[2020] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 59/2018

APPLICATION NO COA2020APP00008

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

CALVIN REID v R

Richard Small, Roy Fairclough and Miss Courtney Foster for the appellant

Mrs Maxine Dennis-McPherson for the Crown

13, 14, 15 January and 4 May 2020

STRAW JA

Introduction

[1] We heard submissions for the application for leave to appeal in this matter on 13, 14 and 15 January 2020. On 15 January 2020, the court gave our decision in the following terms:

> "1) The application for leave to appeal is granted.
>
> 2) The hearing of that application is treated as the hearing of the appeal.
>
> 3) The appeal is allowed.
>
> 4) The conviction is quashed and the sentence set aside but in the interests of justice a retrial is ordered."

[2] At that time, we promised reasons for our decision. This judgment is a fulfilment of that promise. In light of the disposal of the appeal, only a brief summary of the relevant facts will be presented.

Background

[3] On 1 May 2018, Calvin Reid also known as Turbian ('the appellant), was convicted for murder and sentenced to 15 years' imprisonment with the stipulation that he serve 10 years before being eligible for parole.

[4] The case for the prosecution was that Desmond Alcock, also known as Odane ('the deceased'), and the appellant, who were known to each other, had entered into a contractual agreement for the appellant's mother's house to be painted by the deceased.

[5] The appellant's house was located in Ackee Tree (in the parish of Hanover), about 20 minutes' walk from the home of the deceased. On 23 November 2012, about 6:30 pm, while the deceased stood at the gate of the appellant's house, both men were engaged in a dispute about the payment to the deceased. As a result, the deceased threw stones in the direction of the appellant's house, one of which hit Ojay Kerr ('Ojay'), a resident at the appellant's house. Stones were in turn thrown by Ojay. Both men (the deceased and Ojay) received injuries during the stone-throwing incident. One Melvin Barnes, ('Melvin') who is known to all the parties, went through the gate and went into the appellant's house. The deceased eventually left and went home, but stood by the gate at his premises.

[6] Melvin returned from the appellant's house, along with one Romario Ruddock ('Romario') and Odel Alcock (a brother of the deceased). Melvin gave Romario $20,000.00 which he received from the appellant. Melvin left the scene and Romario and Odel Alcock ('Odel') approached the deceased with the money. Shortly after, about 7:00 pm, the appellant and Ojay were seen walking in the direction of the home of the deceased. On seeing the appellant, the deceased, apparently unhappy about the amount of money given to him, walked towards the appellant and Ojay demanding all of his money. At that stage, the appellant is said to have pulled a gun from his pocket, handed it to Ojay and instructed him to shoot the deceased. Ojay pointed the gun and shot at the deceased who received a gunshot injury and died on the scene. Both the appellant and Ojay were charged jointly for the offence of murder.

[7] On the 23 June 2017, approximately 10 months prior to the commencement of the trial of the appellant, Ojay pleaded guilty to the offence of manslaughter of the deceased. That plea was accepted by the prosecution on the basis that provocation would have been a live issue at a trial relevant to Ojay.

[8] The prosecution called three witnesses in support of its case against the appellant, Mrs Norma Alcock (mother of the deceased), Odel and Detective Corporal Garfield Francis, the investigating officer. Mrs Norma Alcock ('Mrs Alcock') and Mr Odel Alcock ('Odel') were relied on as eye-witnesses to the murder of the deceased.

[9] At his trial, the appellant gave sworn evidence. He placed himself on the scene but denied any involvement in the deceased's death. He stated that shortly after the deceased

left his gate, Ojay left behind him. The appellant decided to follow Ojay in order to pacify any continuing dispute. While walking behind Ojay, he saw when Ojay pulled a firearm and fired at the deceased who ran and fell. He denied that he had taken a gun from his pocket and instructed Ojay to shoot the deceased. He called one witness in regard to his good character, Mrs Keisha McNeish. Detective Corporal Peter Johnson, who collected statements from Odel relevant to the investigation of the incident, was also called on behalf of the defence.

Application for leave to adduce fresh evidence

[10] During the course of his submissions, counsel for the appellant, Mr Small, made an application for fresh evidence to be admitted in consideration of the application for leave to appeal. This evidence was contained in the transcript of 23 June 2017 relevant to the sentencing hearing of Ojay. Mr Small stated that the admission of the contents of the transcript would be relevant to certain supplemental grounds of appeal – in particular grounds 5, 6, 7 on which he would be asking permission to proceed if the application was successful.

[11] Counsel also requested permission to add an eighth supplemental ground of appeal during the course of the hearings, to which the application to adduce fresh evidence would also be relevant.

[12] In support of the application to adduce fresh evidence, Mr Small referred to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA') which provides that evidence should be admitted whenever it is necessary or expedient in the interest of justice. He

submitted that the court had a wide discretion which should be exercised as the fresh evidence was "necessary for the determination of the case" as set out in section 28(a) of the JAJA.

[13] He further submitted that this information was not available at the trial but, in any event, non-availability was not a statutory requirement. He contended that this court has the power to admit fresh evidence even if it had been available at the time of trial. He relied on **Brian Smythe v R** [2018] JMCA App 3 which referred to **Clifton Shaw and Others v The Queen** [2002] UKPC 53 and **R v Sales** [2000] All ER (D) 695 which set out the categories applicable to the consideration of an application for fresh evidence to be adduced.

[14] Mr Small argued that it was in the interest of justice for the transcript to be considered by this court as the transcript of Ojay's sentencing shows that the prosecution's case against him is inconsistent with the case against the appellant. This is despite the fact that they were jointly committed and indicted and then subsequently tried separately. Essentially, Mr Small's complaint was that the prosecution alleged in Ojay's case that he acted on provocation and in the case against the appellant, that, although acting in concert with Ojay, he acted in concert to commit murder rather than acted in concert to commit manslaughter.

[15] He also argued that the material contained in the transcript fell squarely within that of "plainly capable of belief" which is one of the categories set out in **R v Sales** which was approved by the Privy Council in **Clifton Shaw and Others v The Queen**.

[16] The application to admit fresh evidence was contested by counsel for the Crown, Mrs Dennis-McPherson. Her submissions were essentially two-fold. Firstly, that the transcript was not relevant to the appellant's trial, as Ojay's guilty plea resulted in a separation of their trials. Secondly, the transcript would have been available at the time of the appellant's trial as counsel (in carrying out due diligence) would have had knowledge of Ojay's plea and the transcript could have been requested.

The court's determination of the application to adduce fresh evidence

[17] Section 28 of the JAJA provides the basis for this court's power to admit fresh evidence at the stage of an appeal. Section 28 (a) and (b) provides:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice —
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and
>
> (c) …"

[18] Brooks JA in **Brian Smythe v R** discussed the relevant principles referred to in **R v Parks** [1961] 3 All ER 633 which provided guidance in giving effect to this court's statutory authority. At paragraph [15] of that judgment, Brooks JA said:

> "…In construing legislation, similar in terms to section 28, Lord Parker stated at page 634:
>
> > '...As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial'." (Emphasis supplied)

[19] Based on the material presented to be adduced, this court did not think it necessary that all four categories as set out above in **Parks** should be stringently applied to the application for fresh evidence. We granted the application to adduce the fresh evidence in light of all the circumstances as we concluded that it was expedient to do so in the interests of justice (see section 28(a) of the JAJA). The transcript of the sentencing hearing relevant to Ojay was therefore adduced as fresh evidence before this court for our consideration.

Grounds of appeal

[20] Mr Small requested and was granted permission to abandon the original grounds of appeal and to argue eight supplemental grounds including grounds 5 to 8 mentioned above. The supplemental grounds of appeal are set out below:

"GROUND 1

The Learned Trial Judge failed to direct the jury at all on the issue of identification. Nowhere did the Learned Trial Judge direct the jury that the issue of identification of the accused was a central issue in this case. The prosecution's case asserted that it was the accused who had handed the gun to Ojay Kerr and used certain words whereas the defence denied handing a firearm to Ojay Kerr or using the words alleged.

A central issue therefore in this case was whether there was a mistake made in the identification whether deliberately or honestly made. This therefore required the most careful direction being given to the jury on how they were required to approach evidence of identification, the warnings that were necessary, the dangers involved in identification evidence even in the case where the alleged perpetrator was known before hand to the alleger and the well established danger of mistakes being made in identification of persons known before hand, and even of relatives.

The fact that there were issues of the credibility of the allegers does not relieve the trial judge of his duty to give appropriate directions on the approach to the reliability of identification evidence even of credible witnesses.

GROUND 2

The Learned Trial Judge failed to direct the jury adequately on the evidence of good character. … He failed to direct the jury on how the issue of good character was to be applied to the issue of the credibility of the Applicant.

GROUND 3

The learned trial judge failed to analyse and direct the jury on the evidence which disclosed substantial material of collusion between the two civilian witnesses and the learned trial judge failed to give appropriate directions to the jury on this issue.

The Learned Trial Judge failed to adequately assist the jury on their approach to the several contradictions and inconsistencies in the evidence given by the two civilian witnesses. The Learned Trial Judge thereby failed to provide the applicant with the full protection of the law.

GROUND 4

The Learned Trial Judge by these omissions, complained of in Grounds 1, 2 and 3, failed to properly present the defence of the applicant, as each of these issues directly bear on issues in the defence of the applicant.

The jury thereby was deprived of the proper assistance of the Trial Judge's duty to fully place the elements of the defence before the jury for their proper consideration.

GROUND 5

The Learned Trial Judge had a duty in this case to have enquired of the prosecution as to the full circumstances in which the crown had offered and accepted the plea of guilty to manslaughter by Ojay Kerr.

The Crown's acceptance of a guilty plea by Ojay Kerr to Manslaughter is incompatible with the Crown's alleging that Calvin Reid murdered the deceased on the basis that the case was presented against Calvin Reid.

The Crown's acceptance of a plea to manslaughter from Ojay Kerr must also raise the issue of manslaughter for consideration by the jury in the case against Calvin Reid given that the Crown was alleging that Calvin Reid was acting in concert Ojay Kerr.

GROUND 6

The co-accused, Ojay Kerr, pleaded guilty to the charge of manslaughter on the basis that he did not receive the gun from Calvin Reid. The Crown either expressly accepted the above basis or must be taken to have accepted it given that the Crown agreed to accept the plea of Kerr proffered on the basis that he did not receive the gun from Calvin Reid. At the minimum the Learned Trial Judge ought to have directed the jury that that was the basis of the plea by Ojay Kerr.

GROUND 7

The sentence was manifestly excessive bearing in mind that it was not open to the prosecution to have proceeded on a basis that was inconsistent with the case that it had accepted by virtue of accepting the plea of guilty to manslaughter in the matter of Reg. v Ojay Kerr, a matter that arose out of the said killing with which Calvin Reid, the Applicant, was charged.

GROUND 8

The learned trial judge wrongly withdrew the issue of manslaughter from the jury."

[21] For the sake of convenience, the grounds will be summarised for discussion. The issues that arose based on the grounds are as follows:

1) Whether the learned judge dealt with the issue of identification properly ***(ground 1)***

2) Whether the failure of the learned judge to give directions on the credibility limb of the good character direction was fatal ***(ground 2)***

3) Did the learned judge deal sufficiently and adequately with the inconsistencies, discrepancies and omissions in the Crown's case including any inference of collusion between the Crown witnesses; in that regard did the learned judge deal fairly and adequately with the defence of the appellant ***(grounds 3 and 4)***

4) Was the conviction and sentence of the appellant, for the offence of murder, fair within the context of the plea of guilty to manslaughter made by Ojay and accepted by the prosecution; and whether in light of that the learned judge ought to have left the issue of provocation to the jury, in respect of the appellant ***(grounds 5, 6, 7, 8)***

Issue 1: Whether the learned judge dealt with the issue of identification properly *(ground 1)*

Submissions on behalf of the appellant

[22] Mr Small submitted that whenever a jury is required to determine any issue of identification, the trial judge is required to give directions. In the case at bar, the defence joined issue with the Crown as to identification. Though an erroneous concession was made as it related to the issue of identification by defence counsel who represented the appellant at trial, it was a restricted concession and the issue of identification was clearly raised. He stated that this was so, as the defence challenged the evidence of the Crown witnesses as to what they said the appellant had done and said at the time of the shooting. He stated that the learned judge failed to give any directions on any aspect of identification.

[23] It was argued that even where there is no reliance on a defence, a trial judge is required to direct the jury on any defence which arises on the evidence. In the appellant's case, the learned judge ought to have directed the jury that, where identification is in issue, the burden of proof was on the prosecution and that it was the prosecution's duty to destroy the defence raised.

[24] Further, the learned judge had a duty to direct the jury that identification is a special area requiring special care and that credible witnesses are in danger of making errors, even in cases of recognition. Reference was made to the case of **Joel Henry v R** [2018] JMCA Crim 32, and in particular paragraphs [16], [17] and [28].

[25] Counsel also submitted that the learned judge failed to review and direct the jury on specific weaknesses in the identification evidence. He stated that the allegation was specifically put to the prosecution's witness, Mrs Alcock, that she was not present at the time of the incident. Further the appellant gave evidence that she was not present and that this evidence of the appellant was never challenged. Counsel complained that there were no directions given by the learned judge in relation to the prosecution's failure to challenge this evidence or on the significance of the evidence itself. This fundamental weakness in the identification evidence ought to have been drawn to the jury's attention and an appropriate direction in law given.

Analysis and decision

[26] We did not consider it necessary that Crown Counsel should be called upon to reply to learned counsel's submissions relative to this ground, as we were of the view that identification was not an issue in the circumstances that arose in the evidence. Counsel who appeared for the appellant in the trial did intimate the identification was not an issue, although at some points in the evidence, he queried the amount of lighting the Crown witnesses said was available on the scene. In particular, counsel below stated that the issue was whether there were two light sources at a particular location, but eventually conceded that "it didn't matter too much".

[27] In any event, it was apparent from the evidence that unfolded that the issue was not whether the appellant was present at the time of the shooting but whether he was in a common design with Ojay to shoot the deceased. The appellant had put himself on the scene and supported the evidence of the Crown witnesses that Ojay had shot the

deceased. On his evidence, Ojay would have been acting alone and he observed what happened as he stood 30 feet behind Ojay at the time the deceased was shot. Neither he nor any of the prosecution's eyewitnesses put any third person on the scene apart from Ojay and the appellant.

[28] On the evidence of the prosecution's witnesses, the appellant would have been standing beside Ojay at the relevant time. The issue of whether the Crown witnesses had the opportunity to properly view the appellant as he stood beside Ojay would therefore be inconsequential. All the parties were well known to each other. No issues of mistaken identity would arise, the prosecution's witnesses would either be lying or speaking the truth as to the role played by the appellant. The jury would have had to determine if the appellant was beside Ojay (as alleged by the prosecution's witnesses) or behind him (as alleged by the appellant), whether he handed the firearm to Ojay and instructed him to shoot the deceased or he did not and in the final analysis, whether they had a reasonable doubt about the evidence offered by the Crown witnesses.

[29] No issue was taken with the learned judge's direction to the jury relative to these issues and as to the burden and standard of proof. The learned judge was therefore correct in his decision to give no direction to the jury on the dangers of mistaken identification. This could only have served to confuse the jury. The major issues for the determination of the jury were the credibility of the witnesses and the issue of joint enterprise. A judge is only responsible to direct the jury on the relevant issues as they

arise (see **Jackson v The State** (1998) 53 WIR 431, 438 and **Von Starck v R** (2000) 56 WIR 424, 429 and 430).

Issue 2: Whether the failure of the learned judge to give directions on the credibility limb of the good character direction was fatal *(ground 2)*

Submissions on behalf of the appellant

[30] It was submitted that where the defence raises the issue of good character, the trial judge is required to give directions in law as to how the jury is to apply that evidence to the appellant's credibility. Mr Small contended that, in the case at bar, the issue of good character was raised by the appellant himself on oath and also by his witness Mrs McNeish. Therefore, he would have been entitled to the benefit of both limbs of the good character direction. The jury had two starkly contradictory versions on the evidence to consider and the appellant was entitled to the protection of the law on this issue. He submitted that, while the learned judge gave directions in relation to the propensity limb, no directions in relation to the credibility limb relevant to good character was given by the learned judge. Reference was made to **Horace Kirby v R** [2012] JMCA Crim 10.

Submissions on behalf of the Crown

[31] Mrs Dennis-McPherson, relying on **Teeluck and John v The State** [2005] UKPC 14, acknowledged that the good character direction has two limbs, namely the credibility and the propensity limbs. She submitted that the learned judge only made reference to the propensity limb and that both limbs ought to have been given when addressing the jury. She referred to the fact that the appellant gave evidence that he was a carpenter and owned a woodwork shop; that he also gave evidence that he was a father and only

had one previous conviction which related to a ganja spliff, to which he had pleaded guilty.

[32] She submitted, however, that the failure of the learned judge to give a good character direction for the credibility limb was not fatal and would not render the conviction unsafe as there was insurmountable evidence against the appellant that the jury could rely on.

Analysis and decision

[33] We found however that there was merit in Mr Small's complaint concerning the failure of the learned judge to give both limbs of the good character direction to the jury. Where a defendant gives sworn evidence and speaks to his good character, whether or not he calls a witness who speaks to his good character, he is entitled to the benefit of the good character direction in relation to both credibility and propensity. This is a settled principle of law (see **Horace Kirby v R**; **Teeluck and John v The State** and **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009).

[34] In dealing with the issue of the appellant's character, the learned judge reminded the jury of the evidence and directed them in the following terms:

> "Now, the defendant gave evidence that he is a carpenter, a workshop operator, and father of two children, five and two years old. He also called Mrs. McNeish who told you that she has known him for some twenty-five years. He is her good friend, and from what she said, they enjoy a close relationship. Mrs. McNeish described him as kind, humble and loving, to the point where she always takes advantage of him.

> Now, he told you that seven years ago he was convicted for being in his possession of a ganja spliff or cigar. The possession of a ganja spliff in today's Jamaica, in so far as it is 2 ounces or less, has been decriminalized. That is, it is no longer the subject of a criminal conviction. In addition to that, by virtue of the passage of seven years, that conviction is spent, and Mr. Reid is entitled to apply to have it expunged from his record. So, although it was the defendant who adduced evidence of his previous conviction, you may well conclude that it is evidence of relatively minor bad character, so minor that had it happened today, it would not be on his criminal record.
>
> Not only is his previous conviction evidence of relatively minor bad character, it relates to an offence of a completely different nature from that for which he is charged before you. The defendant introduced this evidence because he wanted you to know that he has never been convicted of any offence involving violence.
>
> How should you approach the fact that he has no previous conviction for any offence similar to the one he now faces? This is obviously not a defence to the charge, but it may make it less likely that he has committed an offence of violence, namely, murder. You should take this into account in the defendant's favour. It is for you to decide what importance you attach to it. You should bear this in mind during your deliberations."

[35] The learned judge treated correctly with the previous charge of possession of ganja, that it would have been inconsequential to the appellant's good character. The end result would be that the appellant should be treated as a defendant without any previous convictions. In that light, and including the evidence of Mrs McNeish, the learned judge ought to have left both limbs of the good character direction for the consideration of the jury.

[36] The learned judge spoke to the limb of propensity but failed to advance the limb concerning credibility. At the end of his summation, he was requested by defence counsel

to reconsider the issue of the good character direction before releasing the jury for their deliberations. The transcript at page 289, lines 10-24 reveals the following exchange:

> "MR. P. CHAMPAGNIE: I am so sorry, I was just confirming with my friend for the Crown, the last witness, m'Lord, character, good character.
>
> HIS LORDSHIP: I'm sorry.
>
> MR. P. CHAMPAGNIE: Good character.
>
> HIS LORDSHIP: But that's where I started.
>
> MR. P. CHAMPAGNIE: I see.
>
> HIS LORDSHIP: I gave the propensity limb because he had…
>
> MR. P. CHAMPAGNIE: In terms of the witness that was called, m'Lord.
>
> HIS LORDSHIP: Well, I said what she said about him.
>
> MR. P. CHAMPAGNIE: Very well, m'Lord …"

[37] It is not clear why the learned judge thought he was unable to give directions in relation to the limb of credibility bearing in mind his treatment concerning the appellant's previous conviction. We therefore agreed with Mr Small that the appellant, having given evidence, ought to have had the benefit of both limbs of the good character direction.

[38] Although counsel for the Crown urged that the failure was not detrimental because there was insurmountable evidence against the appellant, we found that this submission was untenable since credibility was an important issue in the case and in particular, when coupled with submissions of Mr Small in relation to the evidence that formed the basis for his complaint in grounds 3 and 4 which will be considered below.

Issue 3: Did the learned judge deal sufficiently and adequately with the inconsistencies, discrepancies and omissions in the Crown's case including any inference of collusion between the Crown witnesses; in that regard did the learned judge deal fairly and adequately with the defence of the appellant *(grounds 3 and 4)*

Submissions on behalf of the appellant

[39] Mr Small submitted that there was substantial evidence supporting the issue raised by the defence that there was collusion between Mrs Alcock and Odel, concerning the evidence they both gave relevant to the appellant. These circumstances required the learned judge to give the jury specific directions on how this evidence, if accepted, affected several aspects of the prosecution's case, and these directions were not given.

[40] Further, it was submitted that the learned judge should have given the following directions to the jury:

> (1) The burden was on the prosecution to destroy the defence issue of collusion, together with a related direction on reasonable doubt;
>
> (2) Discussions between witnesses about the subject matter of their evidence should not take place;
>
> (3) The witness should give his or her evidence, so far as practicable, uninfluenced by what anyone else has said, whether in formal discussions or informal conversations; and
>
> (4) Collusion, whether formal or informal, is prohibited. Counsel relied on **Regina v Momodou and anor** [2005] 1 WLR 3442).

[41] Mr Small highlighted the aspects of the evidence which, he submitted, demonstrated collusion. He referred to Detective Corporal Francis' evidence that Mrs Alcock expressed that she did not wish to give a statement until she had a chance to speak with her son, and Mrs Alcock's contrary evidence to the effect that she never told the police any such thing; Odel's failure to mention in his statement that his mother was present on any of four relevant occasions (namely when she would have been standing at her gate with the deceased; when Odel and Romario Ruddock walked up to the deceased; when the deceased walked towards the appellant and Ojay and after the deceased got shot), yet he gave evidence before the jury that she was present during these material times. Counsel pointed out that Odel acknowledged that his statement was read over to him and there was no mention of his mother.

[42] Mr Small submitted that all of the above pointed to positive evidence that Mrs Alcock was not present nor able to give evidence as to the circumstances of the shooting. He stated that this was suggestive of concoction of the evidence, when she gave her statement on the 27th November in relation to the role played by her. He pointed to the fact that this statement was given after Odel gave his statement to the police on the 23rd November. It was contended that this had the effect of compromising both these witnesses' credibility and that the learned judge should have directed the jury accordingly.

[43] It was also argued that the learned judge did not direct the jury concerning Mrs Alcock's evidence that the police had added material to her statement, namely, that she made a report to the police on the night of the incident, but left it open to the jury to

merely find that it was "a slight inconsistency". Reference was made to the following portion of the learned judge's direction (at page 265, lines 19 to 24):

> "…little or no bearing on that major question, that it does not go to the root of the case, you may well decide to ignore it if your opinion is that it does not affect the truthfulness of the witness."

[44] It was submitted that these directions trivialised the serious challenge to the credibility of a "star witness" for the prosecution who had alleged that the police included material in her statement, but in giving evidence, she stated that this never happened. He stated that Mrs Alcock provided no explanation for this "nefarious concoction" and this major discrepancy was left completely unexplained on the prosecution's case. Similarly, he referred to the evidence of Detective Corporal Francis of Mrs Alcock's decision that she did not wish to give a statement until she had the opportunity to speak with her son and stated that this evidence was also left unexplained. In these circumstances, counsel submitted that if the jury accepted the evidence of Detective Corporal Francis that Mrs Alcock refused to give a statement until she had spoken with her son, then the learned judge was required to give the jury specific directions on collusion.

[45] Further, counsel submitted that it was a matter in issue as to when Mrs Alcock spoke to the police. He stated that the defence counsel at the trial suggested to her that the police spoke to her on the date of the incident (the 23rd) and her denial of this, led defence counsel to confront her with her statement. Counsel submitted that these discrepancies played a much greater role in the case than the learned judge accorded to them and that they went to the root of the prosecution's case.

[46] It was submitted also that the learned judge, in effect, directed the jury that Mrs Alcock's evidence was corroborated by the evidence of Odel and failed to give appropriate directions in law as to how the jury was to regard evidence of collusion between two witnesses. Counsel referred the court to page 266, lines 4 to 15 of the summation. He submitted that this was central to the appellant's defence and it required the learned judge to give express directions.

[47] In continuing his assault on the failures of the learned judge, Mr Small submitted that a number of errors were made in the directions to the jury on the legal significance of the evidence. In particular, in relation to the issue of collusion, counsel contended that the learned judge erred in his direction to the jury when he suggested that there was an interpretation of the evidence which would make the conduct of Mrs Alcock permissible and excusable, that is, whether she merely wished to clear up ambiguities in a discussion with her son or whether it was to enable her colluding with her son at the time she declined to give a statement to the police. Counsel submitted that the inference that the conduct of clearing up ambiguities by an opportunity for discussion between two witnesses was permissible could have been corrected by:

(a) Identifying the specific passage (containing the error);

(b) Directing the jury that the passage was an error;

(c) Directing the jury that they should disregard the direction given in error; and

(d) Following with a correct statement of the law in clear terms.

Reliance was placed on the case of **Charley Chen and Louis Chen v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 59 and 60/1971, judgment delivered 8 February 1972, in support of what is required from a trial judge in correcting errors in the direction of the jury on fundamental issues.

[48] It was submitted that merely giving alternative directions left it open to the jury to consider and apply the erroneous directions given at first, as seen at page 271 of the summation. Counsel contended that it was clear the jury preferred the "erroneous alternative view" of Mrs Alcock's conduct. In these circumstances, it was contended that the verdict should not be allowed to stand.

[49] In conclusion, counsel submitted that it was the learned judge's responsibility to properly leave the defence for the jury's consideration and that a failure to deal fairly with the appellant's defence was fatal to the conviction. The net effect of the learned judge's failure to give directions on the issue of identification, the relevance of good character evidence and the contradictions in the Crown's case was that the learned judge failed to properly present the appellant's defence.

Submissions on behalf of the Crown

[50] Mrs Dennis-McPherson submitted that the learned judge gave an accurate and detailed representation of the appellant's defence. In particular, counsel referred the court to portions of the summation where the defence of the appellant was outlined to the jury. At page 288 (lines 7 to 22), the learned judge directed the jury as follows:

> "[The appellant] told the prosecutor that it took him a matter of seconds to reach where Odane lay on the ground and he remained there for about one minute. Having left the scene, he went to his mother-in-law's house. He did not go back to his house that night, nor the night following. So, Mr Reid is therefore asking you to say that he went to the scene alone and took no part in the killing of Odane. That is his defence. His desire to bring an end to a heated argument between his yard-man [Ojay] and Odane led him to the scene and before he could make his intervention, Ojay pulled the firearm and shot and killed Odane. So, he is saying this, although he was present he was not aiding and abetting Ojay in the killing."

[51] As it related to the inconsistencies and discrepancies, reference was made to **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 and **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, in support of the principle that there is no requirement for a trial judge to identify all the conflicts/discrepancies which arise in a case; that it is sufficient for the major discrepancies to be pointed out and the jury to be advised whether they are material or immaterial and the way in which they should be treated.

[52] Counsel submitted that the learned judge dealt with the inconsistencies, omissions and discrepancies in accordance with the established principles.

Analysis and decision

[53] We found that there were material inconsistencies, discrepancies and omissions that would be crucial in the jury's assessment of the credibility of the Crown witnesses, Mrs Alcock and Odel. Both these witnesses gave one account as to the involvement of the appellant in the killing of Odane. The appellant gave a contrary account. Credibility was therefore a major issue. However, it is trite that issues of credibility are for the

determination of the jury (see: **R v Garth Henriques & Owen Carr** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 97 and 98/1986, judgment delivered 25 March 1988).

[54] While the learned judge did not direct the jury in the specific terms as suggested by counsel in paragraph [40] of this judgment, he did give directions in relation to all the salient issues complained of by counsel. Firstly, there were sufficient directions given on how to treat with inconsistencies, discrepancies and the general reliability of the witnesses. Secondly, in relation to the specific pieces of evidence, the learned judge identified all the material and relevant inconsistencies for the jury. He also directed the jury as to how to assess and treat with them. These aspects of the evidence are summarized in paragraphs [55] to [57] below.

[55] In relation to the evidence of Mrs Alcock as to whether she had told the police officer that she wanted to speak to her son before she gave a statement to the police, she denied that she had ever said that. This evidence was contradicted by the evidence of the investigator, Detective Corporal Francis. Her evidence also that she never spoke to the police on the 23rd was contradicted by the evidence of Detective Corporal Francis.

[56] In relation to the evidence of Odel as to whether he had told the police in his statement that his mother was present at the scene at the time of the shooting or at scenes prior to the shooting, he said that he did. When confronted with his statement, he eventually admitted that it was not in his statement, but that his statement was never read over to him. He maintained his evidence that he had told this to the police.

[57] His evidence was contradicted by Detective Corporal Peter Johnson, who took two statements from Odel on 23 November 2012. Detective Corporal Johnson gave evidence that after the first statement was taken, Odel indicated that some things were left out and he wished them to be included. As a result, he rewrote Odel's statement which was read over to him (Odel) before he signed it. Before signing also, Detective Corporal Johnson stated that he explained to Odel that he had the option of making corrections, adding or altering it. In cross-examination, Detective Corporal Johnson acknowledged that Odel had told him that he did not read so well.

[58] All the above evidence would be vital to any assessment of the credibility of each of these witnesses in general and specifically as to whether their evidence as to what each indicated the appellant did could be relied upon. This was even more so in light of the appellant's evidence before the jury that Mrs Alcock was never present on the scene when her son was shot and killed.

[59] Mr Small's complaint was threefold. Firstly, the learned judge did not adequately assist or direct the jury on their approach to these inconsistencies. Secondly, the evidence disclosed substantial material of collusion between these two witnesses and the learned judge failed to give appropriate directions to the jury on the issue. Thirdly, because of these failures, the learned judge did not properly place the elements of the defence before the jury.

[60] A perusal of the summation however revealed that these complaints were without merit. Pages 263 to 273 of the summation revealed the following:

"… Ojay pointed the firearm at Odane, there was one explosion and according to Odel, quote-unquote "fiery flame". Odane run off and Mrs. Alcock ran behind him. Odel supported his mother that she ran behind Odane.

Now, Odane was lying, seen lying facedown before Beenie Man's shop -- and for the record I should say from the evidence, I formed the view that this was not the well-known entertainer -- and there was a hole in his back and Mrs. Alcock said she tried waking him up, but he was unresponsive. And Odel said his mother was beside Odane crying.

Now, the defence presented two challenges to this evidence, one, Mr. Reid neither gave the weapon to Ojay nor commanded him to shoot Odane.

HIS LORDSHIP: And, 2.: **Mrs. Alcock was not present when the shooting took place. We are going to take them in reverse order; so, let us examine the last first.**

Now, it was suggested to Mrs. Alcock that it is not true when she said she was the one who went over and touched Odane after he got shot. She maintained that she was. She first said she did not see the police on the night of the incident. Now, Mrs. Alcock was asked and denied saying in her statement to the police that the police came on the scene about five minutes after, and she made a report to them.

Now, the passage in her statement was read to her once. She asked for it to be read a second time. That was done. After that was done, she said she did not say that to the police, that she had gone to the hospital and upon her return she saw the police but passed and went to her house. It was suggested to her that she had, in fact, so expressed herself in her statement. When she, again, denied saying so, the passage was admitted into evidence as Exhibit 1. So, I remind you of the passage. "About five minutes after police came on the scene and I made a report to the police, I was then taken to the Noel Holmes Hospital where I got some treatment. I later returned to the scene where I saw the body of my son, Odane, which was later removed by Doyley's Funeral Home personnel."

Now, you may be thinking to yourselves that it is an inconsistency to say in evidence that you did not make any report to

the police on the night of the incident, but at the same time, your police statement, records you saying the very thing you are denying having done. Now, if that is what you are thinking, you must ask yourselves whether this is a serious or a slight inconsistency, how does it impact your determination of the question, whether Mr. Reid is implicated in the killing of Odane Alcock.

Now, if you conclude that this has little or no bearing on that major question, that it does not go to the root of the case, you may well decide to ignore it if your opinion is that it does not affect the truthfulness of the witness. If, however, you conclude that it is material or that it is major, then you should bear in mind the three options that you have in so far as inconsistent evidence is concerned.

Now, Mrs. Alcock was not alone in contending that she was a witness to Odane's killing and Mr. Reid's alleged complicity in it. Odel also put her at her gate when he and the other two men came from Mr. Reid's gate. That was one instance in his narration of her presence on the night. And in the other instance, she walked behind Odane when he set off in the direction of the approaching Turbian and Ojay. And, thirdly, that she was beside Odane's body as he lay face down before Beenie Man's shop.

Now, in cross-examination he said he mentioned his mother four times to the police in his description of the events. Now, Odel was asked if it would surprise him that in his statement to the police there is no mention of his mother being present. He answered that he mentioned it. It was here that he told you that he cannot read. He was just shown where to sign and he just signed. The statement was not read over to him, that's before he signed.

But the Defence call [sic] Detective Corporal Peter Johnson, and he told you that he read over the statement to Odel. He read over the second statement he gave. From what Detective Corporal Johnson said, it appears this second statement is the official statement. You may be saying to yourselves, then, that there is a conflict between Odel and Detective Corporal Johnson. This is a matter for you to decide which, if any of them, you are going to accept. You will recall that Odel's statement was read over to him by the clerk while he was in the witness box. At the end of that exercise, he said it was not in his statement that he mentioned his mother. It was suggested to him that the reason for the omission of his mother from his statement is because she was not there. He insisted that she was.

Now, the omission of any mention of his mother in Odel's police statement is an inconsistency. Now, if you accept that it is an inconsistency, you should ask yourselves whether the inconsistency is material or immaterial.

Now, it is a matter for you, like all other matters of fact, but this could be a material inconsistency since Mrs. Alcock is saying she saw Mr. Reid hand the firearm to Ojay and instructed him to shoot and kill Odane.

Looking at it from a common sense point of view, would Odel have mentioned his mother four times in his narration of the events to the police, and all were omitted by Detective Corporal Johnson, a 22-year veteran in the Jamaica Constabulary Force? What reason could Detective Corporal Johnson have for that omission. To say Detective Corporal Johnson omitted all mention of Odel's mother from his statement, the Prosecution would have had to put before you, evidence tending to show that he was either careless or malicious or both. None of that was suggested to Detective Corporal Johnson. Is it reasonable to expect that Mrs. Alcock would have been there and playing the role she allegedly did, and Odel would have forgotten to mention her in his narration of the incident? You do not have to be able to read in order to accurately, if not perfectly, relate how an incident occurred; but then, his statement was read over to him. If he had in fact described the events to include his mother to Detective Corporal Johnson, would he not have noticed that the policeman had omitted every mention of her, especially against the background of being alert enough to point out to Detective Corporal Johnson that there were omissions from his first statement, resulting in the taking of a second.

You must decide whether you are going to reject Odel's evidence altogether, or only in so far as this inconsistency is concerned.

Now, it is convenient at this time to remind you of the evidence concerning the giving of Mrs. Alcock's statement. And remember what we are examining, members of the jury, is the contention of whether or not she actually witnessed these events.

Now, her statement was recorded on the 27th of November, yes, that's some four days after the incident. Now, she denied telling

the police that she did not want to give the statement until she had spoken to Odel. It was suggested to her that the reason she gave her statement on the 27th and not before was because she wanted to hear what Odel had to say. Her response was quote-unquote, "Nothing like that".

Well, Detective Sergeant Garfield Francis, the investigating officer, he was called and he told you he made attempts to record her statement before the 27th. Her statement was not collected because she indicated that she was not feeling well and also that she was not going to give the statement until she spoke to her son.

Now, the defence did not take any issue with her saying she was not well and you will recall that she had to be taken for treatment on the night of the incident. You may well be saying to yourself that if she was not feeling well, that would have been a good reason for putting off the giving of her statement.

What the defence is saying is that she was putting off the giving of her statement because she wanted an opportunity to collude with Odel, to make up the story to say that she was a witness.

Now, if you find that she did not tell the truth when she denied saying she was not giving the statement before speaking to Odel, you would be entitled to ask why she denied it. Was it that she just wanted to clear up any possible ambiguities between them, that is, between herself and Odel, or was it that she was not there and wanted time to hear how the incident occurred in order to insert herself into the picture to strengthen the case against Mr. Reid.

You may be thinking to yourselves that if it was that she only wanted to clear up ambiguities in the recollection then there would really not be any reason to be untruthful about what Detective Sergeant Francis said she said to him.

If, however, you have come to the conclusion that she was hiding what she said to Detective Sergeant Francis because her motive was to give herself time to plan a story, you must reject her evidence.

Now, when considering the question of whether Mrs. Alcock was an actual or manufactured witness you should bear in mind also that you had an opportunity to assess her when she was in the witness box. How did she strike you? You should bear in mind her

> demeanour while she testified, especially during cross-examination. You must consider all the circumstances in deciding whether you can believe her and Odel that she was present and witnessed the incident.
>
> If, after giving the matter your serious consideration you conclude that Mrs. Alcock was not present, two consequences must flow from that conclusion. First, you would be duty bound to reject her evidence about what took place on Montpelier Road. Second, you should ask yourselves whether you ought to reject Odel in so far as he did not tell the truth concerning his mother being present or in totality.
>
> Now, if you decide that you cannot believe Odel, altogether, or you are not sure whether you can believe him, you do not have to go any further in your deliberations as the prosecution would have failed to satisfy you so that you feel sure. In which case, you would return a verdict of not guilty.
>
> If, however, your decision is to reject Odel only in so far as his evidence about his mother being present is concerned, you must then go on to consider the rest of the case against the defendant…" (Emphasis supplied)

[61] When these passages are scrutinised with care, it is abundantly clear that the learned judge dealt specifically with the inconsistencies and discrepancies complained of by Mr Small and did so within the context of an inference of collusion on the part of the Crown witnesses. The learned judge gave concise, sufficient and clear directions as to how to treat with each witness separately and their evidence in general, if the jury found that their credibility was affected. He also spoke to the allegation of collusion and asked the jury to consider whether Mrs Alcock was a manufactured or actual witness.

[62] Mr Small complained that the learned judge gave the impression to the jury that Mrs Alcock may merely have wanted to clear up ambiguities before giving her statement and that this would have been a permissible course of action. However, when one

examines the passage, the learned judge was directing the jury to examine whether she could be believed at all when she said that she did not tell Detective Corporal Francis that she wanted to speak to her son before giving her statement. The learned judge framed the issue as an example of possible motives - whether she merely wanted to clear up ambiguities as against a more sinister motivation of giving herself time to insert herself as a witness to the shooting of her son.

[63] It cannot be said therefore that the learned judge directed the jury that it would be permissible if she had merely wished to clear up ambiguities before giving her statement. That was not the intention or point of the directions. He made it clear that the jury ought to consider that, if perchance, it was merely a desire to clear up ambiguities, why would she have had any reason to deny what Detective Corporal Francis stated that she told him.

[64] Further, the learned judge used the two scenarios as examples after painting a very favourable picture in relation to the evidence of Detective Corporal Francis as to who was to be believed on that particular aspect of the evidence. The learned judge had no further duty having identified the issues for the jury's assessment and the effect their assessment would have on the outcome of any verdict.

[65] The cases cited by Mr Small do not take this matter any further. In **Regina v Momodou and another**, the issue concerned the training or coaching of witnesses in criminal proceedings. The Court of Appeal of England and Wales reiterated the common law principle that training or coaching of witnesses in criminal proceedings, whether for

prosecution or defence is not permissible; that the witness is to give his or her own evidence, so far as is practicable, uninfluenced by what anyone else has said, whether in formal or informal discussions, to avoid any possibility that the witness may tailor his evidence in light of what someone else has said.

[66] In the case at bar, there was no evidence that the witnesses had been trained or coached, formally or informally. However, there was evidence that suggested the possibility that there could have been collusion between the two eye-witnesses for the prosecution.

[67] **Michael Pringle v R** [2003] UKPC 9 a decision of the Privy Council concerned evidence given by a cellmate of the accused as to his admission to having committed the crime. Lord Hope, on behalf of the Board, found that the possibility of the evidence of the cell mate being tainted was a live issue; that there were several specific factors which might have been indicative of an improper motive which the trial judge ought to have brought to the jury's attention (see paragraph [27]). There was a similar issue concerning a tainted witness in **Benedetto v R; Labrador (William) v R** (2003) 62 WIR 63, which was also a decision of the Privy Council.

[68] In **Benedetto v R** as well as **Michael Pringle,** the Board espoused the general principle that a trial judge must always be alert to the possibility that the evidence of a prison informer might be tainted by improper motives and called for special attention. The trial judge therefore had a duty in his summation, to draw attention to factors which might be indicative of an improper motive. In particular, the trial judge ought to (a) draw

the jury's attention to any indications that might justify the inference that the evidence was tainted and (b) advise the jury to be cautious before accepting any such evidence.

[69] In the case before us, all the factors which could have led to an inference of collusion were brought to the jury's attention and directions given as to how to treat with them. We concluded that the learned judge dealt sufficiently with that issue in his directions to the jury. The complaint by Mr Small in relation to the learned judge's failure to properly treat with these on the Crown's case as well as within the context of the appellant's defence is not sustainable. Grounds 3 and 4 were found to be without merit.

[70] Those grounds, however, were sufficient to add fuel to the complaint as it related to ground 2. As indicated previously, we had to assess the impact of the inconsistencies and discrepancies highlighted in the previous paragraphs in light of the absence of the credibility limb relevant to the good character direction. The absence of such direction in relation to one or both limbs can be fatal in circumstances where it is essential that it be given.

[71] Mrs Dennis-McPherson's submission that there is insurmountable evidence against the appellant did not take into consideration that all the evidence depended on an assessment of the credibility of the Crown witnesses. There was no other evidence against the appellant presented by the Crown save what these two eye-witnesses saw and heard. What this court had to consider is whether it could be said that the failure to give the credibility limb of the good character direction would have made no difference to the verdict (see **Horace Kirby v R** paragraph [12], where Brooks JA referred to the judgment

of Morrison JA (as he then was) in **Michael Reid v R**). The consideration of the potential effect of the absence of the good character direction was recently applied by this court in **Calvin Walker & Lorringston Walker v R** [2019] JMCA Crim 27.

[72] Although there was no error committed by the learned judge in his directions to the jury concerning inconsistencies, the issue of credibility was the major issue in the trial. The credibility limb of the good character direction would therefore have been important overall for the jury's assessment on this issue. We concluded therefore that we were unable to say that if the proper directions had been given in relation to good character, the jury would have inevitably returned the same verdict (see **Horace Kirby v R** and **Tino Jackson v R** [2016] JMCA Crim 13). In this regard, issue 2 was found to be meritorious.

[73] Although our decision in relation to issue 2 was determinative of the matter, we thought it prudent to comment on the remaining grounds relied on by Mr Small which are grounded in the reception of the fresh evidence.

Issue 4: Was the conviction and sentence of the appellant, for the offence of murder, fair within the context of the plea of guilty to manslaughter made by Ojay and accepted by the prosecution; and whether in light of that the learned judge ought to have left the issue of provocation to the jury, in respect of the appellant *(grounds 5, 6, 7, 8)*

Submissions on behalf of the appellant

[74] Mr Small submitted that the prosecution wilfully concealed from the court that the appellant's co-accused Ojay offered a plea of guilty to manslaughter on the basis of provocation. In fact, it was Mr Small's contention that the prosecution offered such a plea

to Ojay; that plea was accepted and resulted in the prosecution indicting the appellant and the co-accused for the killing of the deceased on two contradictory bases.

[75] He contended that it was grossly misleading to proceed against the appellant for murdering the deceased at the hand of Ojay, while concealing from the court the fact that the prosecution had offered a plea of manslaughter to Ojay on the basis that he had killed the deceased while acting under the stress of provocation. Counsel contended that the end result was that the appellant was alleged to have murdered the deceased by the hand of a man who was acting under provocation. This led to a miscarriage of justice.

Submissions on behalf of the Crown

[76] Counsel submitted the learned judge did not have a duty to make enquiries of the prosecution with regard to a plea taken by Ojay. Both men were tried separately. Further, the prosecution did not have a duty to disclose the circumstances or reasons for accepting a manslaughter plea from Ojay, as it was not relevant to the trial of the appellant. It was pointed out that Ojay was not being called as a witness for the prosecution.

[77] In relation to the issue of sentence it was submitted that the sentence was not manifestly excessive.

Discussion and analysis

[78] In a perusal of the transcript relevant to the sentencing of Ojay, there is an indication from counsel for the Crown that the prosecution had accepted the plea of manslaughter offered by the defendant based on the factual circumstances. However, in the mitigation address of defence counsel, Mr Fairclough, who appeared below, it is

indicated that the prosecution severed the indictment which had charged both the appellant and Ojay jointly for murder and offered an indictment charging Ojay with the offence of manslaughter. There is, however, no further information available from the transcript as to who made the initial approach for the plea of manslaughter to be considered. This, however, is not the pith and substance of Mr Small's contention with regard to the actions of the prosecution.

[79] Mr Small's submission that the Crown's acceptance of a plea of manslaughter in relation to the previous co-accused of the appellant is incompatible with the case of murder presented against Calvin Reid is not sustainable.

[80] The transcript containing the sentencing hearing in relation to Ojay, reveals that the same evidence mounted against the appellant was used to ground the basis for the acceptance of the guilty plea. It was based on the statements of Mrs Alcock and Odel. The prosecution outlined at the sentencing hearing, the same facts presented to the jury in the trial of the appellant. These facts speak to a stone-throwing incident which led to Ojay receiving an injury to one of his feet. In that regard, the deceased was also injured. Both these men threw stones that hit each other. It is as a result of this, that the Crown conceded that provocation would have been a live issue in the case relating to Ojay.

[81] There are five ingredients that must be established in relation to proving murder. Based on the Crown's case, the first three would have been proven against both Ojay and the appellant, namely – (i) the person is dead, (ii) the accused did a deliberate act that caused the death/acted in concert with someone who inflicted an injury and (iii) the

intention was to kill or cause serious bodily harm. The fourth, the issue of self defence did not arise on the factual circumstances. In relation to the fifth ingredient, the prosecution would have to prove that provocation did not arise on the facts, that neither Ojay and/or the appellant was provoked or may have been provoked, to kill. We have already indicated the factual scenario that could have justified the acceptance of a plea to manslaughter in relation to Ojay.

[82] The fact that Ojay was provoked or may have been acting under provocation when he was handed the firearm and ordered to shoot Odane, did not automatically mean that the appellant shared the same *mens rea* relevant to manslaughter. The question is whether there was any evidence of specific provoking conduct of the deceased that would or could be said to have caused the appellant to lose his self-control at the material time. There must be an evidential basis to leave provocation for the jury's consideration in relation to the appellant.

[83] When the evidence adduced relevant to the conduct of the appellant is reviewed, there is nothing to suggest that he was provoked or may have been provoked at the time it is alleged that he pulled the firearm, gave it to Ojay and gave the order for the shooting of the deceased. Both men had been involved in a dispute over money and had parted company. Subsequently, the appellant had given part of the money owed to the deceased to one Melvin. The jury had obviously accepted the evidence that the appellant would have arrived on the scene where the deceased was subsequently shot, with a firearm in his possession. The question could be asked - for what purpose was he so armed? He

would have had about a 20 minute walk to that scene. Provocation does not arise squarely on this evidence.

[84] On the case for the defence, provocation also did not arise. The appellant stated that Ojay and the deceased had a heated argument and after the deceased left, Ojay walked out after him and he decided to follow as he (the appellant) wanted to "cool down the argument". Although the same 20 minute hiatus would have applied to Ojay, the stark difference is that Ojay had been injured in a dispute involving the appellant and the deceased. Based on these factual circumstances, we did not consider that the learned judge erred in deciding not to leave the issue of provocation for the jury's consideration.

[85] These grounds therefore were separately and jointly found to be without merit as the trial judge would have had no basis to leave the issue of provocation to the jury, even if he had been told that Ojay had, on a previous/separate occasion, pleaded guilty to manslaughter on the basis of provocation. In that regard also, the sentence as set out at paragraph [3] of this judgment could not be considered to be manifestly excessive for the offence of murder.

The issue of a retrial

[86] In light however of our determination as regards issue two (ground 2) and in light of our observations set out relevant to issue three (grounds 3 and 4), the learned judge's failure to direct the jury in relation to the credibility limb of the good character direction was a fatal flaw. We concluded therefore that the appeal ought to be allowed and the

conviction quashed. We then had to consider, guided by section 14(2) of the JAJA, whether, in the interests of justice, a new trial ought to be ordered.

[87] We had invited both counsel to make submissions in relation to a retrial (see **Dennis Reid v The Queen** [1980] AC 343; see also **The Queen v Vasyli** [2020] UKPC 8, a recent decision of the Privy Council which considered the principles relevant to a retrial and applied **Dennis Reid**). Mr Small, on behalf of the appellant, contended that the matter ought not to be subject to an order for retrial. He stated that the prosecution ought not to be given any opportunity to attempt to cure any fundamental defect and there is no evidence whether the witnesses will be available in that event.

[88] Counsel for the Crown submitted that if this court decided to quash the conviction and to allow the appeal, there ought to be a retrial. The issues were essentially matters affecting credibility including the issue of alleged collusion and the witnesses ought to be assessed by the jury as these were matters for their determination. She submitted that, in light of this, the jury should be allowed to return with a verdict.

[89] In consideration of this issue, we concluded that a retrial ought to be ordered as the appeal succeeded because of an error on the part of the trial judge and not as a result of any deficiency in the evidence relied on by the prosecution (**Dennis Reid v The Queen**). This is also, clearly a matter where a *prima facie* case had been made out and there was no compelling reason advanced why a retrial should not be allowed (**The Queen v Vasyli**). The appellant was convicted in June 2018, which could be considered as being fairly recent and there is no evidence that the witnesses would not be available.

In the interests of justice, the matter was therefore remitted to the Home Circuit Court for a new trial to be held as soon as possible.