[2026] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 75 & 76/2015

DERRICK MORGAN v R
ALVIN MORGAN

Gladstone Wilson for Derrick Morgan

Miss Kerry-Ann Wilson for Alvin Morgan

André Wedderburn and Kemar Setal for the Crown

31 January, 1 February 2024 and 13 March 2026

Criminal law – Murder – Leave to appeal against convictions and sentences – Whether learned trial judge was correct to reject the no-case submission – Whether learned trial judge properly directed the jury on principles of self – defence – Whether the force used was reasonable or excessive – Whether learned trial judge should have left manslaughter on grounds of provocation to the jury

F WILLIAMS JA

[1] On 1 February 2024, the second day on which these renewed applications for permission to appeal came on for hearing, after hearing submissions, and with a promise that brief reasons were to follow, we made the following orders:

> "1. The applications for permission to appeal are refused.
>
> 2. The sentences are to be reckoned as having commenced on 16 October 2015, the date on which they were imposed."

Background

[2] The two applicants in this case, Derrick Morgan ('Derrick'), and Alvin Morgan ('Alvin'), who are brothers, were jointly charged on an indictment with the murder of Nenval Richards Jr. ('the deceased'), on 29 April 2011, in the parish of Saint Catherine. To distinguish between their cases, they will be referred to by their first names throughout this judgment. This will be done solely for convenience, as they bear the same surname. Both applicants pleaded not guilty, and after a trial by Thompson-James J ('the learned trial judge'), and jury, they were convicted in the Home Circuit Court, at King Street, in the parish of Kingston. Both applicants were sentenced on 16 October 2015, to 18 years' imprisonment at hard labour, with the stipulation that they serve 15 years before becoming eligible for parole.

Summary of the evidence at trial

<u>The prosecution's case</u>

[3] The prosecution's case, which was based on circumstantial evidence, was elicited from a total of 16 witnesses. In briefest summary, the allegations against the applicants were to the effect that, acting in common design, they murdered the deceased by shooting him, using a revolver issued to Alvin, who was a supervisor at a security company, and attempted to misrepresent the shooting as an act of self-defence, at first failing even to disclose to the police who were first on the scene that one of them (Alvin) had used a firearm in the incident. The evidence, as led through the prosecution's witnesses, revealed that Alvin later stated that he pulled his firearm and discharged it in the direction of whom he said were masked men who jumped from nearby bushes on the night of 29 April 2011. On the prosecution's case, the circumstantial evidence suggested that the crime scene had been staged in an effort to support the applicants' concocted account of having been attacked and acting in self-defence. The killing appears to have been motivated by the alleged abuse of the applicants' sister by the deceased, with whom she had a child. What follows is a summary of the evidence of the main witnesses.

[4] Sherwayne Richards ('Sherwayne'), the brother of the deceased, testified to the deceased having had what he described as "an ups and down relationship" (meaning, as we understand it, a stormy relationship) with the applicants' sister (Sherene), with whom he had had a daughter, and that the two were separated at the time. They quarrelled a lot, he said. The deceased would send Sherene money, diapers and food for the child with taxi drivers. However, on the night that he was killed, he had taken those items with the intention of giving them to her himself. On his evidence, that night, he, the deceased and one "Markie" travelled to Top Road, Marley Hill, in the parish of Saint Catherine, to a bar that was a little distance from where a "nine night" (or wake) was being held. The deceased gave him and Markie some money and left, promising to return. At the "nine night", he saw the applicants, Sherene and another woman. He further testified that Sherene, who appeared angry, told him to "bring down mi Crasses bredda" (that is, in essence, to take his problem-causing brother away from the area). Sherwayne's evidence was that he was about to telephone his brother (the deceased) when Derrick intervened and told him that if he, Derrick, had had his gun, he would kill the deceased in the lane. That lane he understood to be the lane the applicants would use to go home. Sherwayne said that Derrick was "in a temper" when he said those words. Sherwayne also said that when he telephoned the deceased thereafter the call went to voice mail. The applicants and Sherene then left in the direction of the applicants' home.

[5] The evidence from Sergeant Clifton McPherson ('Sergeant McPherson'), was that on 29 April 2011, about 11:50 pm, he was on duty at the Brown's Hall Police Station, when District Constable Irvine McIntosh (who was on station guard duty), reported to him that someone had telephoned and reported that he, the caller, had just killed a man in Wood Hall Lane. Sergeant McPherson then called a service vehicle and travelled in it to Wood Hall Lane. Sergeant McPherson's evidence was that, on arriving at the scene, he saw Derrick, who told him that he was the one who had called the station about the man he had killed. He also testified that, upon his arrival at the scene, Derrick handed over to him a knife encased in a "shield" (or sheath). This was done in the presence of Corporal Paul Henry ('Corporal Henry'), and when he removed the knife from the shield, he noticed

what appeared to be blood on the blade. According to Sergeant McPherson, Derrick pointed out the body of the deceased to him and said he had used the knife on the deceased. Sergeant McPherson also gave evidence that he saw Alvin a little further down the track from the scene, but, at that time, none of the men mentioned anything about hearing an explosion. It was only upon their arrival at the police station that Alvin first mentioned that one of the men who he said had jumped from the bushes at them had fired one shot.

[6] The evidence from Corporal Henry was that, on his arrival at the scene, Alvin took him to the deceased man's body and, when cautioned and asked who had killed the man, Alvin said that it was Derrick who had done it. Corporal Henry also gave evidence that he transported Alvin and Derrick to the station and that, neither at the scene nor on the journey, did either of them mention that a firearm had been discharged at the scene.

[7] Another witness, Detective Constable André Wilson ('Det Cons Wilson'), testified that, on 30 April 2011, he was at the Spanish Town Police Station with Alvin. His evidence was that he asked Alvin whether he was a licensed firearm holder, and Alvin said no but told him that he was an armed security guard and that he took his company-issued firearm home sometimes. However, Alvin denied taking the firearm home on 29 April 2011.

[8] Sergeant Leroy Guy ('Sergeant Guy'), another of the prosecution's witnesses, gave evidence that he visited the Spanish Town Police Station on 1 May 2011, and Alvin and Derrick were pointed out to him. He cautioned both men separately, and when he was cautioned, Alvin told him that the gun used in the incident was at Derrick's house. Subsequently, when Sergeant Guy went to Derrick's house, he found the gun in question: a .38 Special Smith & Wesson revolver with serial number J17921 and nine .38 Special rounds of ammunition and one .38 Special spent shell.

[9] The report of the pathologist, Dr Dinesh Rao, was read into evidence by another pathologist, Dr Parthasarathi Pramanik (Dr Rao having left the island). The post-mortem

examination confirmed that the immediate cause of death was cranial cerebral injury caused by a gunshot wound to the head. There were numerous chop wounds to the chest, face and right shoulder of the deceased which were most likely inflicted around the time of death. According to Dr Pramanik, the deceased man's injuries were not defensive, and the deceased would not have been able to hold a machete if he had received the gunshot injury first. An expended bullet was retrieved from the deceased man's head, and ballistics tests confirmed that it matched the gun found in Derrick's house.

<u>The defence's case</u>

Derrick's case

[10] In his unsworn statement from the dock, Derrick said that he was working as a security officer in an acting supervisory role at a security company. He said that, prior to this incident, he had never been charged for any offence, and he stated that he had always been a decent citizen. Derrick said that, on the night of 29 April 2011, he, Alvin, Sherene Morgan (their sister) and Latoya Ross (his child's mother) were on their way home from a wake in Wood Hall when two masked men jumped from the bushes at the side of the road. According to Derrick, the men cursed at them and said: "put up unnu hand everybody dead…put up unnu hand, gi mi di gun Alvin, everybody dead now". He said he saw one of the men with a machete in his hand, and the other person was pointing something resembling a firearm in their direction. He was frightened, and a tussle ensued between him and the man with the machete, who swung it at him twice. According to Derrick, he dodged the swings of the machete, pulled out his knife and swung it at the attacker.

[11] Derrick said that, a few minutes later, he saw someone on the ground, and he called the police station and reported the incident. When the police arrived, he showed them the person on the ground, and he was taken to the Brown's Hall Police Station, where he gave a statement. Subsequently, he was taken to the Spanish Town Criminal Investigation Branch, where "statements" (his words, which he did not further explain)

were taken, and he was placed in a cell and cautioned. He later participated in a question-and-answer interview.

Evidence of Sherene Morgan for Derrick

[12] Sherene Morgan (the applicants' sister) gave testimony that, up to a point, supported her brothers' account. She testified to walking with the group, including Latoya Ross (who at the time of the trial, she said, was overseas), and of the group being confronted by men who jumped from bushes. At that point, she said, she ran off and ran all the way home, so she could not speak to what happened thereafter. In relation to the deceased, she described him as "wicked" and testified that he always wanted to fight her and that she had seen him use drugs before. She could not recall telling Sherwayne to take home his "crasses bredda" or words to that effect on the night in question.

Alvin's case

[13] Alvin also gave an unsworn statement in which he outlined that he was employed by another security company where he acted as a supervisor, and that, prior to the incident, he had never been arrested by the police. Alvin said that, on the night in question, upon reaching a section of Wood Hall Lane, two masked men attacked the group he was walking with. The attackers demanded that he hand over his firearm, a tussle ensued between him and one of the attackers, and he used his self-defence training to defend himself and his family. He said he heard two gunshots, and that was when he pulled the licensed .38 Special revolver with which he was armed and fired in the direction of the men. The police were called, and the deceased was found suffering from wounds. Alvin said he pointed out the crime scene, a board gun and a machete to the police. He was then taken to the police station, where he gave a statement and was later taken to the Spanish Town Police Station Lock-up. Alvin maintained that what he said in his question-and-answer interview was true and that when he pulled the revolver he was carrying, he was acting in self-defence, as he was in fear of his life and the lives of his brother, sister and his sister-in-law.

The application for leave to appeal

[14] Both applicants, being dissatisfied with the outcome of their trial, made applications for leave to appeal against their convictions and sentences which were refused by a single judge of appeal. The applications were renewed before us.

Original grounds of application/proposed grounds of appeal for Derrick and Alvin

[15] Both Derrick and Alvin in their criminal form B1 had initially filed the following identical grounds of application or proposed grounds of appeal:

> "(1) **Unfair Trial: -** that the prosecution witnesses and the learned trial judge failed to recognised [sic] the fact that I was being attacked and had to defend myself but the court instead failed to adequately address the matter of self defence on my part.
>
> (2) **Lack of Evidence:** - that the evidence upon which the Learned Trial Judge relied on [sic] for the purpose to convict me lack facts and credibility thus rending the verdict unsafe in the circumstances.
>
> (3) **Miscarriage of Justice:** - that the court failed during the trial to upheld [sic] the no case submission as argued by my defence attorney.
>
> (4) **Conflicting Testimonies:** - that the prosecution witnesses presented to the court conflicting testimonies which amounts [sic] to perjury and call into question the soundness of the verdict."

Supplemental grounds of application/proposed grounds of appeal for Derrick and Alvin

[16] Mr Gladstone Wilson, counsel for Derrick, had sought in writing, and was granted, permission to abandon the original grounds and replace those grounds with the following:

> "Ground 1- The LTJ in her assessment at [sic] the no-case submission totally abandoned the law and instead replaced well known decisions for her view of the evidence.

> Ground 2- That although the LTJ gave laborious and tedious direction to the jury [she] missed the essential evidence that was already exposed to the Jury and did not provide guidance in how the law operates. This action on her part robbed the Applicant of a fair consideration of the Applicant's case.
>
> Ground 3- The LTJ failed to assist the Jury on how to apply principles of fact and law."

[17] Miss Kerry-Ann Wilson, counsel for Alvin, had also sought in writing, permission to abandon the original grounds and replace those grounds with the following, on the basis of which detailed submissions were filed:

> "1) The Learned Trial Judge erred in law when she admitted evidence in breach of the hearsay rule.
>
> 2) The Learned Trial Judge erred in law when she failed to properly direct the jury as it relates to the applicable principles of self-defence and excessive force.
>
> 3) The Learned Trial Judge erred in law when she failed to direct the jury of [sic] the effect and consequences of [the] fatally damaged credibility of the prosecution's witness.
>
> 4) The Learned Trial Judge erred in law when she failed to direct the jury as to the principles of joint enterprise and the consequence of the prosecution's failure to prove it.
>
> 5) The Learned Trial Judge erred in law by failing to leave Manslaughter to the jury on the grounds of provocation which arose on the prosecution's case."

[18] However, in court, she made an oral application and was granted permission to abandon grounds one to four and to argue only ground five of her supplemental grounds of appeal.

Issues

[19] Based on the supplemental grounds filed by both applicants and the submissions advanced herein, the remaining grounds to be addressed are:

I. Whether the learned trial judge in her assessment of the no-case submission totally abandoned the law and instead replaced well known decisions for her view of the evidence (Supplemental Ground 1 for Derrick); and failed to assist the jury on how to apply principles of fact and law. (Supplemental Ground 3 for Derrick)

II. Whether the learned trial judge missed the essential evidence that was already exposed to the jury and did not provide guidance in how the law operates, thus robbing the applicant of a fair consideration of his case. (Supplemental Ground 2 for Derrick)

III. Whether the learned trial judge erred in law by failing to leave manslaughter to the jury in relation to Alvin Morgan on the ground of provocation which, it is alleged, arose on the prosecution's case. (Supplemental Ground 5 for Alvin)

Supplemental Ground 1 for Derrick- "The LTJ in her assessment at [sic] the no-case submission totally abandoned the law and instead replaced well known decisions for her view of the evidence."

Supplemental Ground 3 for Derrick- "The LTJ failed to assist the Jury on how to apply principles of fact and law."

[20] It is convenient to deal with supplemental grounds 1 and 3 of Derrick's application together. This is on the basis that the issue arising from those grounds directly relates to whether the learned trial judge erred in calling upon the accused to answer at the end of the prosecution's case. More specifically, Mr Wilson raised the question of whether the prosecution had discharged its duty of negating self-defence.

Submissions for Derrick

[21] Mr Wilson argued that the offence of murder is committed where an accused intentionally causes death or grievous bodily harm without lawful excuse or justification. He submitted that the burden of proof rested on the prosecution to establish that the accused did not act in self-defence or under provocation. In support of this submission, counsel relied on **R v Abusafiah** [1991] 24 NSWLR 531, which, in his submission, affirms

the principle that it is the prosecution's duty to negative self-defence in order to sustain a charge of murder. Mr Wilson contended that the prosecution failed to discharge this burden, as it did not prove that Derrick was not acting in self-defence, or that he used excessive force, or that his actions were without legal justification. Accordingly, counsel submitted that, in the absence of such proof, the learned trial judge should have upheld the no-case submission and ought not to have allowed the matter to proceed at the end of the prosecution's case.

[22] Mr Wilson, in support of his argument that the no-case submission should have been upheld, explored the importance of the prosecution's duty to adduce sufficient evidence to show that a defendant's use of force in defending himself was excessive, which, he argued, the prosecution in this case did not do. The case of **Beckford v R** [1987] 3 All ER 425 ('**Beckford**'), was cited by counsel, who indicated that that case concerned a police officer whose defence was that he acted in self-defence in the fatal shooting of a man, as he had an honest belief that he was being attacked by him. In counsel's summary of the case, that defence was rejected at trial and the conviction affirmed by this court. On appeal, the Judicial Committee of the Privy Council held that the test for honest belief is a subjective one, rather than the objective test formerly used. Mr Wilson also submitted that use of force is justified when a person believes that it is necessary to use force to defend himself or another against unlawful force. He further argued that there was no evidence on which the prosecution relied that proved that more force was used than was necessary in the deceased's killing.

[23] It was submitted that self-defence arose on the prosecution's case and the evidence from the prosecution's witnesses created an opportunity for the prosecution to negative self-defence, but that that was not done. He also contended that, although the learned trial judge, in her ruling on the no-case submission, stated that self-defence was an issue, she rejected the no-case submission because she thought the use of force was excessive. He argued that the learned trial judge left the decision in respect of self-defence to the jury and did not address Derrick's perspective in her summation.

[24] In relation to the injuries on the deceased man's body, counsel submitted that, based on the pathologist's evidence, it was difficult to say what degree of force was used to inflict them. Counsel also emphasised that the cause of death was a gunshot wound to the head and that the chops were not deep enough to have caused any bleeding.

[25] The case of **Robinson v The State** [2015] UKPC 34, was cited by Mr Wilson to submit on the essential ingredients of self-defence. In counsel's submission, that case made it clear that: (i) a person who is attacked is entitled to defend himself; (ii) in defending himself, he is entitled to do what is reasonably necessary; (iii) the defensive action must not be out of proportion to the attack; (iv) in the moment of crisis, a person may not be able to weigh to a nicety the exact measure of defensive action; and (v) in the moment of anguish a person may do what he instinctively thinks is necessary to repel the attack. Counsel then submitted that that case made it clear that a person who is under attack may respond on the spur of the moment and cannot be expected to work out precisely how much force he needs to use in order to defend himself.

The Crown's submissions

[26] In the Crown's written response, the case of **Beckford** was also cited and relied on for the submission that the learned trial judge, in her summation, gave clear directions on self-defence, and she highlighted the relevant evidence from the prosecution and the defence respectively. Crown Counsel emphasised that the learned trial judge referred to the evidence about the machete being found above the deceased man's head and touching his left palm, and the chop wounds, and she directed the jury to consider self-defence and whether the force used was reasonable or excessive. He further submitted that the learned trial judge also mentioned that a little over an hour before the murder, Derrick declared his intention to kill the deceased. Further, the learned trial judge reminded the jury that no homemade firearm was recovered at the scene of the crime nor was there any ballistic evidence to prove that another gun (other than the one Alvin used) was fired at the material time. Crown Counsel also emphasised that the learned trial judge reminded the jury that, when the police arrived on the scene, neither of the

accused men informed them that they had used a firearm to defend themselves and the firearm used to kill the deceased was not handed over at the scene, but was found by the police when they searched Derrick's house.

[27] In his oral submissions, Crown Counsel sought to underscore the point that he advanced, that the killing could be viewed as having been premeditated by the brothers because they did not initially disclose that the deceased was shot and the gun that was used to shoot him was not present at the scene when the police arrived. He also highlighted the fact that there was no mask at the scene or in close proximity to the deceased when the body was seen by the police, although the applicants had contended that their attackers were masked.

[28] Crown Counsel submitted that, in the circumstances, it was reasonable to infer that the accused men's actions were actuated by malice, stemming from the tumultuous relationship between their sister and the deceased. He also argued that, at the time of the murder, Alvin was not working as a security guard and so should not have had the gun in his possession and further highlighted the point that the evidence did not show any defensive wounds on the deceased. Further, Crown Counsel submitted that there seemed to be some staging of the scene. Based on the foregoing, Crown Counsel submitted that this ground of appeal had no merit.

Discussion

The learned judge's treatment of the no-case submissions

[29] The best starting point in the discussion of this issue is Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227. There, the learned Chief Justice made the following observation:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross

> examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it."

[30] Also relevant to this discussion is the later English Court of Appeal case of **R v Galbraith** [1981] 1 WLR 1039, in which, at page 1042, the following observation was made:

> "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." (Emphasis added)

[31] Perhaps even more relevant, given the facts and circumstances of this case (as it deals specifically with no case submissions in cases based on circumstantial evidence) is the decision of **Director of Public Prosecutions v. Varlack (British Virgin Islands)** [2008] UKPC 56 (1 December 2008) ('**Varlack**'). In **Varlack**, the Board disagreed with the Eastern Caribbean Court of Appeal which had found that the trial judge had fallen into error in rejecting the respondent's no-case submission, with the trial ending in her conviction. Her conviction was restored by the Board in a case that largely consisted of circumstantial evidence. The case against her mainly consisted of evidence of numerous

telephone calls between her and other persons who, on the trial court's finding, had acted with her in a common design to lure the deceased to a secluded spot where he was murdered. That case represents a more-recent statement on the law relating to no-case submissions and reaffirms the correctness of the principle stated by Lord Lane in the quotation immediately above. Of particular relevance are paras. 21 and 24, which, so far as is relevant, read as follows:

> "21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.
>
> …
>
> 24… The trial judge correctly approached the submission of no case by reference to the test whether a reasonable jury properly directed might on one view of the evidence convict. When one applies this principle, it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. The judge was in their Lordships' opinion justified in concluding that a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the respondent…"

[32] A similar approach has been taken in this jurisdiction (see, for example, **Baugh-Pellinen (Melody) v R** [2011] JMCA Crim 26) ('**Baugh-Pellinen'**). In that case, Morrison JA (as he then was), after reviewing several authorities, made the following pertinent observation at para. [34]:

> "[34] In the light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt."

[33] Lord Parker CJ's **Practice Direction** makes it clear that a trial judge in a murder case should only uphold a no-case submission where (a) there is no evidence to prove any of the essential elements of murder; or (b) the prosecution's case has been discredited by cross-examination or rendered manifestly unreliable. It is fair to say that neither of those two possible situations arises here. The case of **Galbraith**, therefore, along with cases such as **Varlack** and **Baugh-Pellinen**, seem more relevant to this discussion. In considering this issue it is useful to explore the learned trial judge's ruling on the no-case submission at page 769 lines 14-25 and page 770 lines 1-6 of the transcript. It reads as follows:

> "I have had a chance to look at the evidence in the time that we did not sit and there is no contest, it seems to me, that there is the issue of self-defence. However, when we look at the Post Mortem report and when we hear from the doctor, it seems to me that there is the question of excessive force - - I am sorry, there may well be the question of excessive force and that is something for the jury to decide, in the circumstances. There may well be inconsistencies and discrepancies on the evidence as well, but these are all matters for the jury.
>
> On a look of the evidence as put forward by the Prosecution, in the circumstances, I find that there is a case to answer as it relates to both of you. Case to answer for both accused."

[34] In her ruling on the no-case submission, as quoted above, the learned trial judge indicated that she had considered the prosecution's evidence up to that stage and explained her reasons (whether these were expressed as clearly as one might have expected, or not) for finding that there was indeed a case to answer. It is reasonable to

infer that the learned trial judge's saying that: "there may well be the question of excessive force" must have arisen from the pathologist's noting of both a gunshot wound and multiple chop wounds, along with the absence of any defensive wounds on the body of the deceased. What does the totality of the evidence up to the stage of the making of the no-case submission disclose? We have reviewed the transcript in its entirety to assess the state of the evidence at the point at which the no-case submission was made, and we are satisfied that the prosecution, at the close of its case, had presented sufficient evidence to justify the judge's determination that a *prima facie* case had been made out. Accordingly, her ruling that there was a case to answer, cannot be faulted. Why do we say this? It is true that the learned trial judge mentioned the existence of discrepancies and inconsistencies. As is not uncommon, these existed on the prosecution's case, and the learned trial judge brought the more important examples of these to the attention of the jury. Despite these, however, there remained, in our view, adequate evidence upon which a jury properly directed could have convicted.

[35] On the one hand, some of the police witnesses testified to receiving reports from Derrick and Alvin to the effect that they had been attacked and had acted in self-defence in an effort to repel the attack. Thus, self-defence was raised. On the other hand, however, there was also evidence from police witnesses who testified to the entire circumstances surrounding the receiving of the report of the killing, their visit to the scene of the incident and their observations there, to the taking of the men into custody, the police interviews, and Derrick and Alvin's ultimate arrest. That evidence as to the entire circumstances cast considerable doubt on the veracity or reliability of the accounts that Derrick and Alvin had put forward.

[36] So that, the entirety of the evidence showed, from one perspective, a contention of self-defence; but, from another perspective, the possible verdict that would be open to a jury of a premeditated murder. Among the circumstances, in the following list, which is not exhaustive, was the evidence adduced that: (a) Derrick, shortly before the killing, had declared an intention or desire to kill the deceased with a gun; (b) it eventually

emerged that the deceased was in fact killed with a gun; (c) one brother had initially claimed to have killed the deceased, but it was later revealed that it was the other brother who had done it; (d) initially, the brothers made no mention – either at the scene or on the journey to the police station – of the fact that a gun was used by them in the killing, but later evidence showed that the deceased died from a gunshot wound; (e) the machete at the scene was found by the deceased's left palm, although the evidence (even from Sherene who gave evidence for the defence) is that he was right-handed; (f) no mask was found at the scene, although Sherene testified and Derrick and Alvin stated that the attackers were masked. In our view, the prosecution's case, as it stood at the time that the no-case submission was made, it fell to be considered in part under the second limb of Galbraith- though not entirely: that is, although there was an advertence to self-defence in reports made to the police by the then defendants, other evidence presented by the prosecution cast considerable doubt on the viability of that possible defence and painted an alternative picture supportive of the prosecution's case.

[37] It is fair to say that at the close of the prosecution's case its "strength or weakness depend[ed], in part, 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" (per Lord Lane CJ in **Galbraith**). Therefore, although inconsistencies and discrepancies existed on the prosecution's case, they were not of the nature or did not rise to the extent that required the trial to be stopped. In fact, it could fairly be said that Derrick and Alvin's accounts to the police, when viewed against the totality of the evidence presented at the stage of the no-case submission, also revealed inconsistencies and discrepancies, making it appropriate for them to have been called upon to answer the case against them. Adopting the approach taken in **Varlack** and accepting that the test on a submission of no case to answer where a case centres on circumstantial evidence, is whether it was reasonably possible for the jury to accept the guilty inference or inferences put forward by the prosecution, and reject all possible innocent ones, then

it becomes clear that the learned trial judge was correct in rejecting the no-case submission. We, therefore, disagreed with Mr Wilson’s contention that the no-case submission ought to have been upheld. As a result, we found that supplemental ground 1 for Derrick was without merit and determined that there was, in fact, a case to answer.

Derrick’s supplemental ground 3 – the learned judge’s failure to assist the jury on how to apply principles of fact and law.

[38] In relation to Derrick’s supplemental ground 3 – that is that the learned trial judge failed to assist the jury on how to apply principles of fact and law, it was our considered conclusion that this ground also lacked merit. This conclusion arose from our review of the transcript against the background of all the complaints made by Derrick. As the case centred on self-defence, we directed our attention to that defence and the evidence concerning it in particular. What we found from our review was a careful giving of directions by the learned trial judge, which directions were related to the evidence in the case.

[39] Before directly considering this ground, we briefly review the law on self-defence, which, in any event, was not a point of dispute in this appeal.

The law on self-defence

[40] The local case of **Beckford**, referred to by both sides, is a good starting point, and, for a full understanding, we will recap the facts. In **Beckford**, the appellant, a police officer, was part of a group dispatched to investigate a report of an armed man terrorising his family at their home. Upon the police's arrival, a man fled from the back of the house and was pursued by officers, including the appellant. There was conflicting evidence about what happened next. The Crown claimed that the man was shot by the appellant and another police officer after being discovered in hiding, even though he had surrendered and was unarmed. On the other hand, the appellant argued that the man had a firearm, which he used to fire at the police and was killed in return fire. No gun was recovered. At the appellant's murder trial, the judge instructed the jury that, if they

found that the appellant reasonably believed his life or safety was in danger, he could be acquitted on the ground of self-defence. He was convicted.

[41] The appellant appealed to this court, arguing that his honest belief of being in danger was sufficient for self-defence. This court ruled that his belief needed to be both reasonable and honest, dismissing the appeal. The appellant then appealed to the Privy Council, which held that the correct test with respect to the mental element in self-defence is a subjective one – that is, whether he, the defendant, honestly believed that he faced an imminent attack. Further, that honest belief may be founded on a misunderstanding of the facts. A defendant contending that he acted in self-defence is to be judged by that subjective test (as to his honest belief), even if mistakenly held, regardless of whether the mistake was reasonable from an objective standpoint. Thus, the test for self-defence allows a person to use such force as is reasonable in the circumstances as that person honestly believes them to be. Consequently, the trial judge had misdirected the jury, and the appeal was allowed, resulting in the conviction being quashed.

[42] The case of **Beckford** makes it clear that the test in respect of self-defence is a subjective one and that, where the defence arises, a defendant ought to be judged based on his or her honest belief of the facts at the moment he or she used force to defend himself or herself. **Beckford** also establishes the principle that a person facing an imminent attack does not have to wait for the assailant to deliver the first blow, and that, in certain situations, a pre-emptive strike may be justified as an act of self-defence. The question, then, in this appeal is whether Derrick and Alvin honestly believed that they faced imminent attack, or were being attacked, and, if so, whether the force used to defend themselves was reasonable in the circumstances. Another question to consider is whether Derrick and Alvin were justified in defending themselves in the manner they did, after (on their case) the deceased and another assailant jumped from the bushes and said "P-hole hole unnu a go dead tonight". All the circumstances of the encounter have to be considered.

[43] It may be useful, at this juncture, to recount the defence advanced by the applicants at their trial. Both Derrick and Alvin said that two masked men jumped out at them from the bushes and said "P-hole hole unnu a go dead tonight". In his unsworn statement, Derrick claimed he saw one person holding a machete and another pointing an object that resembled a firearm in their direction. He felt frightened, and a struggle broke out between him and the man with the machete, who swung at him twice. He dodged the swings and, in response, drew his knife and struck at the attacker. Alvin, in his unsworn statement, recounted that two masked men confronted the group he was walking with, demanding that he hand over his firearm. A struggle then ensued between him and one of the attackers, during which, Alvin said, he used his self-defence training to protect himself and his family. He stated that, after hearing two gunshots, he drew the licensed .38 Special revolver with which he was armed and fired in the direction of the assailants. We now go to the directions given to the jury and the evidence grounding the jury's findings on the occurrences that night.

The learned trial judge's direction to the jury on self-defence

[44] To determine whether the learned trial judge properly directed the members of the jury on the principles of self-defence, we have carefully reviewed her summation in its entirety. Set out hereafter are what we consider to be some of the more important portions of the summation relating to the directions on self-defence. At page 1045, lines 16- 25 and page 1046, lines 1-11 of the transcript, the learned trial judge reminded the jury that Alvin and Derrick both raised the defence of self-defence. In addition, at page 1046, lines 12-25, and page 1047, line 1 of the transcript the learned trial judge said as follows:

> "Madam Foreman and your members, you remember Mr. Wilson told you it is both good law and good sense that a man who is attacked may defend himself, that is law… I am telling you that [a] man has a right to defend someone, and his property as well. The law is that-- it is good law and common sense that you may do but may do only what is reasonably necessary but everything will depend upon the particular facts

and conditions. Madam Foreman and your members, if you think that Alvin and Derrick that night were or may have been, were or may have been [sic] acting in lawful self-defence they are entitled to be found not guilty, yes."

"Because the Prosecution must prove the accused's guilt; it is for the Prosecution to prove that they were not acting in lawful self-defence; not for Alvin and Derrick to establish that they were. They didn't have to say a thing; and you must consider self-defence in the light of the situation in which both accused – unless you believe they failed, <u>you must ask yourselves whether the men honestly believed that it was necessary to use force to defend themselves at all</u>." (Emphasis added)

[45] Page 1049, lines 4-25 are also relevant and so is reproduced below:

"Madam Foreman and members of the jury, obviously a person who is under attack may react on the spur of the moment, and he cannot be expected to work out how much force he needs to defend himself; he cannot weigh out that to a nicety. On the other hand, if he goes over the top and uses force out of all proportion of the anticipated attack, or attack on him, or used more force than is really necessary to defend himself, the force used would not be reasonable, so, you must take into account the nature of the attack on the accused, and what he Then [sic] did…

Madam Foreman and your members, if you are sure that the force that the accused men used that night was unreasonable, then they could not have been acting in lawful self-defence; but if you think that the force used by both accused, listen, was, not only was, or may have been reasonable, they are entitled to be acquitted, to be found not guilty."

At page 1057, lines 16-25 the learned trial judge stated:

"Taking all of this into consideration, Madam Foreman and your members, if you feel that—sure that both accused men deliberately and not by accident, that is that they intended either to kill Nenval, or to inflict serious - - accused men deliberately and not by accident, that is they intended to kill Nenval, or to inflict serious bodily harm on him without lawful

> justification, that is not acting in lawful self-defence, and without lawful excuse…"

The direction continues at page 1058, lines 1-8, and is reproduced below:

> "to kill Nenval, then it is open to you to find them both guilty.
>
> If you are in doubt you let them go. They said they were acting in lawful self-defence that night, defending themselves and the others who were with them from the attack of the two masked men; if you believe them then it is open to you."

[46] These sections that have been reproduced from the transcript make it clear that the learned trial judge took the time to direct the members of the jury on the principles of self-defence in keeping with the authorities, and how to treat the evidence in relation to it. She related her directions to the evidence in the case. As a result, we could not find that the learned trial judge erred in law by failing to properly direct the jury as it relates to the applicable principles of self-defence and excessive force. The only criticism that could possibly be made of the summation on self-defence is perhaps to regard the direction on honest belief as superfluous – that is on the basis that the applicants were saying not that they feared that they were about to be attacked, but that they were actually attacked. In light of the overall summation, however, that direction on honest belief would not have had any adverse effect on the applicants' case.

[47] The learned trial judge also gave the jury directions on how to treat the evidence in relation to the post-mortem report which could have been used to try to determine the degree of the force used by Derrick (the only applicant who said that he had used a knife) in the deceased's killing. Dr Pramanik, an expert witness, attended the trial and gave evidence on Dr Dinesh Rao's post-mortem report for the deceased. Dr Pramanik spoke on the content of the post-mortem report and gave evidence that the deceased had nearly oblique chop wounds on the front and upper chest, the front and lower chest, mid-chest and abdomen. There was also a nearly oblique chop wound across the right side of the root of the deceased man's nose and face. There was also an oblique incised wound over the right shoulder cuff. The bullet entered over the left ear lobule and was embedded

in the cerebellar lobe. (For completeness, "oblique", as used in the post-mortem report, means that the wound was inclined down.) Dr Pramanik mentioned that there were no defensive injuries (injuries that are caused when a victim being attacked tries to protect himself) seen on the deceased (pages 973 to 982 of the transcript).

[48] In relation to the use of force, the learned trial judge, at page 979, lines 1-9 of the summation said:

> "Madam Foreman and members, he told you that it would be difficult to say what degree of force was used in relation to the injuries one to seven as the depth of the injuries were not measured. He told you the cause of death is the cranium cerebral injury, head injury caused by gunshot wound to the head."

[49] At page 981, lines 12-25 and page 982, lines 1-8 of the summation, we see where the learned trial judge directed the jury on how to treat the evidence in relation to the post-mortem report. That section is reproduced below:

> "Madam Foreman and members of the jury, I must tell you something about Dr. Rao [sic] postmortem examination result Exhibit 'A' and notes 8A. Dr. Rao was not present, he did not take an oath you could not see him to judge his demeanour. What you have is a report from Dr. Rao prepared by him, and his note was read, and it was read by his colleague. He was not here, he could not be cross-examined, his evidence could not be tested by cross-examination and what you have to do, Madam Foreman and your members, is to attach the amount of weight that you think you ought to give to the report. You have it read and the notes as well, bearing it in mind that it is not sworn evidence, and it was not tested by cross-examination. You have to look at it, consider it and attach such weight to it as you think you should; take all of this into consideration when you come to look at his statement to see what you make of it, and attach to it what weight you think it deserves."

[50] In our view, these directions were more than adequate and clearly related the legal principles to the facts of the case.

[51] However, there are other aspects of supplemental ground 3 that were concerning and that underline the view that this supplemental ground, along with supplemental ground 1, was wholly unmeritorious. An example will suffice to demonstrate this. At page 12 of Derrick's written submissions, it is asserted that:

> "In her summary, the LTJ made sure to inform the Jury of the relationship between Sherine [sic] Morgan and the Accused men. That was not done with Sherwayne although both persons gave sworn evidence. In other words, believe Sherine less than Sherwayne."

[52] In spite of this categorical assertion, however, this is what page 884, lines 18- 23 of the transcript discloses as a part of the learned trial judge's summation:

> "Sherwayne Richards testified that Miss Eugene [sic] Palmer is his mother, Nenval Richards was his brother. He looked – he identified the image on the programme as well. He said he know [sic] Sherene Morgan. His deceased brother had taken Sherene home, and had shown her to him and his father as his, the deceased's lady."

[53] It is clear from this excerpt from the summation that the learned trial judge did, in fact, refer to the relationship between Sherwayne and the deceased in her summation; and that she did so not just once but twice. This complaint is, therefore, exposed as being baseless. So too is another example: that concerning a machete that was found at the scene but not produced at the trial. In counsel's submission:

> "The existence of the machete was stated by more than one witness but ignored by the LTJ because it was missing. This piece of evidence should have been accepted under 'the best evidence rule' as it existed and treated by several police officers. This piece of evidence was not properly explained to the Court."

[54] A perusal of the transcript, however, shows that, contrary to this submission, from line 24 of page 1015 to line 12 of page 1018, the learned trial judge is recorded as extensively reviewing the evidence relating to the machete, when recounting the

evidence and the various answers given by Detective Corporal Marlon Jackson. So, that contention that the learned trial judge ignored that evidence is wholly incorrect.

[55] Further, as counsel for the Crown pointed out, photographs of the machete that was taken from the scene was provided to the jury as an exhibit by way of a compact disc that was tendered into evidence by consent and so available for the jury to view. Additionally, it is important to observe that no issue turned on whether or not there was a machete at the scene. No one was disputing that a machete was found at the scene. In any event, the case of **R v Jadusingh & anor** (1964) 6 WIR 362 essentially establishes the principle that failure to produce an exhibit is not necessarily fatal.

[56] Having carefully reviewed the transcript, we disagreed with Mr Wilson's submissions to the effect that the learned trial judge failed to properly direct the jury on the applicable principles of self-defence and excessive force. In fact, we formed the view that the learned trial judge was thorough in her summation and gave adequate directions to the members of the jury on the principles of self-defence. We, therefore, concluded that supplemental ground 3 for Derrick was also without merit.

Supplemental Ground 2 for Derrick: Whether the learned trial judge missed the essential evidence that was already exposed to the Jury and did not provide guidance in how the law operates, thus robbing the Applicant of a fair consideration of his case.

[57] In support of this ground, a number of arguments were advanced by Mr Wilson on Derrick's behalf. Many of these arguments were ones that were advanced in relation to the other grounds, making it unnecessary to delve into this ground in any great detail. For example, the first argument made under this ground involved the contention – already addressed and resolved in the Crown's favour – that the learned trial judge "decided to disregard the machete completely…".

[58] Another argument that was made under this ground was that: "…self-defence should have been negatived and not ignored." (page 9 of the submissions). We have already conducted a fairly extensive review both of the law with respect to self-defence,

and the directions given by the learned trial judge, and have found that the directions given met the required standard.

[59] The last substantive argument advanced under this ground was to the effect that the summation was somehow unbalanced and unfair. From our review, however, the summation appeared to have been comprehensive, balanced and fair, accurately summarizing the evidence of each witness, with appropriate directions given with respect to the main issues in the case.

[60] In the result, we concluded that this ground of appeal has not been made out.

Supplemental Ground 5 for Alvin: Whether the learned trial judge erred in law by failing to leave manslaughter to the jury in relation to Alvin Morgan on the ground of provocation which arose on the prosecution's case.

Summary of submissions for Alvin

[61] Miss Wilson submitted that the learned trial judge should have directed the jury that they could have found the accused men guilty of manslaughter if they considered that the force used in self-defence was excessive and unreasonable. To support this submission, counsel cited the case of **R v Lenford Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 74/2004, judgment delivered 29 July 2004. Miss Wilson argued that, in that case, Clarke, who raised self-defence, was convicted. However, this court held that the trial judge erred in not leaving provocation to the jury and that the directions on self-defence were materially flawed. The conviction was quashed and a new trial ordered. In counsel's submission, both the prosecution's case and the applicant Alvin's unsworn statement raised the defence of provocation, and so the learned trial judge should have directed the jury on the option of finding the then accused guilty of manslaughter. In addition, counsel referred to the case of **R v Raymond Henry** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 55/1996, judgment delivered 10 November 1997.

[62] Miss Wilson then sought to apply the aforementioned cases to the instant appeal and contended that the presence of the machete by the deceased man's hand and the evidence of the prosecution's witness about the deceased's attack on Alvin's sister raised the defence of provocation. She also submitted that the then accused men were attacked while on their way home in the dark and that was a basis for the learned trial judge to have instructed the jury on the option of finding the accused men guilty of manslaughter on the basis of provocation, though the defence had not been raised by counsel.

[63] In concluding her submissions on this point, counsel submitted that, in the circumstances, the verdict of murder ought to be quashed, and the sentence set aside, and that a verdict of manslaughter and a sentence of 10 years' imprisonment at hard labour be substituted.

The Crown's submissions

[64] In response, Crown Counsel accepted the general proposition that, depending on the circumstances, the question of whether there was any provocation should be considered and left to the jury, where such evidence existed. He submitted, however, that the learned trial judge was correct in not leaving the lesser offence of manslaughter as a possible verdict for the jury to consider, as there was no evidence to warrant such an action in this case. To support his argument, he referred to section 6 of the Offences Against the Person Act ('OAPA'), and to the case of **Raymond Bailey v R** [2021] JMCA Crim 34 ('**Raymond Bailey**').

[65] He also submitted that, based on the state of the deceased man's body and utterances by the applicants to the police at the scene and at the police station and their conduct during the investigation, there was no evidence of provocation. Counsel then highlighted the fact that Derrick raised self-defence with the use of a knife while Alvin raised self-defence with the use of a firearm he took from work. On that basis, there was no cogent or other evidence on either the prosecution's or the then defendants' case that would have warranted the learned trial judge's leaving the question of provocation to the jury. It was on that basis that counsel also submitted that the instant application is

distinguishable from the case of **Raymond Bailey**, and thus the trial judge did not err by not leaving the offence of manslaughter as a possible verdict for the jury's consideration.

Discussion

[66] The most appropriate point of departure for a discussion of this matter is section 6 of the OAPA. It reads as follows:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[67] That is the essence of the defence of provocation. As is well known, if successfully established, it does not result in a complete acquittal on a charge of murder; but would have the effect of reducing what would otherwise be a conviction for murder to one for manslaughter, carrying with it a less severe sentence.

[68] In **Joseph Bullard v The Queen** [1957] AC 635 ('**Bullard**'), at page 642, Lord Tucker, in discussing the circumstances in which provocation ought to be left for a jury's consideration, said:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked." (Emphasis added)

[69] **Bullard** makes it clear that, even if manslaughter was not raised by counsel for the defence, where evidence of provocation arises, a trial judge has a duty to give to the jury directions on it and leave it open for the jury to return a verdict of manslaughter. The case of **Phillips v R** 53 Cr App R 132 makes it clear that the test for finding provocation, where it arises, is a two-step one: the first being a question of fact and the second, a question of opinion. In that case, Lord Diplock, writing on behalf of the Board, observed at page 134:

> "The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury, <u>assuming that there is any evidence upon which they can so find</u>, is: 'Was the defendant provoked into losing his self-control?' The second, which is one not of fact but of opinion, 'Would a reasonable man have reacted to the same provocation in the same way as the defendant did?'" (Emphasis added)

[70] Another relevant authority (in which **Bullard** was applied) is **Dwight Wright v R** [2010] JMCA Crim 17, in which McIntosh JA (Ag) (as she then was) at para. [27] said:

> "[27] The submissions by counsel for the appellant, so vigorously advanced, were indeed well-founded. A trial judge's duty is clear, as it relates to the issue of provocation, in circumstances such as those in the instant case. We adopt the words of Lord Tucker, in Bullard, as being entirely applicable to this case:
>
> > 'Every man on trial for murder had the right to have the issue of manslaughter left to the jury <u>if there was any evidence on which such a verdict could be given.</u> To deprive him of that right must of necessity constitute a grave miscarriage of justice and it was idle to speculate what verdict the jury would have reached.'" (Emphasis added)

[71] Both **Dwight Wright v R** and **Bullard**, on which the former case is based, make it clear that a trial judge's duty to leave the issue of provocation and the alternative verdict of manslaughter to the jury for their consideration can only arise if there is

sufficient evidence on which the jury could reasonably find that there is provocation, and be in a position to return a verdict of guilty of manslaughter.

[72] In light of the authorities, this court is duty bound to accept the Crown's submissions on this issue that the learned trial judge was correct in not leaving manslaughter as a possible verdict for the jury to consider. This is on the basis that the issue of provocation should only be considered if there is evidence to support it. On our assessment, no such evidence existed or arose at the trial of the matter.

[73] We reviewed the evidence in its entirety, and we did not find that the applicants met the evidential bar as was outlined in **Raymond Bailey**. We did not believe that any evidence arose for the learned trial judge to have left manslaughter to the jury. As a result, we concluded that the learned trial judge was correct in not leaving the issue of provocation and the lesser offence of manslaughter for the jury's consideration in the circumstances. This ground was, therefore, also without merit and so failed.

[74] It was for the foregoing reasons that we made the orders set out at para. [1] of this judgment.