown bore the burden of negativing self-defence. In support of her contention, she directed the court's attention to pages 984, 985 and 997 of the transcript, at which the learned judge said:

> "…the Crown must negative self-defence. They must prove to you that when these men committed the offence of murder, they were not acting in self-defence. That burden is on the Crown…"
>
> "So as I said before, and I will say it again, the burden is on the prosecution to negative self-defence. It is not for the Defendants to prove that they were acting in self-defence. They do not have to prove that.
>
> …"

> "It is for [sic] the burden of the Crown to negative self-defence, to prove to you that they were not acting in self-defence. I cannot more than overemphasize that to you.
>
> …"

[79] The learned judge, Crown Counsel submitted, had fairly balanced the issue of self-defence between the Crown's case and that of the appellants. He summarized the Crown's case regarding its submission that self-defence did not arise as well as the reason advanced by the appellants for having acted in self-defence. He further explained to the jury the verdict to be given if they accepted Mr Dixon's evidence or if they believed that the appellants acted in self-defence.

[80] Crown Counsel contended that the learned judge thoroughly explained the legal terms in relation to self-defence to the jury. She indicated that he defined self-defence and explained to the jury that it was a complete defence. The learned judge, she submitted, further explained that if it was found that the appellants acted in self-defence, they were to return a verdict of "not guilty". The jury was also told that a person under attack was under no duty to retreat, nor must he await the attack. Such a person, they were told, would be entitled to pre-empt the attack. In support of her contention that the learned judge also broke down the law into simple and accurate words, she directed our attention to the following direction of the learned judge as an example:

> "…a person who is attacked, or who believes that he is about to be attacked...may use such force as is reasonable [sic] necessary to defend himself. And if that is the case, he is acting in lawful self-defence and is entitled to be found not guilty."

[81] Crown Counsel further contended that the learned judge properly explained the principles of self-defence to the jury by explaining the subjective test for determining whether the appellants had an honest belief that it was necessary to defend themselves and whether the force used was reasonable. He further explained the meaning of reasonable force and reminded the jury that the appellants were attacked with a gun and a knife and explained that persons under attack, are not expected to weigh what force to use.

[82] Crown Counsel conceded that the learned judge failed to direct the jury on how to treat with the gun. That shortfall, she submitted was, however not fatal to the directions. Regarding Mr Adedipe's complaint that the learned judge failed to direct the jury that, even if they did not believe the appellants, but were in doubt regarding the Crown's case they should acquit, Crown Counsel submitted that although the learned judge did not specifically so state, his summation would have assisted. She directed the court's attention to the learned judge's direction to jury as follows:

> "So, Madam Foreman and your members, there are two main questions you have to answer, if you find that they were acting in self-defence. The first, did the accused men honestly believed [sic] this was necessary to defend themselves? In other words, it is a subjective view. It is how they feel, or put it another way, did they, the accused men honestly believed [sic] or may have honestly have believed that it was necessary to defend themselves?
>
> If you are sure that the accused men were not acting in self-defence as the Crown is saying, then they would be guilty, but if you decide that they were or might have been acting in self-defence, that they believed it was necessary to defend themselves, then you go on to consider the second question.

> What is the second question? That is stating all the circumstances and the degree and the danger as the accused men honestly believe them to be, was the amount of force which they use reasonable? …" (pages 999-1000)

[83] At pages 981-982 of the transcript, the learned judge in directing the jury on burden of proof said:

> "…So if at the end of the day you are not certain or you are not sure of the accused men guilt you must say not guilty, you are not sure, you have any doubt at all those doubts must [sic] resolved in their favour, that's what the law says. …"

[84] In refuting the complaint that the summation lasted for several days, Crown Counsel submitted that the learned judge reiterated his directions on self-defence closer to the juncture at which the jury was sent to deliberate. She pointed the court to page 1200 of the learned judge's transcript:

> "HIS LORDSHIP: And I said if – the defence is saying they were acting in self defence, so lawful self defence meaning if they were under attack and honestly believe[sic] that they were under attack and acted and used reasonable force then they would not have committed an offence. I make sure say that."

[85] Crown Counsel contended that the complaints levelled at the learned judge regarding this ground, are without merit.

Law/Analysis

[86] Both Mr Godfrey and Mr Adedipe submitted that the learned judge's directions on self-defence were general and insufficient. The issue, therefore, was whether the learned judge's directions on self-defence were in fact insufficient. At pages 984-987 of the transcript; the learned judge said:

"…Madam Foreman and members of the jury, you would recall in this case, **the prosecution is saying the deceased was killed without lawful justification and that these two accused men were not acting in self-defence.** They say this through the witness name [sic] Roshane Dixon, that they put forward to you. But on the other hand, the defence are saying that they were acting in self-defence. So you see the two situations.

…

So as I said before, and I will say it again, **the burden is on the prosecution to negative self-defence. It is not for the Defendants to prove that they were acting in self-defence.** They do not have to prove that.

You might notice, Madam Foreman and your members, that one of the ingredients of murder is intention. Intention is not capable of positive proof. None of us can get into the mind of anyone and know what they are thinking. I am looking at you twelve, I don't know what you are thinking and you can't tell what I am thinking. None of us can do that. The good Lord gave us that privacy. Yet, where one of the essential ingredients of the offence of murder, it must be proved like any other ingredient. So intention, must be proved. It must be proved. You might be wondering how. The only way to prove a person's intention, is to infer -- as I tell you about drawing inference -- is to infer from the words or conduct or both. That is what the law says.

In the absence of evidence to the contrary, you are entitled to regard the accused men as reasonable persons. That is to say, an ordinary responsible person capable of reasoning.

In order to discover their intention therefore, in the absence of any expressed intention, you look at what they did, if you accept they did anything. You ask yourselves, you ask whether an ordinary fair, responsible person must have known that death or serious bodily harm would result from their action.

If you find that they must have known, then you may infer that they intended the result and this could be satisfactory proof of the intention required to establish the offence [of] murder.

…" (Emphasis supplied)

[87] The learned judge directed the jury on the burden to be discharged regarding the defence of self-defence. He correctly directed the jury that the appellants had no duty to prove that they acted in self-defence rather, it was the Crown's burden to negative self-defence. In order to negative self-defence, the learned judge explained that the Crown bore the burden of proving that the appellants had the requisite intention to commit murder and which intention could be inferred from the evidence**.**

[88] The learned judge also directed the jury that in their deliberation on whether the appellants had the requisite intention, it was necessary to assess "whether an ordinary fair, responsible person must have known that death or serious bodily harm would result from their action".

[89] There was no issue taken as to whether the deceased was shot by Mr Findlay, or whether he intended kill or to cause serious bodily harm to the deceased. The issue was whether the killing was lawful. Lord Lane CJ's following statement in **R v Gladstone Williams** (1984) 78 Cr App R 276, at 280, was cited with approval by the Privy Council **Solomon Beckford v R**, as correct:

> "The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more." (page 143)

Lord Griffiths further explained the Privy Council's reasoning by the following statement:

> "It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal

> trial, must be disproved by the prosecution. If the prosecution fail [sic] to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful." (page 144)

[90] The learned judge was therefore obliged to direct the jury that it was the Crown's duty to prove that the appellants' actions, which were, the shooting and killing of the deceased, were unlawful. It was of particular importance to have further directed them that the appellants were lawfully executing their duty by going in search of armed robbers and seeking to apprehend them.

[91] The learned judge ought also to have instructed the jury further, that it was the Crowns' duty to prove that, when the deceased was shot and killed, the appellants were no longer acting lawfully. It was insufficient to have directed the jury to assess whether or not the appellants possessed the intention to kill or cause serious bodily harm to the deceased. His directions in that regard were therefore incomplete.

[92] The learned judge continued his directions on self-defence at pages 996-1002 of the transcript. He said:

> "… On the other hand, the defendants are saying they were acting in self defence when they fired their firearms which result [sic] in the death of Mr. Richards. The defendants are saying they went in search of men who used gun and knife to rob two boys. The Crown is denying that. The Crown is saying that they went up the beach yes in search but they came back and acted otherwise, very well. The defendants are saying on -- on their way down the beach they see Richards armed with gun and Dixon with knife and said pussy hole don't move and as a result they acted in self defence of their lives.

HIS LORDSHIP: Let me say that the Defendants have no burden to prove that they were acting in self-defence. It is for the burden of the Crown to negative self-defence, to prove to you that they were not acting in self-defence. I cannot more than overemphasize that to you.

They both gave sworn testimony, that is on oath. So you will have to consider their evidence and say whether you believe them or not. If you believe that they were acting in self-defence, that is the end, and they use reasonable force in the circumstances, you will have to say that they are not guilty. If you believe Roshane, you say guilty.

Madam Foreman and your members, I come to another issue that I mentioned earlier, the issue of self-defence. Self-defence in law is a complete defence. What that really means is, once you find that a person is acting in self-defence, you have no choice but to say not guilty, if the force was reasonable. It is one of the main issues raised in this case.

…

It is for the prosecution to make you feel sure that the accused men were not acting in lawful self-defence and not for the accused men to prove they were acting in self-defence. You will recall in law, the accused is not required to prove their innocence. **The law is not that person or persons only act in lawful self-defence, if in all the circumstances as they believed them to be, it was necessary for them to defend themselves, that the amount of force which they use [sic] in doing so was reasonable.**

…

If you are sure that the accused men were not acting in self-defence as the Crown is saying, then they would be guilty, but if you decide that they were or might have been acting in self-defence, that they believed it was necessary to defend themselves, then you go on to consider the second question.

…" (Emphasis supplied)

[93] We agree with Crown Counsel that the learned judge adequately directed and reminded the jury that the burden of negativing self-defence rested on the prosecution. There was, however, no attempt by the learned judge, as complained by counsel for the appellants, to assist the jury with the application of the law to the evidence.

[94] The learned judge continued his summation at page 1199 thus:

> "…If after having heard what both accused men said if you believe what they say that they were acting in self defence and reasonable force was used the verdict would be one of not guilty. **If you don't believe them you will have to go back to the Crown's case to look to see if the Crown has make [sic] you feel sure because if the Crown causes you to be in doubt about what happened you have to return a verdict of not guilty, because you would not be sure.** So you have to be sure about what the Crown present [sic] to you before you can return a verdict adverse to them or verdict of guilty, if you believe the Crown's -- prosecution witnesses.
>
> …" (Emphasis supplied)

[95] It was apparent from the learned judge's directions that there was no merit in Mr Adedipe's complaint that the learned judge failed to direct the jury that even if they did not believe the appellants, they were obliged to assess the evidence in its totality. They were adequately directed to do so. He further directed them that having done so, if they had any reasonable doubt, the appellants should be found not guilty.

[96] The learned judge further explained the law on self-defence and the test to be applied; he said:

> "…Let me say also, that it is both good sense and good law, that when you are under an attack to defend yourself, **the**

law does not allow -- does not say that you have to retreat or run away. That is not the law of this country. The law doesn't say when you are under an attack you must gallop and run away.The law doesn't say that. That is not the law. The law does not require you to retreat. Likewise, the law does not allow you to wait on the preempted strike, that is the first strike by the man. The law doesn't require that one.

Let me tell you what lawful self-defence is in law. The law says, the person who is attack [sic]-- the law is [sic] in Jamaica, a person who is attacked or believed [sic] that he is about to be attacked -- notice as I said, a person who is attacked or believed [sic] that he is about to be attacked, may use such force as is reasonable [sic] necessary to defend himself. And if that is the case, he is acting in lawful self-defence and is entitled to be found not guilty. That is the law.

So in other words, if he honestly believe [sic] that he is about to be attacked, he may use force, or if he is under an attack, he may use force to repel that, but it must be reasonable force. In other words, you can't ask an elephant to crush an ant. That would be excessive force. But gun to gun, if you find that self-defence arise, if you believe it would be reasonable; if you think so. Not my view.

…

If you recall, the Defendants said they were attacked with gun and knife and they fired their guns in self-defence.

So, Madam Foreman and your members, there are two main questions you have to answer, if you find that they were acting in self-defence. The first, did the accused men honestly believed [sic] this was necessary to defend themselves? In other words, it is a subjective view. It is how they feel, or put it another way, did they, the accused men honestly believed [sic] or may have honestly have believed [sic] that it was necessary to defend themselves?

…

What is the second question? That is stating all the circumstances and the degree and the danger as the accused men honestly believe them to be, was the amount of force which they use [sic] reasonable? You recall that both their defence attorneys suggested to Mr. Dixon that he and Richards attacked the two accused men with gun and knife.

It is a matter for you, Madam Foreman and your members of the jury to decide whether the force use [sic] was reasonable, bearing in mind they said they were under attack. That is, if you believe they were under attack.

Force use [sic] in self-defence is unreasonable and unlawful if it is out of proportion to the nature of the attack, or if it is in excess of the nature which is required by the accused men to defend themselves.

When considering the force used by the accused men, whether it was reasonable or not , you must bear in mind that a person or persons who are defending themselves cannot be expected in the heat of the moment when they are under an attack to weigh up what defensive force to use to repel that attack.

In other words, if they are under an attack, should I use a knife? Or I should a kick? Or should I do this. You are not expect [sic] to do that. You are only defending yourself. That is what the law says. You are not expected to weigh what force to use.

If you conclude that the accused men did no more than they honestly thought was necessary for them to defend themselves, you may think that is strong evidence that the amount of force used by them was reasonable.

If you are sure that the amount of force used by the accused men was unreasonable, they cannot have been acting [in] lawful self-defence and is [sic] guilty. On the other hand, if the force used by them or might have [been] used by them is reasonable, then the accused men would not be guilty." [Emphasis supplied]

[97] Although the learned judge correctly explained to the jury that a person under attack was under no duty to retreat, his explanation of the law on self-defence regarding the pre-emptive strike was confusing and potentially misleading. As quoted above, the learned judge stated:

> "Likewise, the law **does not allow you to wait on the pre-empted strike**, that is the first strike by the man. The law doesn't require that one." (Emphasis supplied)

[98] If the jury did indeed misunderstand the learned judge's directions on this, it would prove to be fatal to their analysis of the law in light of the facts in this case. It would have also been useful to their understanding of the law, to apply that direction to the evidence.

[99] It was the appellants' case, that they pre-empted the strike. Their evidence was that they were pounced upon by the deceased and Mr Dixon who brandished a gun and knife respectively and in self-defence, they discharged their firearms. It was, therefore, imperative that the jury understood that the appellants were under no duty to wait for the deceased to fire his gun before discharging theirs.

[100] By his directions, the learned judge sought to assist jury by further elucidating the law and test for self-defence. There was, however, merit in the appellants' submissions that the learned judge did not sufficiently assist the jury with the application of the law to the appellants' case. Mere regurgitation of the evidence was insufficient. Lord Griffiths in **Solomon Beckford v R** stated:

> "In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief, it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held. Their Lordships therefore conclude that...the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another."

[101] The learned judge's directions to the jury on the application of the test for self-defence were brief and insufficient. He reminded them of the appellants' evidence that they were attacked by Mr Dixon and the deceased who brandished a gun and knife at them. However, he neglected to remind them that, on both the Crown's and appellants' case, a knife was in fact found on Mr Dixon, and a gun, which was said to belong to the deceased, was handed to Superintendent Rigabie upon his arrival at the scene. The learned judge ought to have reminded the jury that there was no explanation regarding the presence of the gun. No assistance was given to the jury relating to the impact the gun and the knife had on the defence. The learned judge was obliged not only to put the appellants' case to the jury, but to bring to their attention evidence supportive of their case that they were attacked and that the force used to repel the attack was not disproportionate.

[102] Of significance also, and which the learned judge failed to point out to the jury, was the unchallenged fact that the appellants were police officers assigned to search for robbers who reportedly were armed and dangerous. The learned judge ought to have explained that those circumstances could have caused the appellants a "heightened sense

of apprehension", as posited by Mr Adedipe. Such a direction would have aided the jury in determining whether or not they believed that the appellants were or may have honestly feared for their lives.

[103] In light of the foregoing, the appellants were deprived of their right to have had the jury properly consider their defence that they were indeed honestly of the belief that they were under attack.

[104] The learned judge's summation commenced on 13 November 2014 and lasted for lasted four days. The aforementioned directions on self-defence were given on Friday, 14 November 2014. Upon the resumption of the court, the learned judge summarized the evidence. Prior to the retirement of the jury on 19 November 2014, the learned judge briefly reviewed the various issues and the law, including that of self-defence. At page 1197 of his transcript, he said:

> "…I told you about self-defence. I told you that a person acting in lawful self-defence, if he honestly believe [sic] that he is under attack, and the force that he use [sic] is reasonable.
>
> I told you also that a person need not run when he is under attack. That is to retreat. I told you a person acting in self-defence doesn't have the time to weigh up what force to use. I told you all of that.
>
> …"

[105] We agree that consequent on the intervening weekend, and the lengthy summation, the reiteration of the law on self-defence at this juncture, was brief. It would have been imperative for the learned judge to guide the jury on how to apply the evidence

he had summarized, to the law. Having considered the learned judge's directions on self-defence in their totality, we concluded that the jury was not sufficiently assisted with their assessment. Accordingly, there was merit to this ground.

Whether there was a common design/joint enterprise between the appellants to shoot and kill the deceased.

Submissions on behalf of Tyrone Findlay

> (e) The Learned Trial Judge failed to direct or sufficiently direct the jury on the issue of common enterprise in light of the fact that the Appellant and his colleague were obeying a lawful order and pursuing a lawful assignment given by his superior officer.

[106] Mr Godfrey contended that Mr Findlay's position differed significantly from that of a civilian in a similar position. The pertinent question, he submitted, was "when was this joint venture hatched?" It was counsel's submission that, although both appellants were armed with firearms, those firearms were to be regarded as "tool[s] of the trade". It was his further submission, that possession of those firearms could not create a joint enterprise.

[107] Counsel further argued that the learned judge's directions on common design were general. He posited that if the principles of common design and the applicable evidence were disclosed to the jury, the verdict could possibly have been different. It was counsel's submission that the jury was addressed by the learned judge in a manner which suggested that the appellants were acting together. The learned judge, counsel complained, failed to explain that the cases were different.

Submissions on behalf of Leonard Lindsay

> (iii) The learned trial Judge erred in law in that he failed to give adequate directions on joint enterprise/ common design.
>
> (iv) The learned trial Judge erred in law in that he failed to direct the jury that they ought to assess the case against Leonard Lindsay separately.

[108] It was Mr Adedipe's submission on behalf of Mr Lindsay that no evidence was adduced that he did anything to the deceased. Counsel submitted that on the Crown's case, the witness, Mr Dixon was searched and shot by Mr Lindsay. That shooting allegedly was done at the urging of Mr Findlay after he shot the deceased.

[109] Counsel submitted that the circumstances in which the shooting occurred were that the appellants were police officers who were acting in the course of their duty, having been dispatched to the beach, and were lawfully armed in search of two men who reportedly were the perpetrators of an armed robbery. The appellants, therefore, were under a duty to apprehend those men.

[110] Importantly, counsel posited, it was the appellants' and Superintendent Rigabie's evidence that the deceased and Mr Dixon matched the description which was given by the two young men, of the men who robbed them. On that evidence, the appellants would have been entitled to stop and search the men as there would have been sufficient basis for reasonable suspicion that they were the perpetrators of the robbery.

[111] The Crown's case, taken at its highest, was that Mr Findlay, having instructed the deceased to put his hands down, then shot him three times. There was no evidence, Mr

Adedipe submitted, to suggest that there was a prior plan or arrangement between the appellants for the deceased to be shot. Moreover, on the Crown's case, it was Mr Findlay who instructed Mr Lindsay to shoot Mr Dixon.

[112] The alleged divergence from lawfulness, Mr Adedipe contended, began at the point at which it was alleged by the Crown that the deceased was instructed to put his hands down and was shot by Mr Findlay. Counsel questioned the likely effect on Mr Lindsay, assuming the Crown was able to establish its case. He pointed to the following, which he considered to be insurmountable hurdles which confronted the Crown:

(a) identifying the joint enterprise;

(b) ascertaining where it was conceived and on what terms; and

(c) demonstrating that Mr Lindsay was involved in a common design to murder the deceased.

[113] According to Mr Adedipe, there was no evidence to support any of the above. He was steadfast in his contention that the shooting of Mr Dixon cannot be treated as evidence of a common design to murder the deceased. The learned judge, counsel submitted, failed to address the jury on the lack of evidence on the Crown's case, of a common design.

[114] Mr Adedipe submitted that the law in respect to common design is well settled. Mere presence at the scene of a crime does not by itself make one a participant nor can it result in complicity. Instead, active involvement, encouragement, and/or assistance

was required to ground a charge of common design. For that submission, counsel referred the court to **R v Coney** (1882) 8 QBD 534 and **Webley & Meikle v R** [2013] JMCA Crim 22.

[115] It was counsel's further submission that there was no evidence to suggest that Mr Lindsay was a participant in the shooting of the deceased or that he acted pursuant to an agreement to shoot and/or kill him. Mr Adedipe pointed out that at the very least, up to the point that the deceased was shot, on both the appellants' and the Crown's case, Mr Lindsay was fulfilling his lawful duties as a police officer. It was, therefore, incumbent on the learned judge to point out to the jury that the appellants were on lawful duty.

[116] Mr Adedipe further argued that the learned judge was required to direct the jury on the individual culpability of an accused person who is jointly charged. Counsel submitted that the learned judge failed:

> (a) to direct the jury of the requirement to assess the evidence against each appellant separately;
>
> (b) to advise them that Mr Lindsay could only be culpable if they found that Mr Richards had been murdered; and
>
> (c) that Mr Lindsay either killed the deceased or aided and abetted the killing.

[117] Mr Adedipe further contended that the appellants, having been charged jointly and severally; a conviction for Mr Findlay, did not inexorably result in a conviction for Mr

Lindsay. It was counsel's submission that the learned judge's failure to address the jury in the proper way, deprived the appellants of a full, balanced summation and the chance of an acquittal. For that submission, counsel relied on the case of **DPP v Merriman** [1973] AC 584.

The Crown's submissions

[118] Miss Bolton, however, contended that the learned judge's directions on common design/joint enterprise were sufficient. The learned judge, Crown Counsel submitted, repeatedly told the jury that the issue of common design arose on the evidence. He further explained the requirements for arriving at a finding that the appellants were acting together and that both participated in the killing of the deceased.

[119] It was also Crown Counsel's submission that the learned judge directed the jury that, in determining whether the appellants intended to murder the deceased, it was necessary to 'discover' the actions of the appellants. The learned judge, Crown Counsel submitted, further directed the jurors that in determining the actions of the appellants, consideration should be given to the appellants' evidence. He also explained to the jury that, in considering the appellants' evidence, they were not doing so because the appellants bore any burden. He further explained that it was a legal requirement consequent on the appellants having testified under oath.

[120] It was also Crown Counsel's submission that the learned judge defined common design and applied the definition to the evidence. He was at pains, she submitted, to mention that it was the Crown's case that not only were the appellants present at the

commission of the offence, they actually aided and abetted each other in the commission of the offence. Crown Counsel relied on the learned judge's statement which highlighted aspects of Mr Dixon's evidence and postulated that he correctly directed the jury by instructing them that if they believed Mr Dixon's evidence it was possible for them to find:

> "…that the accused men were acting together in furtherance of an agreement to either cause grievous bodily harm to Mr. Richards or to kill him."

[121] Crown Counsel further contended that the learned judge's directions were in keeping with the well-established cases of **R v Coney** and **Webley & Meikle v R**. She argued that even if the learned judge did not explicitly direct the jury to assess the appellants' cases separately, it could have been inferred from his directions, given the context in which they were given. It was Crown Counsel's submission that this ground was without merit should therefore failed.

Law/Analysis

[122] Mr Lindsay did not discharge his firearm at the deceased. The uncontroverted evidence is that it was Mr Findlay who shot and killed the deceased. The issue, therefore, was whether, as Mr Adedipe contended, the learned judge adequately directed the jury on common design in light of the Crown's evidence. Counsel has sought to impugn the following directions to the jury on common design:

> "Now, Madam Foreman and your members, the prosecution in this case, is saying that Tyrone Findlay and Leonard Lindsay acted together meaning in concert to kill Tony Richards meaning they participated together. In other words, that the two of them join together in a joint enterprise either to kill Tony Richards or to cause him serious bodily injury. A joint

enterprise is when two or more persons agree on an offence and that agreement is carried out and the offence is committed then the [sic] each person takes part -- an active part in the commission of the offence is guilty of the offence, that's what the Crown is saying. The Crown is saying that both accused men were present at the commission of the offence and actually aid and abet in the assistance of the commission of this offence.

In the case -- in the evidence of Roshane Dixon I will go into more details but I am just highlighting certain things, if you believe him is [sic] that both accused men pass him, I will go into more details as a say, came back on the beach, pass him go some distance, with guns in their hands and say police freeze, then air in hand -- hand in the air by the deceased, tell him to put it back down, empty his pocket, took ratchet knife, then one say bun him, bun him, deceased fell on his back, he fell on his face then one somebody put a knife in hands. That's his evidence in total but I will go in more details later.

If his evidence is accepted by you then it is possible for you to find that the accused men were acting together in furtherance of an agreement to either cause grievous bodily harm to Mr. Richards or kill him. You have heard from Inspector McIntosh, from Superintendent Harrisingh and others. Mr. Dixon [sic] evidence is the main witness for the prosecution it is only if and only if you accept his evidence that both men were acting as he said or as he describes then and only then can you say both men were acting together in furtherance of an agreement to kill or cause serious bodily harm to Mr. Richards. On the other hand, the defendants are saying they were acting in self defence when they fired their firearms which result [sic] in the death of Mr. Richards. The defendants are saying they went in search of men who used gun and knife to rob two boys. The Crown is denying that. The Crown is saying that they went up the beach yes in search but they came back and acted otherwise, very well. The defendants are saying on -- on their way down the beach they see Richards armed with gun and Dixon with knife and said pussy hole don't move and as a result they acted in self defence of their lives." (pages 994-996)

[123] At page 1197 the learned judge encapsulated his directions thus:

> "I told you about common design is where two persons acting together. We call it acting in concert. Because that is the Crown's case that these two gentlemen acting in concert. Two persons who join and do something."

[124] The crux of common design/joint enterprise is that each party intended to jointly commit an unlawful offence. That intention does not need to be expressly stated. The agreement to jointly commit an unlawful offence can be inferred from the behaviour of the parties. A party who encourages the commission of a crime or assists in its commission is equally culpable as the actual perpetrator.

[125] The Privy Council decision, **Jogee and Ruddock v The Queen** [2016] UKPC 7, elucidated the required conduct by the following statement:

> "The requisite conduct element is that D2 has encouraged or assisted the commission of the offence…"

[126] At paragraph 12, the Privy Council further enunciated that, in cases which require a "particular intent", there must be an intention "to assist or encourage" the other party "to act with such intent". The Privy Council provided further clarification as follows:

> "Once encouragement or assistance is proved to have been given, the prosecution does not have to go far as to prove that it had a positive effect on D1's conduct or on the outcome: **R v Calhaem** [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree

> whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encourage or assisted by it."

[127] In our view, there was no evidence that Mr Lindsay encouraged Mr Findlay or assisted in the shooting of the deceased, for him to be held culpable as an aider and abetter.

[128] On the Crown's case, the only words of encouragement to harm, were uttered by Mr Findlay when he instructed Mr Lindsay to, "bun him, bun him!" The words, "bun him", in the Jamaican parlance, translated, means "shoot him". Significantly, those words were uttered by Mr Findlay in reference to Mr Dixon and not the deceased. The evidence on the Crown's case was that the deceased was shot by Mr Findlay after he complied with his instructions to put his hands down.

[129] The shooting of the deceased in the presence of Mr Lindsay was relied on by the Crown as evidence of a common design by the appellants to shoot and kill the deceased. It is worthy of note that there was no evidence that either Mr Lindsay or Mr Findlay was charged for the shooting of Mr Dixon.

[130] As pointed out by counsel for both appellants, the appellants were lawfully at the scene armed with guns, on an assignment to apprehend two alleged robbers, who on both the Crown's and the appellants' case, matched the description of the deceased and Mr Dixon. The unchallenged evidence was that, prior to the act of shooting the deceased, the appellants were acting lawfully.

[131] Although it was within the jury's purview to determine whether the shooting and killing of the deceased was unlawful and pursuant to a common intention of both of the appellants, the learned judge was nevertheless obliged to assist by correctly directing them on the law relative to the evidence. Accordingly, the learned judge did identify the issue of common design and directed the jury on it; but, as submitted by Mr Adedipe, his directions in the particular circumstances of this case, were insufficient.

The failure to direct the jury on mere presence

[132] It is settled law that mere presence at a scene of crime is not conclusive of guilt. In the English case, **The Queen v Coney**, at page 8, Cave J, with whom the members of the court agreed, cited with approval **R v Young** (1838) 8 C&P 644, in which Vaughan J said:

> "…[M]ere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals. If either of the prisoners sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not do or say anything; yet, if he was present and was assisting and encouraging when the pistol was fired, he will be guilty of the offence imputed by the indictment."

[133] There was, therefore, justification for Mr Adedipe's complaint on behalf of Mr Lindsay that the learned judge, having indicated to the jury that both appellants were present at the scene, ought to have directed the jury that it was Mr Lindsay's case that although he was present, he neither aided nor abetted the shooting of the deceased.

[134] The learned judge was further required to explain to the jury that Mr Lindsay's mere presence when the deceased was shot and killed, was not, without more, sufficient to establish a common intention to murder him**.** No guidance was given to the jury regarding their assessment of Mr Lindsay's presence at the scene by the learned judge. His contention that he was deprived of his right to have his case assessed independently of Mr Lindsay's, was therefore meritorious.

The failure to consider Mr Lindsay's case separately

[135] Relying on the House of Lords case of **DPP v Merriman**, it was Mr Adedipe's submission, with which the court agreed, that the appellants' having been jointly and severally charged, their cases ought to have also been considered separately.

[136] Accordingly, the jury should have been directed that even if they found that Mr Findlay was guilty of murdering the deceased, that did not automatically inculpate Mr Lindsay. The jury would have had to consider the evidence against Mr Lindsay separately, and consider whether he and Mr Findlay had a common intention to murder the deceased. More so in light of the Crown's reliance on common design to impute guilt to Mr Lindsay.

[137] The learned judge was under a duty to not only direct the jury as to the law of common design, but also to direct them as to the approach they should adopt in applying the law to the evidence. In light of the evidence, the learned judge's directions were deficient in assisting the jury in that regard. Not only were the learned judge's directions general, he failed to:

(a) sufficiently assist the jury on the issue of common design against each appellant/the application of the law to the evidence; and

(b) to properly address Mr Lindsay's case separately which was especially required because of the Crown's reliance on common design to establish the charge of murder against him.

[138] In light of the learned judge's failure to properly address those crucial issues and his inadequate guidance to the jury regarding common design, we considered that this ground was meritorious and that the verdict of guilt in respect of Mr Lindsay was unsafe.

Whether the learned judge failed to leave the statutory defence to the jury.

Submissions on behalf of Tyrone Findlay

> (d) The Learned Trial Judge failed to leave to the jury the statutory defence available to the police officers acting in the course of their duties pursuant to section 13 of the Constabulary Force Act and section 14(2) of the Constitution (predating the 2011 amendment of the Charter of Rights).

[139] It was Mr Godfrey's submission, that the learned judge failed to leave to the jury the statutory defence available to police officers acting in the course of their duties, as afforded to them by virtue of section 13 of the Constabulary Force Act and section 14(2) of the Constitution (predating the 2011 Amendment to Charter of Rights), specifically under subsections (a) and (b).

[140] Counsel emphasized that in such circumstances the position of the appellants differs greatly from that of a civilian who would have found himself in a similar position. According to Mr Godfrey, Mr Findlay did what he was bound to do.

The Crown's submissions

[141] Crown Counsel, Miss Bolton conceded that the learned judge did not specifically refer to section 13 of the Constabulary Force Act and section 14(2) of the Constitution (which predates the 2011 amendment of the Charter of Rights). It was, however, her submission that the appellants' status as police officers at the material time did not entitle them to be treated differently from any other witness in a case. For that submission, she relied on **Raul Khouri v R** [2012] JMCA Crim 19.

[142] Miss Bolton contended that, on both the Crown's and appellants' cases, the learned judge repeatedly reminded the jury that the appellants were dispatched on a police assignment by their superior, to go to the beach in search of armed robbers who had earlier that night, held up and robbed two young men. In those circumstances, posited Crown Counsel, it would have been unnecessary to give either the direction as to the statutory defence pursuant to section 13 of the Constabulary Force Act, or the direction pursuant to 14(2) of the Constitution. His failure to do so, she contended, would not be fatal.

[143] Crown Counsel opined that given the circumstances of the instant case, even if such a direction had been given, it would not have changed the outcome, as credibility

was one of the main issues and it was for the jurors, having heard all the evidence and assessed all the witnesses, to determine which account they believed.

[144] The jurors' verdict, Crown Counsel submitted, demonstrated that they did not believe the appellants' account that they were acting lawfully and thus found that they were not entitled to protection under the law. They were, therefore, deemed to have been on a frolic of their own. Crown Counsel posited that this ground was without legal merit and asked this court to find that it failed.

Law/Analysis

[145] Reliance was placed on section 14(2) of the Constitution (which predated the 2011 Amendment to the Charter of Rights), which provided:

> "14. – (1) …
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -
>
> a. for the defence of any person from violence or for the defence of property;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. for the purpose of suppressing a riot, insurrection or mutiny; or
>
> d. in order lawfully to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war."

[146] On the appellants' case, Mr Findlay discharged his firearm in defence of himself and Mr Lindsay upon being attacked with a gun and a knife by Mr Dixon and the deceased. In those circumstances, they would have been entitled to the defence afforded by the Constitution.

[147] Section 13 of the Constabulary Force Act outlines the duties of a police officer. It reads:

> "13. 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, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company."

[148] Whether criminal liability should be ascribed to the appellants for the killing of Mr Richards, was determined by the common law, the Constitution and the statute. The common law aspect was, in part, dealt with in the law concerning self-defence, whilst the statutory aspect should have been addressed, in circumstances such as these, by section 13 of the Constabulary Force Act. In **Vince Edwards v R** [2017] JMCA Crim 24, Brooks JA continued by stating that:

> "[47] …Where both the defences of self-defence and the execution of duties as a police officer, arise during a case, it

> is the trial judge's obligation to give full directions in respect of both."

[149] The unchallenged evidence is that appellants were dispatched to Alligator Pond Beach on an assignment to apprehend two armed robbers who, as aforesaid, had held up and robbed two young men at gun point. In light of the disparate versions of the circumstances in which the shooting occurred and the fact that the appellants were Detective Constables on a specific assignment, the learned judge was obliged to provide the jury with a more complete direction by citing the statutory defence of section 13 of the Constabulary Force Act. Such a direction might have assisted the jury in understanding the appellants' duty as police officers in light of the evidence.

[150] In light of Mr Findlay's explanation as to the circumstances under which he discharged his firearm, had the jury been properly directed on the statutory defence, they would have had to consider whether in those circumstances, the shooting of the deceased was reasonably justifiable. It is possible that they might have arrived at a finding that the shooting of the deceased by Mr Findlay was further to his lawful execution of his duty as a police officer.

[151] Crown Counsel argued that the learned judge discharged his duty by reminding the jury that the appellants were police officers on duty when the shooting occurred. This was, however, not sufficient as the learned judge should have directed the jury that police officers are afforded an additional defence. Brooks JA in **Vince Edwards v R** stated:

> "[65] Based on that analysis, although 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." (Emphasis supplied)

[152] In the instant case, the Crown asserted that it was sufficient that the appellants were referred to as being police officers who were sent out on duties by their superior. It was, however, the trial judge's obligation to give full directions in respect of both, which would require him to not only explain the law but also to review the facts and accurately and fairly apply the law to those facts.

[153] The learned judge was obliged to advise the jury of the statutory defence, even if that defence did not arise on the defence's case. Directions on self-defence alone would not suffice. An implied direction in these circumstances would be a non-direction and therefore a misdirection. In light of the foregoing, the failure of the learned judge to direct the jury to consider the statutory defence was fatal. This ground, therefore, succeeded.

Whether the verdict was perverse, unreasonable and/or not supported by the evidence.

Submissions on behalf of Tyrone Findlay

(a) The verdict is unreasonable and cannot be supported by the evidence.

[154] Mr Godfrey submitted that credibility was of extreme importance because the Crown's case against Mr Findlay was entirely dependent on Mr Dixon's evidence. He indicated that Mr Dixon's evidence was that he and the deceased were "the victims of an unprovoked and an unwarranted attack by the appellants". It was, however, Mr Godfrey's submission that the sequence of events as described by Mr Dixon, ought to have been scrutinized for inconsistencies.

[155] Counsel directed the court's attention to Mr Dixon's insistence under cross-examination that, when he was shot, two cell phones were in his hands. That evidence was discrepant with his evidence at the preliminary inquiry that, at the point in time he was shot, there was nothing in his hands.

[156] Counsel also directed attention to the inconsistencies in Mr Dixon's evidence regarding the distance he was from the deceased at the point at which he was searched by Mr Lindsay and the deceased was searched by Mr Findlay. Counsel also highlighted the following unresolved issues in Mr Dixon's evidence, which he submitted were material: while he and the deceased were being searched, they were beside the boat, which assertion is inconsistent with the deceased's body being found 10-12 feet away from boat after the shooting and Mr Dixon falling 18-20 feet away.

[157] Mr Godfrey further highlighted the discrepancies in the Crown's case regarding the recovery of the gun. It was Superintendent Rigabie's evidence that he was handed a gun by Mr Findlay on his arrival at the scene. It was also his evidence that that gun was recovered from the deceased. Counsel pointed to the absence of any explanation on the Crown's case for the presence of the gun. He further submitted that it was the Crown's case that two young men were robbed on the beach by four men and the deceased and Mr Dixon were identified by one of the young men as two of the robbers.

[158] Counsel further submitted, that although credibility was within the purview of the jury and it was their right to accept or to reject aspects of a witnesses' testimony, where there are unresolved inconsistencies, they directly affect the credibility of that witness.

[159] It was his submission that the verdict was unreasonable and could not be supported by the evidence. Mr Godfrey argued that the learned judge failed to direct the jury that where there are admitted inconsistencies they may only be resolved from the witness' mouth and, if they are left unresolved, no positive finding against the appellant could be made upon them.

Submissions on behalf of Leonard Lindsay

> (v) The verdict against the appellant Leonard Lindsay is perverse/not supported by the evidence particularly because on the evidence he was present at the scene pursuant to an official assignment, he did not do or say anything to the deceased, and his actions were focused on the other complainant at the scene.

[160] On behalf of Mr Lindsay, Mr Adedipe urged the court to find that upon a fair view being taken of the totality of the evidence and the findings that were reasonably open to

the jury, the verdict was perverse and not supported by the evidence. The crux of his argument in support of this contention was that Mr Lindsay was not only lawfully present at the scene pursuant to his duties as a police officer on a specific assignment, but he had no interaction with the deceased. All of his actions were directed to Mr Dixon.

[161] Counsel posited that the undisputed evidence was that:

> "i) two youngsters were robbed and one injured by men one of whom was armed with a gun and the other with a knife.
>
> ii) the two accused men were dispatched, in the course of their duty, to investigate the matter and to seek to find the assailants of the two youngsters.
>
> iii) it was at night on the beach and the two accused men were warned by their superior about the danger of the assignment.
>
> iv) there was a confrontation with two men who fitted the description given by the two young boys.
>
> v) the defence testified that they were assailed by the two armed men and they were shot in self-defence.
>
> vi) the crown evidence [sic] denied that the two men attacked the policemen
>
> vii) the evidence of Findlay and Lindsay was that the deceased was armed with a gun which he brandished at them
>
> viii) the unchallenged evidence of Superintendent Rigabie who was first on the scene is that the witness Dixon was found with a knife near his hand. Lindsay had testified that he kicked it out of his hand. The witness Annette Hamilton for the crown had testified that she was early on the scene after the shooting and she removed a knife from his hand. She subsequently handed the knife to the police (this knife was an exhibit in the case).
>
> ix) Findlay testified that he retrieved the gun from the deceased after he was shot and he handed it to

> Superintendent Rigabie. Superintendent Rigabie confirmed that he was given that gun by Findlay.
>
> x) The crown failed to satisfactorily account on its case for the presence of the gun and the knife on the scene."

[162] Counsel, therefore, concluded that the jury ought to have returned a verdict of not guilty in light of the evidence, especially having regard to the numerous inconsistencies and discrepancies on the Crown's case.

The Crown's submissions

[163] Crown Counsel, on the other hand, submitted that the evidence supported the verdict. She relied on her earlier submissions in support of the learned judge's decision to reject the no case submission.

[164] It was the jury's responsibility to decide who to believe, she submitted. The appellants testified under oath and the jury were instructed by the learned judge to give the same weight to their evidence as that given to the Crown's witnesses. Ultimately, the main issue in this case was credibility, that is, who the jury believed, she submitted. Crown Counsel further submitted that Mr Godfrey's assertions regarding the inconsistencies were incorrect.

[165] Where explanations are provided for admitted inconsistencies, it was for the jury to decide whether or not the explanations were reasonable and further whether they would accept or reject them, she argued. It was Crown Counsel's submission that these grounds were without merit and should fail.

Law/Analysis

[166] The matter therefore fell within the province of the jury to determine the credibility of the Crown's sole eyewitness. The inconsistencies and discrepancies in the Crown's case were not significant. It was the learned judge's duty to properly direct the jury on the law and its application to the evidence. Having found that the learned judge's directions in relation to self-defence, common design and the statutory defence were deficient, it was unnecessary to address these grounds.

Conclusion

[167] For these reasons, we made the orders stated at paragraph [5] herein.