

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. P022 of 2021

BETWEEN

KENYATTA KING

Appellant

AND

THE STATE

Respondent

PANEL:

M. Mohammed J.A.

M. Wilson J.A.

R Boodoosingh J.A.

DATE OF DELIVERY: December 14, 2023

APPEARANCES:

Mr. Wayne Sturge and Mr. Shane Patience appeared on behalf of the Appellant.

Mr. Wayne L. Rajbansie appeared on behalf of the Respondent.

JUDGMENT

Joint judgment delivered by M. Mohammed J.A., M. Wilson J.A. and R. Boodoosingh J.A.

INTRODUCTION

1. The Appellant, Kenyatta King, also called “Biter”, was charged with the murder of Shulah Mitchell (the deceased) which was alleged to have occurred on April 12, 2008. On November 12, 2021, he was found guilty of murder by a judge sitting alone and was sentenced to death by hanging.
2. The Appellant has appealed his conviction.

THE CASE FOR THE RESPONDENT

The alleged incident of April 10, 2008

3. On April 10, 2008, around 5:00pm, Nathaniel Mitchell (Mitchell), the deceased’s brother, was playing football in Caroni. Mitchell’s friends, Clint and Dereem, and the deceased were also present. A green Toyota Yaris motor vehicle approached him. The Appellant, Kenyatta King, whom Mitchell knew as “Biter”, and two other men exited the vehicle. Mitchell had known the Appellant for a couple of months from seeing him around in the village in which he lived. Mitchell was struck and forcibly pushed into the front passenger seat of the car. The Appellant, who was armed with a gun, entered the vehicle and sat beside him. The vehicle was driven by someone known to Mitchell as “Richie”. While Mitchell was in the vehicle, a man unknown to him, who was seated in the back seat, held his hands back and cuffed him. Richie also slapped him on his face. The Appellant placed the gun to Mitchell’s head. He confronted Mitchell with an

accusation that he (Mitchell) had been telling persons “on the junction” that the Appellant was involved with a ten-year old girl. Mitchell denied this accusation.

4. The men drove Mitchell to Trantrill Road where he was released. He made his way back to Caroni where he met the deceased and two police officers in the vicinity of Railway Road Bar. The police officers had a conversation with Mitchell and asked him certain questions but he denied that anything had happened to him, as he was afraid.

The alleged shooting incident – the subject of the indictment for murder

5. On April 12, 2008, Mitchell and the deceased were in the company of a man named Farai at Mosque Street in Caroni. A young man who was riding a bicycle approached them and informed them that the Appellant was “out the road”. Farai took the young man’s bicycle and went out the road to speak to the Appellant. Mitchell and the deceased stayed behind. According to Mitchell, the deceased found that Farai was taking a long time to return so they decided to go out the road to see what was happening between Farai and the Appellant. While in the vicinity of the restroom of Railway Road Bar, the Appellant pulled out a firearm and pointed it in their direction. Farai, upon seeing what was happening, said to the Appellant, “No. No. No. Is a cool scene nah, is a cool scene. Dem fellas come out the road to see what going on with me nah.” The Appellant then tucked the firearm into the waistband of his pants. Farai called Mitchell and the deceased over and they had a conversation with the Appellant about the incident which had occurred on April 10, 2008 between him and Mitchell.
6. While this conversation was taking place, Jim Brown (Brown), who was Mitchell’s neighbour, appeared. According to Brown, he was on his way to a mini-mart when he observed the Appellant in what appeared to be an argument with Mitchell, Farai and the deceased. He had known the Appellant for approximately seven or eight years. Brown said that the men

were gesticulating with their hands and were speaking in a loud tone. Brown stood approximately three feet away from the Appellant. He listened to their conversation but did not say anything. He heard the Appellant say that Mitchell was going on the “junction” and telling people that he (the Appellant) was with a ten-year old girl. The Appellant then looked left and right and according to Mitchell, he said, *“It look like allyuh come here to do me something, so let me start it.”* According to Brown, the Appellant said, *“I feel like allyuh going and come to do me ah ting.”* The Appellant proceeded to pull out a firearm, pointed it at Brown and fired one shot, before running off. The rest of the men moved away quickly. The bullet struck Brown on his left shoulder. It exited through his lower left arm and struck the deceased on the right side of his chest. Brown ran along the main road to the Kelly Village taxi stand where he hired a car to take him to the Eric Williams Medical Sciences Complex (“Mt. Hope Hospital”) where he received medical attention. The deceased had gotten to the entrance of Railway Road Bar when he collapsed and succumbed to his injury.

7. Sgt. Lalchan Gobin responded to the report of the shooting and upon arriving at the scene, he observed the deceased’s body lying in the doorway of the bar. The deceased’s body was taken to the Mt. Hope Hospital.
8. On April 14, 2008, Dr. Mc Donald Burris conducted a post-mortem examination on the deceased’s body. She concluded that he died from a gunshot wound to the right side of his chest. The trajectory of the bullet was front to back and upward.

The circumstances, which led to the arrest of the Appellant and the police investigation

9. On June 5, 2008, Police Constable Clarence Jackman was on mobile patrol in the Wallerfield area when he received certain information. Acting on that information, he intercepted a motor vehicle in which the Appellant

was a passenger. The Appellant identified himself as “Sherwin Purcell”, age 35, of La Fortune Road in Febeau Village. Constable Jackman informed him that he was a suspect in a report of murder that took place in the Caroni District on April 12, 2008 and cautioned him. The Appellant made no reply. He was arrested and informed of his rights and privileges before being conveyed to the Arima Police Station. While there, he was cautioned and made no reply. Later that evening, Corporal Nigel Morrain spoke to the Appellant and cautioned him and he responded, *“Is not me who do it.”* The Appellant was transferred to the Homicide Office.

10. On the next day, Sergeant Brandon John and Police Constable Motilal Rampersad approached the Appellant relative to the shooting incident in question. The Appellant stated under caution, *“I did not do that”* and *“I have nothing to say.”* He was subsequently charged with the murder of the deceased.
11. Shafeer Ali, an employee of Railway Road Bar, stated that on the day in question, he heard a gunshot and saw four men running - the deceased; Mitchell (whom he knew as “Natty”); Brown (whom he knew as “Praydi”); and Farai (whom he knew as “Goliath”). He did not see the Appellant on that day. He stated however, that two days prior, on April 10, 2008, the Appellant had contacted him and asked him to look after his house. The Appellant also indicated that the deceased and his friends were looking for him (the Appellant).
12. Lennox Seebaran, the owner of Railway Road Bar, gave evidence that at the material time, he was at work in the bar when he heard a loud noise, “two bangs” which sounded like gunshots. He observed Brown and Mitchell running along the southern side of the Southern Main Road and the deceased running on the northern side. These men were from the village and were known to him. He stated that the deceased ran into the doorway of the bar before slumping to the ground. He enquired from the

deceased what was happening but he got no response. Natasha Ali came to the deceased's assistance.

13. Natasha Ali testified that at the time of the incident, she was walking along the Southern Main Road when she observed Mitchell and Brown "flagging down" a car. She called out to Mitchell but he did not respond. She proceeded to Railway Road Bar where she saw the deceased lying on the ground. She touched his shoulder and called out to him but he did not respond.

THE CASE FOR THE APPELLANT

14. The Appellant elected to give evidence and called two witnesses on his behalf, his friends Anesha Chan Pak and Rudy Mohammed. His case was one of a denial and that he acted in self-defence. He also denied kidnapping and assaulting Mitchell on April 10, 2008.
15. According to the Appellant, it was Brown, who was armed with a firearm on the day in question and that during the course of a struggle with him, it was discharged. He stated that at all times, he was acting in self-defence and that he was not the one who discharged the firearm.
16. The Appellant testified that on April 7, 2008, around 5:45am, he was at his home in Railway Road in Caroni and was washing down his yard when two men, Praydi (Brown) and a man named Hamza approached him. Brown offered to sell the Appellant a mobile phone, which he refused. The men then asked the Appellant to "side with them" in a war between two brothers named Shawnie and Dawnie but he refused. The men then left.
17. Later that morning, around 9:00am, the Appellant was inside his house when he heard his gate open. He looked outside and saw Mitchell and the

deceased entering his yard. He observed that Mitchell was selling cocaine to someone inside his yard and the deceased appeared to be keeping watch on the road. The Appellant went outside and confronted Mitchell and asked him, *"Why you keep leaving up the road and coming down by me to sell Praydi's drugs?"* Mitchell threatened him and an argument ensued between them. The Appellant pushed Mitchell outside of his premises. Mitchell threw a stone at him and indicated that he would tell "Praydi" that he was preventing them from *"eating ah food"*.

18. Later that morning, the Appellant was inside his house when he observed Mitchell, the deceased and two other persons unknown to him walking towards his house. The men began breaking his windows. The Appellant heard Brown's voice saying that he (the Appellant) *"had to pay for this"*. When the men left his yard, he exited through the back door and went to the home of his friend, Rudy Mohammed, in Curepe. He stayed at Mohammed's house until he felt that things had cooled down. Mohammed testified that the Appellant stayed at his home in Curepe for a week prior to the date of the shooting. The Appellant testified that his friend, Anesha, would go to his home and retrieve clothing for him.

19. On April 12, 2008, Anesha was unable to retrieve the Appellant's clothing so he decided to go to his house. Upon arriving, he observed that the tyres on his car had been slashed and that other windows of his house had been broken. He packed some clothing and locked his house. As he was about to leave, he was confronted by two men whom he recognised from the April 7, 2008 incident. One of them was armed with a knife while the other wielded a hockey stick. The man with the knife asked him, *"Whey de effing cocaine?"* and before he could respond, the man with the hockey stick struck him, causing him to fall to the ground. He then stood up and ran towards his front gate where he met Brown, Mitchell and the deceased. Brown was armed with a firearm. He pointed it at the Appellant and said to him, *"Where yuh running going? Ah go kill yuh here today for my effing*

ting.” The Appellant responded, *“All yuh know I didn’t take anything from all yuh. You all want to kill me for stopping “Natty” and Shulah from selling your drugs in mih yard.”* Brown struck the Appellant with his gun and instructed the others to take the Appellant to the back of the yard. Brown was about to hit the Appellant again with the gun when the Appellant grabbed his hand. A scuffle ensued between them and the Appellant attempted to grab the gun from him. During this struggle, the Appellant was stabbed in his back with a knife by one of the other men. A gunshot then sounded. Brown pulled away from the Appellant and the gun fell to the ground. Brown ran away and the other men followed behind him. The Appellant ran through his back yard and went to the house of his friend “Queso”. While at “Queso’s” house, he saw two men whom he knew to be part of Brown’s gang, Hamza and “Goliath”, approaching. The Appellant left “Queso’s” house and hid in some bushes where he called his friend Rudy to pick him up.

20. Rudy Mohammed gave evidence that he picked up the Appellant around 2:30pm that day. He observed that the Appellant had an injury to his lower back. The Appellant however refused medical attention. The Appellant stayed at his home for some time after this.
21. Anesha Chan Pak testified that she was a friend of the Appellant. He stayed at Curepe with her, Rudy Mohammed, Mohammed’s brother and his wife. She stated that she went to the Appellant’s house in Caroni on at least three occasions to retrieve his clothes and a document for him. The Appellant’s front door was open when she visited. On one Saturday when she saw the Appellant, she observed that he had a wound on his lower back. This wound bled for two days. The Appellant refused medical attention so she attended to his injury.

The Appellant's Conversations with Mitchell and Brown in Prison

22. The Appellant testified that while in prison, he met up with Praydi (Brown) and Natty (Mitchell) who were incarcerated at the time. The Appellant gave evidence that he went over to Brown's prison cell and immediately upon arriving, Brown said to him, *"Biter, if I was you, I would ah had to do the same thing to defend myself."*
23. The Appellant also testified that on one occasion, he spoke to Mitchell in prison and asked him, *"Why you cause all this whole scene to happen?"* Mitchell replied that, *"Praydi was the one who had him coming down by him (the Appellant) to sell drugs because he (the Appellant) did not want to side with them for warring with de fellas and dem, Shawnie and Dawnie".*

THE APPEAL

24. Counsel for the Appellant, advanced nine grounds of appeal on behalf of the Appellant.

Ground 1: The learned trial judge erred in law by misdirecting herself on the issue of self-defence by applying the wrong test.

Appellant's submissions

25. Counsel for the Appellant submitted in essence that the learned trial judge misdirected herself on the issue of self-defence at different times in her judgment and applied the wrong test in relation to honest belief and wrongly found that the issue to be determined was whether the Appellant's mistake was reasonable. This resulted in her applying an objective test of reasonableness rather than the applicable subjective test.

Respondent's submissions

26. Counsel for the Respondent, submitted that the test applied by the learned trial judge was well founded. Counsel stated a person might use such force as is reasonable in the circumstances, as he honestly believes them to be, in the defence of himself or another person, as being the test for self-defence. He submitted that the reasonableness of the Appellant's belief is material on which the court could determine whether the Appellant held the belief. Additionally, Counsel submitted that if the Appellant's belief was mistaken and the mistake was an unreasonable one that might be a powerful reason to conclude that the Appellant did not honestly hold such a belief. Counsel for the Respondent also opined that one had to consider whether the Appellant was in fear of an imminent attack and had to defend himself, against the surrounding circumstances. He viewed the Appellant's act as a pre-emptive strike and was of the view that the Appellant formed the belief that was operating on his mind based on his own conduct of the recent past.

Law, Analysis and Conclusion

27. In this case, there were two diametrically opposed accounts of the incident that led to the death of the deceased. One version from the prosecution witnesses, Brown and Mitchell; the other version from the Appellant. On both versions, the issue of self-defence arose. The trial judge rejected the version of the Appellant and accepted the prosecution's version as she was entitled to do as the finder of facts in a Judge alone trial.

28. On the prosecution's version, the trial judge stated her findings of facts, and applied the law of self-defence to those facts. She concluded that the Appellant did not honestly believe that he was going to be attacked. The trial judge therefore found he was not acting in self-defence when he shot the deceased. Having concluded that the act of shooting was unlawful and that the prosecution proved all the other elements of murder, she found the Appellant guilty of murder.

29. The classic pronouncement upon the law relating to self-defence is that of the Privy Council in **Palmer v. The Queen**¹:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters, the good sense of the jury will be the arbiter. There are no prescribed words which must be employed... in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the concept of necessary self-defence. If there has been attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary that would be the most potent evidence that only reasonable defensive action had been taken. ... The defence of self-defence either succeeds so as to result in an acquittal

¹ [1971] A.C. 814

or it is disproved, in which case as a defence it is rejected" (per Lord Morris, at pp. 831-832)."

30. In **R v Williams (Gladstone)**², the English Criminal Division of the Court of Appeal addressed the issue of "honest belief". We now restate the facts as recorded in the headnotes.

31. M saw a youth attempting to rob a woman in the street. He gave chase, knocked the youth to the ground and attempted to immobilise him. The Appellant, who had not witnessed the attempted robbery, then came on the scene. M told the Appellant that he was a police officer, which was untrue, and that he was arresting the youth. When M failed to produce a warrant card a struggle ensued in which the Appellant punched M in the face. The Appellant was charged with assault causing actual bodily harm. At his trial, his defence was that he had honestly believed that the youth was being unlawfully assaulted by M and that it was irrelevant whether his mistake was reasonable or unreasonable. The judge directed the jury that the Appellant had to have an honest belief based on reasonable grounds that M was acting unlawfully. The Appellant was convicted. He appealed on the ground that the judge had misdirected the jury. It was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. **The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all.** It followed that there had been a material misdirection. (emphasis added)

32. In **Williams**, the Court of Appeal allowed the appeal and quashed the conviction and Lord Lane, CJ said the following:

² [1987] 3 All ER 411

“The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at **all**. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of **all**, that **the prosecution have (sic) the burden or duty of proving the unlawfulness of the defendant's actions**, second, that **if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts** and, third, that **that is so whether the mistake was, on an objective view, a reasonable mistake or not**. In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come (sic) to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come (sic) to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it. (emphasis added)

33. In **Beckford v R**³, their Lordships approved of the above passage in **Williams**.

³ [1987] 3 All ER 425

34. In **Beckford**, the Appellant was a police officer who was a member of an armed posse, which was sent to investigate a report that an armed man was terrorising and menacing his family at their house. When the police arrived at the house a man ran out of the back of the house pursued by police officers, including the Appellant. There was a conflict of evidence about what then occurred. The Crown alleged that the man was unarmed and was shot by the Appellant and another police officer after he had been discovered in hiding and had surrendered, while the Appellant claimed that the man had a firearm, had fired at the police and had been killed when they returned the fire. At the trial of the Appellant for murder, the judge directed the jury that if the Appellant had a reasonable belief that his life was in danger or that he was in danger of serious bodily injury, he was entitled to be acquitted on the grounds of self-defence. He was convicted. He appealed to the Court of Appeal of Jamaica, contending that he was entitled to rely on the defence of self-defence if he had had an honest belief that he had been in danger. The Court of Appeal held that the Appellant's belief that the circumstances required self-defence had to be reasonably and not merely honestly held, and dismissed his appeal. The Appellant appealed to the Privy Council.

35. The Privy Council in **Beckford** held that if a plea of self-defence was raised when the defendant had acted under a mistake as to the facts, he was to be judged according to **his mistaken belief** of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self-defence was that a person could use such force in the defence of himself or another that was reasonable in the circumstances, as he honestly believed them to be. It followed that the trial judge had misdirected the jury. The Privy Council allowed the appeal and quashed the conviction.

36. Lord Griffiths in **Beckford**⁴ referred to the Judicial Studies Board's model direction for self-defence that Lord Chief Justice approved. The directions contains the following guidance:

"Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not."⁵

37. Having examined the law of self-defence in some detail, we now turn to how the trial judge directed herself in relation to the issue of self-defence. We will first address her statements of the law on self-defence contained in paragraphs 6, 74, 75, 76, 78, 84, 85 and 86 of the judgment.

"[6] ...The law recognizes the right of an individual to defend himself when he is attacked, even if that self-defence results in death...

[74] A person who is attacked is entitled to defend himself, even if such defence results in the death of the attacker... If there has been no attack, then the issue of self-defence does not arise...

⁴ Lord Griffith reflected on the history of the common law in relation to "honest belief". He noted the fact that prior to **DPP v Morgan** the whole weight of authority supported the view that it was an essential element of self-defence not only that the *accused believed* that he was being attacked or in imminent danger of being attacked but also that such belief was based on *reasonable grounds*. Lord Griffith recalled that it was not until 1898 that an accused was able to give evidence in his own defence and it was natural that the judges, in the absence of any direct statement of his belief from the accused, should have focused attention on the inference that could be drawn, from the surrounding circumstances. He noted that judges still gave directions to include "reasonable grounds" even after 1898. At page 433 in **Beckford**, Lord Griffith commented on the practice in Jamaica of Appellants declining to give evidence in their own defence and to relying on a statement from the dock. He stated: "now that it has been established that self-defence depends on a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

⁵ Beckford at page 433

[75] An accused is entitled to raise self-defence where he believes that it was necessary to use force to defend himself from an attack or an imminent attack. In defending himself, an accused must use reasonable force in the circumstances, as he honestly believes them to be. The defence cannot succeed where the tribunal of fact does not believe that an accused needed to defend himself or where the tribunal of fact is sure that the degree of force used was, more than was reasonable in the circumstances, as an accused believed them to be...

[76]...the State must satisfy me to the extent that I am sure, that King did not honestly believe that at the time he shot the deceased, he needed to defend himself against an attack. If I am sure, that King did not honestly believe that it was necessary to defend himself, in the circumstances, as he perceived them to be, then the defence fails and I can find him guilty of murder.

[78] If I am sure, that King believed that the shooting was necessary to defend himself or if I am unsure, that he did not believe that it was necessary to defend himself, then the plea of self-defence remains available. The State then has to go on to satisfy me, so that I am sure, that King's actions were not a reasonable response, in the circumstances, as King perceived them to be. If the State proves, that his actions were not a reasonable response in the circumstances, as King genuinely perceived them to be, then the plea of self-defence fails and King would be guilty. If, however, the State fails to prove that the response was not reasonable in the circumstances, as King perceived them, I must find him not guilty.

[84] I looked at the case for the defence first. If I accepted the case for King that he did not shoot the deceased or I am unsure whether he shot the deceased, I must find King not guilty. **If I do not accept King's denial, then I must go on to consider whether he genuinely believed**

that he needed to defend himself. If I do not accept that Brown threatened King and pointed a gun at him, or I do not accept that King, otherwise apprehended an attack upon himself, the issue of self-defence does not arise. If I accept, that Brown pointed a gun at King or that King otherwise apprehended an imminent attack upon himself, self-defence becomes a live issue.

[85] I then have to turn to the case for the prosecution to see whether they have satisfied me beyond a reasonable doubt that King did not genuinely believe that he needed to defend himself. If the State proves, that King did not genuinely believe that he needed to defend himself then the plea of self-defence fails. If the State does not satisfy me so that I am sure that he did not genuinely believe, that he needed to defend himself, the plea of self-defence remains available.

[86] The State then has to satisfy me so that I am sure that the shooting was not a reasonable response in the circumstances, as King perceived them to be. If the State so satisfies me, the plea of self-defence fails and King will be guilty. If they fail to so satisfy me, then I must find King not guilty. In other words if the State fails to disprove self-defence, I must find King not guilty.” (emphasis added)

38. Having reviewed the directions contained in these paragraphs, we begin by saying that the directions, which a trial judge gives in a case, are fact sensitive. It is not necessary to give full directions on self-defence in every self-defence case. For example, “honest belief” will not be relevant in every self-defence case. We find however, that “honest belief” was a live issue in this case and it was therefore necessary for the trial judge to direct herself in relation to it.

39. In paragraphs 6 and 74 of the judgment, we note that the statements in relation to self-defence do not include imminent attacks or honest belief

of an imminent attack. The trial judge began paragraph 6 with the words “the law” and paragraph 74 with the words “a person”. The use of these words in these paragraphs confirms for us that the trial judge was making general statements in relation to self-defence as the court did in **Palmer** and not specific statements on the law in relation to the case. We find there is no error with the trial judge’s directions in paragraphs 6 and 74.

40. In paragraph 75, the trial judge explicitly states that a person can defend themselves not only when there is an attack but also when there is an imminent attack. She referred to honest belief when addressing reasonable force - *“an accused must use reasonable force in the circumstances as he honestly believes them to be.”* The trial judge refers to “an accused” in this paragraph and not to “the accused”. In this paragraph as well, the trial judge is speaking in general terms about self-defence and not in relation to the specific facts of this case. We find there is no error in the trial judge’s directions on self-defence in paragraph 75.

41. In paragraph 78 of her judgment, the trial judge properly directs herself on the issue of “honest belief” and in paragraphs 84, 85 and 86, on the consequences of her believing or disbelieving the Appellant’s honest belief to defend himself.

42. The trial judge acknowledged that in this case self-defence arose on the case for the Appellant and on the case for the State. However, she did not accept the evidence of the Appellant on the issue of self-defence. See paragraphs 97⁶, 102⁷ and 104⁸ of her judgment. Nor did she accept the

⁶ “I did not accept King’s version of events because it was inconsistent and I found that King was not a credible witness. His recount of events were (sic) highly implausible and I found him to be an unreliable witness.”

⁷ “I did not accept that either of the two unknown men struck King and he ran to the front where he encountered the deceased, Mitchell and Brown.” confronted with it.

⁸ King said that while he was struggling with Brown the man with the hockey stick struck him. Having already rejected that the incident of April 7, 2008, took place it was not difficult for me to find that these two men who King allegedly recognised from that incident were not present

evidence of the Appellant's two witnesses. See paragraphs 106⁹ to 111.

43. The trial judge then considered the basis of self-defence on the case for the State. She did so by reviewing the evidence of King and Mitchell and the circumstances of the case. This was to enable her to determine whether the prosecution satisfied her, to the extent that she was sure, that King did not honestly believe that he needed to defend himself in the circumstances, as he perceived them to be. See paragraphs 125 to 133. We agree that this approach was necessary in the absence of evidence from the appellant in relation to this version of events, which is the subjective limb of the two-staged test of self-defence.

44. The trial judge considered, inter alia, the following in her review of the circumstances to determine if the appellant honestly believed that he was going to be attacked:

"[125] The incident of April 10, 2008, assisted me in understanding clearly what happened on April 12, 2008....

[126]...I am satisfied so that I am sure, that when Mitchell and the deceased approached, King apprehended some type of confrontation...;

[127] King knew all the parties in this incident. He knew their affiliations and their reputations and given what he knew of them, he had reason to believe that a confrontation was inevitable. They were known to move as a unit; according to the witness Shafeer Ali they had a reputation of not being afraid of anyone.

on April 12, 2008. I also found that King was not attacked with a hockey stick nor stabbed in his back with a knife."

⁹ "I did not accept the evidence of the two witnesses called to support his testimony." – Para. 106 of the judgment of the trial judge

[128]The incident of April 10, 2008, best explains King's reaction and his state of mind. I am satisfied so that I am sure that is why King pulled out the gun when Mitchell and the deceased approached him and Farai had to assure him that it was a cool scene. King was expecting some sort of retaliation from Mitchell or one of his group.

[129]...I am not sure that Mitchell was calmly explaining himself as he alleged. The evidence of Brown who from a distance got the impression that an argument was taking place supports this.

[130] What was King's perception of the circumstances in which he found himself? He had kidnapped Mitchell, who, with the deceased and Brown were a tight unit. Mitchell and his group were now confronting him since the kidnapping. He must have felt that they were out for retaliation for the kidnapping and this is reasonable in the circumstances."

45. In our view the trial judge's analysis reflected in her findings in paragraphs 125 to 130 led her to the conclusion that the Appellant felt that the group consisting of David, Farai, Mitchell and the deceased were as the trial judge puts it "out for retaliation". We have no reason not to accept her analysis and the basis of her analysis. This analysis was followed by her directions in paragraphs 131 to 134:

"[131] King did not have to wait for anyone in the group to attack him, once he genuinely perceived that he was in danger, he was entitled to act to stave off an attack..."

46. This first sentence in paragraph 131 is an accurate statement of the law.

47. However, in the same paragraph 131, the trial judge states the following:

“[131]...Even if King were mistake (sic), the issue is whether his mistake was reasonable in the circumstances, as he believed them to be. In other words, even though he was mistaken, was it reasonable, in the circumstances, that he believed existed, for him to feel the need to defend himself?”

48. Thereafter, the trial judge then directs herself to determine whether the mistake was reasonable. Apart from what appears to be some typos in this paragraph, we are of the view that the trial judge conflated the issues of mistake and reasonable belief. In any event, the only possible way in which this paragraph could be understood is that after alluding to the fact of the Appellant’s honest belief, that they were out for retaliation, the trial judge engaged in an analysis of whether or not such a mistake was reasonable and found that it was not.

49. Paragraphs 132, 133 and 134 reveal the trial judge’s thought process which showed that the judge took into consideration objective factors to determine what ought to be a subjective test, that is the “honest belief” of the appellant that the group was out for retaliation.

50. For ease of reference, see paragraphs 132, 133 and 134:

[132] I found that King, even in the circumstances as he perceived them to be, was not mistaken and did not genuinely believe that he needed to defend himself. On the case for the State, King did not see anyone armed, so he had no idea of the gravity or the extent of any proposed attack. There were four men, he was alone, however, he was already assured and believed that the other three men were not intending to harm him, hence the reason he put away the gun, in the first instance. The only potential threat was the newly arrived Brown. While he is entitled to defend himself in the face of an attack or an imminent

attack, he is not entitled to eliminate a potential threat, which may or may not materialize, in the absence of an imminent attack.

[133] Brown said nothing to him, neither Brown nor the others made any threats to him, no one advanced towards him, no one was instructed to attack him. No one reached for any weapon. There is no evidence that an attack was imminent. There was no indication of any attack or impending attack by Brown or his group. While King is not obligated to retreat in the face of an attack, I took into account that he failed to retreat when it was possible to so (sic). Brown and the others did not attack, even if King thought he was going to be attacked, he did not even try to retreat or de-escalate the situation. He could have used the gun to hold the men at bay to make an escape; instead, his first and only intuition was to attack. He was the aggressor, the only aggressor. This is evidenced by his words "Let's start this" before firing the shot. Nothing "was started"; nothing began before he fired the shot. I found that King did not genuinely believe that he needed to defend himself in the circumstances, as he perceived them to be. I found that his actions were aimed at eliminating a potential threat that may never have materialized. His attack was not because of a genuinely mistaken belief that he was under attack or that an attack was imminent. I found that he was the aggressor. The plea of self-defence fails. I now turn to consider whether the State has proven all the essential elements of the offence beyond a reasonable doubt.

[134] Having found that King was the aggressor and that he shot at Brown without legal justification, I am satisfied beyond a reasonable doubt that he unlawfully shot Brown. I am further satisfied that when he shot at Brown he had the intention to kill him or cause grievous bodily harm by the fact that he discharged a lethal weapon at his chest. The bullet having passed through Browns shoulder and lodge in the chest of the deceased, based on the doctrine of transferred malice I

attributed King's intention when he shot Brown to the deceased, even though the deceased was not the intended victim. I am satisfied that King had the requisite intention to kill or cause grievous bodily harm when he shot the deceased. I am further satisfied, so that I am sure, that it is that single bullet that entered the chest of the deceased that caused his death. I am further satisfied that the deceased died the same day of receiving this injury. The prosecution has satisfied me beyond a reasonable doubt of all the essential elements of the offence."

51. We find that the trial judge misdirected herself in paragraphs 131 to 133.

In our view, the trial judge in effect accepted that the Appellant honestly believed that the group was seeking retaliation for the kidnapping of Mitchell a few days before. However, she revisits this finding by then asking herself whether the 'mistake' was reasonable and relying largely on objective factors to determine this subjective aspect of the test of self-defence. This was contrary to the law as explained in **Williams** and adopted in **Beckford**.

52. In **Beckford**, while it was permissible to consider the circumstances, to decide whether it was reasonable or not for the Appellant to have such an honest belief, once the tribunal of fact makes such a finding that such an Appellant honestly apprehended an imminent attack, whether or not the mistake was reasonable was irrelevant. In this case, however, the trial judge had the benefit of the oral utterances of the Appellant immediately prior to shooting from the evidence of Brown and Mitchell - two State witnesses. Brown said the Appellant said *"I feel like allyuh going and come to do me ah thing' and he out with ah gun and he shot me and he ran off."* Mitchell said the Appellant said: *"like allyuh come here to do me something. Let us start it"*. This, inter alia, was vital evidence of what was operating in the mind of the Appellant.

53. Having regard to our analysis above, we find that this ground of appeal has merit.

Ground 2: The learned trial judge's finding that the defence of self-defence was disproved is unreasonable and/or unsupported by the evidence. As a result, the verdict is unreasonable and/or cannot be supported having regard to the evidence.

54. We are not quite certain if this ground states what Counsel for the Appellant meant to argue. The trial judge did not make a finding that the defence of self-defence was disproved. Instead, what she found in essence, as stated in Ground 1, was that the Appellant did not honestly believe that there was a need to defend himself and therefore the issue of self-defence failed. Because of her finding, she did not have to consider whether the force used was reasonable. As far as the trial judge was concerned, there was no basis for the Appellant to raise the issue of self-defence.

55. We agree as stated in ground 1 that the trial judge erred in her consideration of self-defence for the reasons therein stated.

Ground 3: Failure to Put - The learned trial judge erred in law in disregarding parts of the Appellant's evidence on the basis that the Appellant failed to put aspects of his case to prosecution witnesses.

56. Under this ground, the Appellant submitted that the judge did not place sufficient weight to the Appellant's evidence as the judge reasoned that relevant aspects of the Appellant's case were not put to the prosecution witnesses, Mitchell and Brown. The Appellant submitted that the judge was inaccurate or unfair in the way she viewed the Appellant's evidence and what was put towards the aforementioned witnesses. The witnesses

were rigorously cross-examined and the Appellant in putting forward his case, allowed the witnesses to accept, deny or explain the Appellant's version of the case. If the judge reasoned that the Appellant's case was not put, then the judge failed to consider the reasons why certain evidence was not put. Additionally, the relevant evidence, which the judge reasoned was not placed before the witnesses was not relied upon by the prosecution. Therefore, the judge was plainly wrong to rule that the Appellant's case was not put to these witnesses.

57. The Appellant's case was based on self-defence. From the cross examination of Mitchell on September 16, 2021, it was put to him that he went to the Appellant's house on April 7, 2008 to sell drugs. The Appellant confronted Mitchell and his brother, the deceased, about selling drugs. The Appellant stated that Mitchell indicated that he will alert another accomplice, Praydi, that the Appellant was trying to stop them from selling drugs. All of these assertions were denied by Mitchell. It was also put to Mitchell that the deceased was shot from a gun belonging to Praydi. This was also denied by Mitchell.

58. From paragraph 98 of the judges' reasons, the judge stated that there was a failure to put aspects of the Appellant's case to the prosecution witnesses. In failing to put forward the case, the prosecution did not have an opportunity to accept, deny, or explain aspects of the Appellant's case and so the judge did not place weight to the Appellant's case. For example, the issue of Brown having fired a shot before the Appellant's gun fired was never put to the prosecution. One of the prosecution witnesses, Lennox Seebaran, heard two shots, while another witness, Shafeer Ali, heard one. But this aspect was not put and so the evidence of the prosecution witnesses was not fully tested.

59. It is a general rule of evidence that a party when cross-examining a witness is required to put the material aspects of his case to the other side if he

wishes to submit to the court that the evidence should not be accepted on that point: **Phipson on Evidence**¹⁰. This is a rule of fairness that enables the witness the opportunity of explaining any contradictions in his evidence. Where material aspects of the case are not put this disentitles the attorney from relying on it in closing addresses. This is one aspect of the issue.

60. The question that arises is whether the finder of fact, the judge in this case, is entitled to go a step further and draw an adverse inference impacting on the witness' evidence for a failure to put a material aspect of the case.

61. In **Jackson v The State PC**¹¹ the failure to put aspects of the defence case came into focus. The trial judge had pointed out the fact that aspects of the case were not put to the witness and noted that the evidence of the witness "went in unchallenged so to speak". It was also explained to the jury, however, that they were required to look at the totality of the evidence from both sides. Notwithstanding the failure, the judge told the jury that they had to look at the evidence and not fault the accused for omissions to put the aspects of the case or hold it against the accused because the accused may have forgotten something. There may be a variety of reasons why a fact may not have been put. The judge also pointed out that there was no opportunity for a police officer to reply to an important suggestion because the matter had not been put. Lord Nolan speaking for the Board at page 441 stated:

"The matters upon which Mr Pantor omitted to cross-examine the prosecution witnesses were important, and the omissions were quite properly raised by Mr Mohammed in the presence of the jury. In the absence of any explanation from Mr Pantor the judge had to deal with them as best as he could."

¹⁰ (17th edition) para 12-12

¹¹ (1998) 53 WIR 431

62. In **Anderson Mapp and Darryl Bissoon v the State**¹², the Court of Appeal at paragraph 112 noted:

“Counsel further submitted that the judge’s directions clearly illustrated the distinction between what is evidence and what is put. The judge also gave a general direction regarding the failure to put instructions to a prosecution witness. She was astute to remind the jury that the failure by counsel to put the matter in cross-examination could be attributable to a variety of reasons and therefore the failure to put it should not be held against the accused or used as a basis for drawing adverse conclusions against him.”

63. The court of appeal concluded that the directions were “balanced and fair” in the circumstances. It follows from this statement of the law therefore that the judge as fact finder has to look at the failure to put material allegations in a balanced and fair manner and that failure to put should not generally be held against the accused or be viewed as a basis for drawing adverse conclusions against him.

64. Quite apart from the failure to put however is the principle that material inconsistencies can impact on the reliability of a witness’ evidence.

65. What then was the approach taken by the judge? In her judgment there were several occasions where she indicated she did not place much weight or did not place any weight on the evidence of the Appellant because the contentions he advanced in evidence had not been put to the prosecution witnesses, Mitchell or Brown. These included:

“[91] I did not accept that the incidents related by King of the April 7, 2008, occurred. I found that King’s account was implausible, incoherent

¹² Crim App Nos 13 and 14 of 2012, delivered 21 July 2016 (Weekes JA, Soo Hon JA, Mohammed JA)

and inconsistent. According to King, he knew Brown and Hamza before, they were not friends. He had several prior fallings out with Brown. Brown and he were not friends, neither was he friends with Hamza. Why would they want King to side with them in a war? I found that highly unlikely. **King said that Brown and Hamza were warring against Dawnie and Shawnie. However, that was never put to Brown or Mitchell. What was put to Brown was that Dawnie and Shawnie were warring among themselves and Brown wanted him to take a side. Of course, that makes even less sense than what King said. While what was put is not evidence, it demonstrates that the State's witness was not confronted with King's version on this issue. I placed no weight on what King said on this issue, as Brown was not tested on it in cross-examination.** This notion that Brown would ask King an acquaintance with whom he had had fallings out according to King, to be part of some faction was illogical and unlikely. I did not accept that this exchange took place.

[92] I also found it highly unlikely that Mitchell would come later and open King's gate, enter his yard to sell someone cocaine. This was impractical and nonsensical. Mitchell could have easily and furtively, conducted the sale on the roadway. If King claimed that Mitchell was selling drugs in front his house, on the roadway that would have been more plausible. There is no reason for Mitchell to go into his yard to sell cocaine. Why would someone come off the street to go into King's yard to buy cocaine? It just did not make sense. King allegedly pushed Mitchell out of his yard but what of the person to whom he was selling. No mention was made of him it is almost as if he did not exist. I found incident as related by King highly implausible and I did not accept that this occurred.

[93]... I found that King was not being truthful when he recounted this event hence the reason he forgot to mention Brown, who was

supposed to be the protagonist. Whereas it was put to the witnesses that there were four persons Brown, Mitchell the deceased and an unidentified person, according to King it was four plus the disembodied voice of Brown. **Again only what King said and the denial of the prosecution witnesses is the evidence on this issue, however this was also another instance where the witnesses were unable to accept, deny or explain King's version of events. I did not put much weight on King's evidence on this issue.**

[95] Brown denied that he went to King's residence and asked him for his drugs and he threatened King because he could not find drugs that he, Brown had stashed in King's place. King made no mention of this and claimed that he was inside pretending not to be home during this incident. I therefore accepted the evidence of Brown that he never threatened King and that he had not stashed drugs at Brown's house.

[96] **I looked at the inconsistencies in King's testimony and the fact that he gave a different version than that that was put to the witnesses. It meant therefore that the prosecution witnesses were not challenged with some of the issues that arose on King's version of what transpired later that morning. I placed little weight on the untested assertions of King.** I considered King's three convictions and his kidnapping of Mitchell, noting that it did not mean that King was incapable of speaking the truth. However, because of the inconsistency and implausibility of the events of April 7, 2008 I was not convinced that he was being truthful. I did not accept his evidence on this issue. I therefore found as fact that the incidents of April 7, 2008 did not occur and therefore I placed no reliance on them in understanding the events of April 12, 2008.

Do I accept King's version of events?

[97] I did not accept King's version of events because it was inconsistent and I found that King was not a credible witness. His recount of events were (sic) highly implausible and I found him to be an unreliable witness.

[98] **Several aspects of the case for the defence were not put to the prosecution witnesses. Questions asked by counsel is not evidence, the evidence is the response of the witness. I drew no adverse inference or ascribed any fault to King for the failure to put certain parts of his case to the prosecution witnesses. I acknowledge, however, that the prosecution witnesses were robbed of the opportunity to accept, deny or explain those aspects of the defence case. In those circumstances, I placed little weight on those aspects of the defence case.**

...

[101] The issue of Brown firing a shot before the gun allegedly went off during the struggle was never put, to the prosecution witnesses. The witness Seebaran spoke of hearing a bang and described it as two shots. Ali spoke of hearing one shot. **Ali was never discredited on this issue and in light of King's failure to confront any of the prosecution witnesses on there being more than one shot, I placed no weight on the evidence that Brown fired a shot before the gun went off in the alleged struggle.** I did not accept that Brown fired a shot before the shot that killed the deceased.

[102] I did not accept that either of the two unknown men struck King and he ran to the front where he encountered the deceased, Mitchell and Brown. The prosecution witnesses denied that Brown, Mitchell and the deceased confronted King. That he tried to run and he could not run because the two men were in front by the car. **They were never confronted with the version advanced by King in his evidence in chief, of being confronted firstly the two unknown men and then by**

Brown's group at the front of the house. That version of King's case was never put to the prosecution witnesses and therefore it remained untested. I placed no reliance on it and I did not accept it.

[103] **It was put to Brown he asked King for his F---g cocaine. However according to King it was one of the unknown men who had asked for the cocaine and when he encountered Brown, Brown said he would kill him for his F---g thing. I placed no weight on this assertion by King because the witnesses for the prosecution were not confronted with it.**

...

[111] **Given the inconsistencies and implausibility in the case for the defence, I did not accept King's case. His version of events varied on crucial issues from the version that was put to the prosecution witnesses. The State's witnesses were not confronted with his version of events and therefore I placed little weight on his assertions.** The fact that I found him to be not credible as regards the events of April 7, 2008, also made him not credible in so far as his defence was entwined with the alleged events of April 7, 2008. I took into account his previous convictions and I acknowledged that even though he was less likely to be truthful, it did not mean that he was incapable of speaking the truth. However, having regard to the factors mentioned above I was satisfied that he was not speaking the truth. I did not find him a credible or reliable witness and I did not accept his version of events." (emphasis added)

66. There were several occasions where the judge stated she either did not place any weight or did not attach much weight to aspects of the Appellant's evidence because these specific matters were not put to the prosecution's witnesses. In fairness, the judge did also say she drew no adverse inference against the Appellant for the failure to put aspects of the defence case to the prosecution witnesses. When one looks at the analysis

as a whole also there were other reasons identified why she did not accept the Appellant's evidence. She found the Appellant's account of the April 7, 2008 incident to be "implausible, incoherent and inconsistent". She found the version "illogical and unlikely". Another assertion was "impractical and nonsensical". She stated there was "no reason for Mitchell to go into his [the Appellant's] yard to sell cocaine". The incident related by the Appellant was "highly implausible". The judge stated there were "inconsistencies in King's testimony and the fact he gave a different version than that that was put to the witnesses". The judge further noted the "inconsistency and implausibility of the events of April 7, 2008" as related by the Appellant. She mentioned again his account was "inconsistent" and "highly implausible". There were "inconsistencies and implausibility in the case for the defence" she noted.

67. The judge identified matters not put to the prosecution witnesses but also evidence of the Appellant that was inconsistent with what was put to the prosecution witnesses. In the mix was the implausibility of his evidence, as she determined it.

68. It is difficult to separate the judge's analysis into compartments. The judge was entitled to find that the Appellant's version was implausible. She was also entitled to consider inconsistencies between what was put to the prosecution witnesses to evidence given by the Appellant to the extent that these occurred.

69. While the **Jackson** case suggested the judge had to make what could be made of failures to put aspects of the case to the other side, **Mapp and Bissoon** spoke of not drawing any adverse inference against the accused. Placing no or little weight to the evidence is drawing an adverse inference. The judge was not entitled, based on the **Mapp and Bissoon** case, to disregard or give no weight to aspects of the evidence that had not been put to the prosecution witnesses because, as the cases show, there may be

a variety of reasons, not ascribable to an accused, why his lawyer may not have put particular aspects of the case. To the extent that she did this, the judge erred.

70. The question that follows is, does this error contaminate the judge's other views about the implausibility of the Appellant's evidence and inconsistencies between what was put and what he said. In other words, did these instances of attaching no weight to the evidence or discounting his evidence for the reason of not putting aspects of the case colour the judge's other reasons sufficiently to make her rejection of the Appellant's evidence unfair?

71. This occurred of course even before the judge went on to consider the prosecution's case. She was only entitled to consider the prosecution's case if she had rejected the defence case. If she was unsure of the defence case, that had to be the end of the matter. The judge identified a number of instances where this failure to put certain specific aspects of the case influenced her.

72. In addition, it is to be recalled that an attorney need not put every bit of instructions, with mathematical particularity, in a case once the case has been put broadly enough that the witness can fairly respond. It is clear that the main tenets of the defence's case were broadly put to the prosecution's witnesses. Given the number of instances identified by the judge where she discounted the Appellant's evidence on this ground it is not possible to divorce this aspect from her other legitimate reasons for rejecting his case. Her rejection of the case was the compendium of these reasons. To the extent that she was influenced by a factor she was not entitled to, the basis of the judge's rejection of the Appellant's evidence was, respectfully, undermined.

73. The judge was required to consider all the evidence and evaluate it, notwithstanding the failure to put aspects of it to the prosecution witnesses. The approach of disregarding aspects of the evidence or placing no weight on it solely or largely because it was not put, is not an approach sanctioned by the authorities cited above. The judge or jury is required to grapple with the evidence nevertheless and determine where the plausibility and credibility assessment of that evidence carries the case. We also observe that had the judge reminded herself in her judgment of the principles stated in the authorities of how the failure to put aspects of one's case should be approached, and that all that is needed is for the case to be put in clear and broad terms, she would not likely have fallen into the error which she did.

74. We therefore find merit in this ground.

Ground 4: Bullet trajectory

The learned trial judge failed to consider the scientific evidence of the bullet's trajectory through Brown and the deceased and whether that evidence was inconsistent with the State's version of events.

75. The Appellant submitted that the trajectory of the bullet is an important consideration in the matter. The Appellant's case was that Brown had the gun, which discharged during a scuffle between Brown and the Appellant. Based on the evidence in the form of a Post-Mortem Report of the deceased, Dr. McDonald Burris concluded that the deceased died of a gunshot wound to the right chest and that the trajectory of the bullet was front to back and upwards. The Respondent adduced evidence of a medical report evidencing that Brown received a gunshot wound with an entry point in his arm and exit point in his arm. The Appellant posited that based on this evidence, it was likely that Brown and the Appellant were lower in a bent or sideways position during the scuffle while the deceased was

standing in higher position. Therefore, the bullet hit the deceased while travelling upwards (relative to the ground) but appears to have passed through Brown in a downward direction (relative to his body, which was bent or sideways relative to the ground). The judge made no mention of this aspect of the Appellant's case.

76. The evidence of the bullet trajectory is shown in the Post Mortem report dated April 14, 2008: direction of bullet – upwards and backwards, from front to back, left to right. Dr McDonald Burris concluded in the summary of opinion of cause of death that the deceased died from a gunshot wound to the chest. The medical report of Brown dated April 12, 2008 showed that the bullet entered his shoulder and exited his arm.

77. At the trial during the examination of Brown on September 8, 2021, Brown indicated that the bullet entered his left shoulder and exited his lower left arm.

78. The judge's reasons do not mention the trajectory of the bullet.

79. The primary importance of the post mortem report was to establish the cause of death of the deceased. The report established that the deceased died from a gunshot injury to the right chest. There was also a medical report that Brown, the witness, was shot and the report showed an entry and exit wound in his left arm. In an appropriate case evidence relating to entry and exit wounds can be used to proffer an opinion on the relative positions of the shooter and the victim. If the bullet exits and strikes another person, as was the prosecution's case here, evidence can probably show what may have occurred after the bullet exited the first person and entered the second. For this to be done, there has to be evidence elicited on the issue. This could arise from the examination in chief or cross-examination of the forensic pathologist. Further, another expert can be

called to give evidence, which can support or dispute the version of the forensic pathologist.

80. These experts can demonstrate how they came to their conclusion by, for example, giving evidence on the angle of the wounds, the likely path it took, and the characteristics of the wounds which could show which was an entry and which was an exit wound etc. They may be able to show the basis by giving evidence of measurements and observations which they made. This can then be compared to known scientific writings or their relative experience.

81. What, however, is untenable is for Counsel to seek to proffer a theory in the absence of supporting evidence. This calls for speculation, which is impermissible.

82. Brown's evidence was that the bullet entered his left upper arm and exited his lower left arm. He demonstrated this to the judge at the trial on 8 September 2021.

83. Counsel for the accused submitted that the "trajectory" of the bullet was inconsistent with the prosecution case. Counsel suggested that if the accused and Brown were facing each other, and the deceased passed behind Brown, it would be impossible or at least highly improbable for the bullet to have passed through Brown in a downward direction and then through the deceased in an upward direction.

84. In closing submissions, Counsel submitted to the judge:

"I want to still visit the issue of the medical of Mr. Jim Brandon Brown. The medical indicates that the trajectory -- entry wound came through the left shoulder and exited in the left arm. **And yet, that would indicate a downward trajectory, if one takes what is said in the**

medical. And that is not consistent with what happened to the deceased. If we are taking it as he said, they were standing -- well, one went behind the other -- one would not expect that the trajectory of the -- with respect to the deceased, is in the direction given, especially in light of the fact that it's supposed to be a downward direction leaving the first, Jim Brandon Brown. So, to me, that only makes sense -- **the trajectory only makes sense if they are in fluid motion, which would be consistent with a fight, people all over, people up and down and it's not people standing directly in front of each other. So that if it is that you have one telling you downwards -- leaving one downward, and the other one is the -- the post-mortem is saying, "going upwards" that tells you that it isn't as Jim Brandon Brown said. Because, how is it that the bullet is leaving downward and yet entering the person, the deceased, going upward."** (emphasis added)

85. Counsel submitted that this was all a matter of common sense, ordinary logic and experience that could be posited without the need for expert evidence on this point. It was further submitted that this was a weakness on the prosecution's case, which the prosecution had to prove by calling expert evidence on.

86. We are unable to agree with this. If such a theory was to be posited it could not come forward in the closing address of counsel without some foundation in the evidence. The forensic pathologist had to have been cross-examined on this matter to give legs to such a contention. There may have been a perfectly clear scientific explanation for this occurrence. It was not open to counsel to speculate on this matter, which is what he sought to do. Further, the judge could not leap to then consider that this theory was consistent with the defence's case of there being some struggle at the point in time.

87. The judge had the benefit of seeing and hearing Brown's evidence and had the post mortem report. The judge was entitled to consider that and therefore had the opportunity to form a view on the matter. The judge was also entitled to accept that there was no issue raised in the evidence that the deceased was shot, that he died from a gunshot injury and that the accused had fired the shot which struck him. There was no evidence that another shot was fired or that there was a second shooter.

88. In the absence of the issue being developed in the case, the judge was right not to accept counsel's invitation, based on his theory, to speculate. This ground of appeal is therefore without merit.

Ground 5

The learned trial judge erred in law when her ladyship failed to uphold the submission of no case to answer, the prosecution having adduced no evidence of identification.

89. Counsel for the Appellant submitted that the prosecution failed to adduce any evidence of an essential element of the offence, that is, the identification of the Appellant as the perpetrator of the offence up until the close of the case for the prosecution. Specifically, they contend that there was no identification procedure conducted by the police to enable the prosecution's identification witnesses to identify the Appellant, as the perpetrator of the offence. The prosecution's case was that the eyewitnesses Brown and Mitchell had a conversation with "Bita" or "Biter" or "Bitar" and that he shot the deceased. However, there was no evidence to support that person referred to as Bita, Biter or Bitar, was the Appellant in this matter. Counsel for the Appellant contended that the prosecution was put on notice that identification was an issue during the Preliminary Inquiry.

90. Counsel for the Respondent contended that this ground of appeal has no merit as this case was not an identification type case in the classic sense, but rather it was a recognition case. Counsel for the Respondent submitted that the trial judge had various strands of evidence before her in the prosecution's case, for coming to her decision that identification was not an issue. The prosecution relied on the evidence of Brown, Mitchell, PC Rampersad and Supt. John in support of their contention that identification was not an issue.

Decision of the trial judge

91. After hearing the submissions of the parties on the issue of identification the trial judge ruled that:

“... I do not agree that there is no evidence of identification. I do not know that a dock identification in these circumstances would have taken us any further. I do not know how helpful a verification exercise would have been. At no point in time was the identity of the Appellant challenged in any way. And on the authority of cases like, the case cited by the State which is *Ellis v Jones*,... *Bruce v his Majesty's Advocate*, *Robson v His Majesty's Advocate* and *Ram and another v DPP*, I am satisfied that there is sufficient evidence of identification to be left to a jury...”

Law, analysis and conclusion

92. The normal function of an identification parade is to test the ability of the witness to identify the person who allegedly committed the offence and to provide safeguards against mistaken identification. An accused person can be identified by way of an identification parade or by other means, such as confrontation, group identification or even by dock identification.

93. An identification parade ought to be held where: the witness had no previous knowledge of the suspect and saw him commit the crime; where the witness or suspect are not known to each other; or where the witness claims he knows the suspect and the suspect denies it.¹³ An identification parade would not be held if it is not useful or practicable to hold one.¹⁴ In this case the Appellant did not dispute the identification during the course of the investigation. According to Counsel for the Appellant, the Appellant raised this issue during the preliminary enquiry. It is also the Appellant's case that the court should dismiss the case because of the prosecution failure to identify the accused.

94. The prosecution's case against the Appellant was based on recognition and for this reason an identification parade would have served no useful purpose. The prosecution's case was based, *inter alia*, on the identification evidence of Brown and Mitchell. Both these witnesses said they knew the Appellant before and they knew him by his nickname and from around the village. The lack of identification evidence was not an issue for the defence during the prosecution's case against the Appellant. If identification was in fact an issue, one would have expected the Counsel for the Appellant to test the identification evidence of these witnesses and to put that they were in fact mistaken. This was not done. Even if this was an error or omission on the part of the Counsel for the Appellant, one would have equally expected that a ground of appeal would have been that the trial judge failed to direct herself along the lines of **Turnbull**¹⁵ because there was no such direction given by the trial judge. However, there is no such ground of appeal. The Appellant's case was never that of mistaken identification. Instead, it was that of denial, self-defence or alternatively accident. In fact, the Appellant in his case admitted having an encounter

¹³ John v State of Trinidad and Tobago [2009] UKPC 12

¹⁴ Trinidad and Tobago Gazette, 16 September 1994 Vol 33, No 190

¹⁵ R v Turnbull [1977] QB 224

on the day of the incident with Brown and Mitchell, but gives a different location of that incident and describes the circumstances differently.

95. In refusing to uphold the no case submission, the trial Judge relied on **Ram v DPP**¹⁶, **Robson v H.M. Advocate**¹⁷ and **Ellis v Jones**¹⁸. In summary, these cases suggest that in the absence of expressed identification, a judge can look at the indirect and circumstantial evidence before them to decide, by implication that the Appellant was the person who committed the offence.

96. In the case of **Ram**, the victim said that he had been assaulted by Ram and Passelle. There was no identification parade, confrontation exercise or identification parade. During cross-examination, no questions were put to the victim as to the identity of the accused. But at the conclusion of the prosecution's case, there was a submission of no case to answer. The trial judge rejected it and the case proceeded. Ram and Passelle appealed the decision of the trial judge to proceed with the case in light of the lack of identification evidence from either witnesses.

97. On appeal, Mann J in delivering the judgment in **Ram**, stated that the court of appeal had to assess two questions. Firstly, whether before making the no case submissions, the Appellant's counsel contended and put to the prosecution's witnesses, that the Appellants were not the perpetrators. Secondly, whether in the absence of identification evidence, the trial judge was justified in finding that the Appellants were the persons responsible for assaulting the victim. In answering the second question, Mann J concluded that the trial judge was justified in rejecting the no case submission. He held that:

¹⁶ 1896 QB 686

¹⁷ 1996 S.C.C.R. 340

¹⁸ 1973] 2 All ER 893

“The persons before them had confirmed their names. The injured party had given the names of those who assaulted him and said that he knew them at school. There was there (sic) material warranting the rejection of the submission.”

98. Mann J also noted that none of the prosecution witness were questioned nor did the defence ever put to them as their case, that the men named as the perpetrators were not the persons and that they did not commit the offences.

99. In the case of **Robson** the Appellant was charged with lewd practices towards two children. At trial, one of the child victims clearly identified the accused, whereas the other child victim did not. The children’s parents had given indirect identification evidence of the Appellant. In delivering the Judgment Lord Justice- Clerk in coming to his decision referred to the case of **Bruce**, which stated that the identification of the accused as the person who committed the offence should not be left to be implied. The court in **Robson** found that there was no good reason why the prosecution did not follow the rule in **Bruce**. However, notwithstanding that fact, the court went on to assess whether the circumstantial and indirect evidence, led on behalf of the State, was sufficient to prove that the offence was committed by the accused. The court found that concerning the detailed evidence, which the parents gave, as well as the evidence of the children victims, there was sufficient evidence for the jury to draw the inference that the Appellant was the man who committed the crime.

100. There was no identification procedure done in this case. What was before the court was indirect evidence that Brown and the accused knew each other for at least 1 year and that for that year they saw each other every day at various times of the day, whether it be day or night. Brown also indicated that when he saw the accused, he would usually “hail” him and that he saw the accused about 1 or 2 nights prior to the shooting. This

was one of the strands of indirect evidence, that the trial judge had before her in coming to her decision.

101. There was also the evidence of Mitchell. In examination in chief, Mitchell testified that the Appellant, Richie and Anthony kidnapped him on April 10, 2023. Mitchell stated that he knew the Appellant from the village for some months prior to the kidnapping on 10 April and that he would often hail him when he saw him. He said when Biter kidnapped him he was less than 1 foot away from him and there was nothing obstructing his view.

102. From the evidence of the witnesses, it was open to the trial judge to draw the inference that the man to whom the witnesses called and referred to as “Biter” was the Appellant who stood in the dock.

103. The fact that the case for the Appellant was never that of mistaken identification but instead that of denial, self-defence and accident assists us in concluding that there is no merit whatsoever in the ground of appeal.

Ground 6 – The trial judge’s error in limiting the use of the bad character evidence of the prosecution witnesses, Mitchell and Brown, for the purpose of credibility only.

The previous convictions of the prosecution witnesses Mitchell and Brown

104. At the trial, defence counsel was permitted to cross-examine the prosecution witnesses Mitchell and Brown as to their previous convictions. In relation to Mitchell, four previous convictions were admitted pursuant to **section 15M(1)(b) of the Evidence Act Chapter 7:02** as the judge found them to be of substantial importance in the context of the case as a whole¹⁹. These previous convictions were for the offences of possession of

¹⁹ See the Judge’s Rulings - Transcript dated September 1, 2021 at page 11; Transcript dated September 10, 2021 at page 4.

marijuana for the purpose of trafficking (2018), possession of cocaine for the purpose of trafficking (2015), housebreaking and larceny (2014) and robbery with violence (2010). In respect of Brown, his previous conviction for possession of marijuana (2018) was admitted pursuant to **section 15M of the Evidence Act**²⁰. The judge also admitted the Appellant's evidence of the incident which was alleged to have occurred on April 7, 2008 (referred to at paragraphs 16-18 above) as reprehensible conduct as she considered it to be important explanatory evidence.

105. The trial judge at paragraph 56 of her reasons limited the use of the bad character evidence in respect of Mitchell and Brown to an assessment of credibility only. She stated that,

“[56] The respective convictions of both men were allowed into evidence as relevant to their credibility only. The defence is saying that because of these convictions it is less likely that these witnesses are speaking the truth. I cannot and did not use the evidence of the convictions to establish propensity to behave in any manner alleged by the defence, except for untruthfulness. When deciding whether what the witnesses said, in relation to the shooting was true, I took into account their respective convictions.”

106. Counsel for the Appellant submitted that the trial judge erred in law by limiting the use of the bad character evidence of the prosecution witnesses for the purpose of credibility only. He submitted that the evidence was also relevant to the issue of propensity and that it had the potential to lend credence to the Appellant's case. He contended that Mitchell's convictions for possession of dangerous drugs for the purpose of trafficking were relevant to showing a propensity towards drug activity and thus had the

²⁰ See the Judge's Ruling - Transcript dated September 10, 2021 at page 4.

potential to make it more likely that he was selling drugs in the Appellant's yard on April 7, 2008. Counsel for the Appellant further submitted that Mitchell's previous conviction for the offence of robbery with violence demonstrated that he had acted violently in the past and that this had the potential to support the Appellant's case that Mitchell and his group were the aggressors who attacked him.

107. In the decision of this Court in **Marlon King v The State Crim. App. No. S002 of 2012**, the Appellant was convicted of the murder of the daughter of his common-law wife, four-year old Amy Annamunthodo (the deceased). The main witness for the prosecution was the Appellant's friend, Andre Rocke (Rocke).

108. Rocke gave evidence that on the day in question, he was in the downstairs area of the Appellant's home, smoking a cigarette. He was leaning against one of the middle pillars of the house and after two to three minutes, he felt the house vibrating. He became curious and went up the front stairs and peeped through a hole in the door. He saw the deceased hanging from a cloth, tied by her hair. Her feet were off the ground and she was swinging back and forth. She was not crying. Her mouth was tied with what appeared to be a plastic bag and she was dressed in a pair of underwear alone. He saw the Appellant cuffing her on her chest and rib area about twenty to thirty times, saying to her, *"Hush your mouth. Hush your mouth. You wouldn't hush your mouth."* Rocke observed all of this over a period of two minutes. On seeing what was happening, Rocke became frightened and did not know what to do. He descended the stairs and attempted to contact the police on his cell phone about two to three times but was unsuccessful. He thereafter left for his house.

109. The post-mortem examination report revealed that the deceased suffered extensive injuries, including bruises on her face, neck, chest, belly, shoulder, hands and pelvis. There were scrapes on her neck and chest and

belly. There were burns, resembling that from a cigarette, on her chest, belly, thighs and private parts. There was bruising and bleeding on her scalp. One of her right ribs was fractured and several of her organs were bruised, including the thymus, lungs and liver.

110. At the trial, the defence was permitted to lead evidence of Rocke's bad character. He had a previous conviction for malicious wounding. He also misconducted himself a few months prior to the deceased's death, during an incident at the house where he accused the Appellant's common-law wife, Anita, of stealing his sim card from his cell phone. He armed himself with a knife from the kitchen and threatened to kill her. The Appellant proceeded to chase him away with a hayfork. It was suggested that as an act of revenge against Anita, Rocke lied about having witnessed the Appellant beating the deceased. It was suggested that he was the one responsible for deceased's injuries which led to her death. In relation to this evidence, the judge directed that jury that, *"When assessing Rocke's evidence you are entitled to take into account his conviction for wounding and the fact that he has acted in the past aggressively towards another in the form of his alleged 'grandcharging'."*

111. On appeal, counsel for the Appellant submitted that this direction was insufficient. He submitted that the judge should have directed the jury that Rocke's conviction for malicious wounding together with evidence of his reprehensible conduct of "grandcharging" with a knife, may have demonstrated his propensity towards violence in that they were similar in nature to the offence charged. This Court stated at paragraph 72,

"72. In this case, the judge admitted the evidence of Rocke's bad character in the form of his previous conviction and his past reprehensible misconduct as being relevant solely to his credibility. In doing so, he correctly outlined the statutory considerations as set out under section 15M(3) of the EAA. **However, it is clear to us that the**

issue to which the bad character evidence related was that Roche's violent behaviour was potentially relevant to both his credibility and his propensity to commit the offence. Roche's propensity became central to the Appellant's defence when the Appellant attacked Roche's character suggesting that he was a violent person and might have committed the subject offence. Undoubtedly, these issues were of substantial importance to the case. With respect to the substantial probative value of the evidence in relation to these issues, we consider that the case for the Appellant was that he did not inflict the injuries on the deceased which caused her death. Instead, he suggested that Roche was responsible for her death. The evidence of Roche's bad character was of substantial probative value in relation to the identity of the person who committed the offence and was of substantial importance in the context of the case as a whole. The bad character evidence was important to demonstrate that Roche might have had a propensity to violence and thus it was plausible that he was responsible for inflicting the fatal injuries on the deceased. Accordingly, we find that the judge erred in not directing the jury on the propensity limb of Roche's bad character." (emphasis added)

112. In the decision of **R v Kelly**²¹, the Appellant was convicted of the offence of bigamy. She married one Robert Atkinson on September 7, 1996. They had one son who was born in 1993. They separated in 2001 but did not divorce. Atkinson learnt, however, of the Appellant's plans to remarry. On August 20, 2005 the Appellant went through the wedding ceremony with her new partner. At the trial, it was agreed that she was still married at the time to Atkinson. The prosecution's case was that she knew that she was still married to Atkinson when she purported to marry her new partner. The case for the Appellant was that Atkinson had a propensity for forging public documents and, on this occasion, out of spite, he had forged another

²¹ [2008] EWCA Crim. 1456

document and sent it to the Appellant to persuade her that they were divorced. The Appellant's case was that she believed she had been divorced and claimed that she had been "set up" by Atkinson who was bitter because of the intended marriage and wished to humiliate her. It was alleged that Atkinson forged and sent to the Appellant what purported to be a decree absolute, so as to make her believe they had in fact been divorced and she was free to go through with the marriage ceremony.

113. At the trial, Atkinson was questioned about his previous convictions. He had several convictions, including one for the offence of making a false statement to obtain benefits, two for using an altered vehicle excise license, and one for using false instruments to obtain property by deception.

114. On appeal, the Appellant's complaint was that the trial judge directed the jury in relation to Atkinson's credibility but not his propensity to either use false documents or to act deceitfully. While the Court's decision on that issue is not relevant to our analysis in this ground, it is noteworthy that it was accepted that Atkinson's previous convictions were relevant not only to the issue of his credibility, but also to establish his propensity for dealing with forged documents.

115. In the decision in **R v GH**²², the Appellant, G, appealed against his conviction for robbery. G had been charged with two robberies which had taken place at the same premises within one month. He was convicted of the second robbery but the jury had been unable to agree in relation to the first. He had denied involvement and alleged that a third party, H, was responsible. H, who was called by the prosecution to give rebuttal evidence, also denied involvement. Under section 100(1)(b), (3)(c) and (d) of the **Criminal Justice Act 2003** of the United Kingdom, the judge admitted

²²[2009] EWCA Crim. 2899

evidence of H's previous conviction for theft on the basis that the offence had taken place only eight days before the first robbery which G had been charged with and at the same premises. The judge however excluded evidence of two robbery convictions which H had acquired some six years earlier, on the basis that their facts bore no relation to those robberies which G was charged with, one being a street robbery and one being the robbery of a train passenger. The prosecution submitted that s.100 did not permit the admission of evidence of the propensity of a non-defendant to commit the crime in issue.

116. In allowing the appeal, the court found that the judge had misconstrued the meaning of s.100. The court stated that notwithstanding that s.100 made no specific reference to propensity, it was not limited in such a way as to exclude evidence either of the propensity of a non-defendant or his credibility since both might have substantial probative value in relation to a matter in issue in the proceedings, such as the identity of the perpetrator. The court found that G had been deprived of the opportunity of putting to H, in the presence of the jury, not only that he was a thief, but that he was also one who was prepared to use violence to achieve the objective of his theft and a highly misleading picture had therefore been painted. The court stated that the adduction of offences such as the earlier robbery convictions was permitted by s.100, notwithstanding that they were of a different character. They were relevant, both to show the propensity of H to use violence in order to steal and also as going to his credibility.

117. The decisions in **Marlon King, Kelly** and **GH** all demonstrate that in order to adduce propensity bad character evidence in respect of a non-defendant, the evidence must be relevant to a matter in the proceedings that is of substantial probative value. The utilisation of bad character evidence in relation to a non-defendant for the purpose of an assessment of propensity is entirely context-dependent and involves a fact sensitive

analysis. A relevant consideration in that analysis is that such evidence cannot be amorphous, unanchored and “at large”. The evidence must be of a nature that has the potential to segue into an ingredient of the offence for which the defendant is charged or be capable of demonstrating that the non-defendant has a propensity to commit the specific offence for which the defendant is charged. Without excluding the possibility of other factual scenarios, we can identify two contexts which would distinctly give rise to this. The first is where the defendant alleges that it is a prosecution witness who has committed the offence for which he is charged and alleges that this witness is purveying a false account (see, for example, **Marlon King**).

118. The second is where the issue of self-defence arises and a propensity to engage in violent conduct may be relevant, for example, in ascertaining whether the victim may have been the aggressor. Neither of these situations remotely arise in this case. It is apparent to us that the trial judge was mindful of this when she delivered her **first** Oral Ruling on the Application to adduce Bad Character Evidence of Mitchell and Brown, in which she admitted three of Mitchell’s previous convictions (one for the possession of cocaine for the purpose of trafficking, one for housebreaking and larceny and one for robbery with violence). The trial judge stated that²³,

“In relation to the application under Section 1B, the Defence stated that the bad character evidence has substantial probative value in relation to matters, which are in issue in the proceedings and are of substantial importance in the context of the case as a whole. In particular, the identity of the person who committed the offence, the motive of the witnesses, the defence of self- defence and the credibility and/or creditworthiness of the witness.

²³ Transcript dated September 1, 2021 at page 6, lines 34-47.

The Defence made a bare application. It did not establish how the proposed bad character evidence is capable of identifying the person who committed the crime. They did not indicate how the evidence is capable of establishing motive and they did not establish whether motive is a substantial issue in this case.” (emphasis added)

119. Later in her ruling, the trial judge said²⁴,

“Is the bad character evidence of substantive probative value in relation to the matter in issue in the proceedings? This assessment is by definition highly fact sensitive in each case...

...

It is an assessment of whether the evidence in question substantially goes to prove the point which the Applicant wishes to prove on the issue in question. The issue will often, but not always be easy, the propensity of the person against whom the application is made to behave in a particular way or his credibility. The probative value of the evidence at Bar holds to be assessed in the context of the case as a whole. This means that it may, in some cases, be appropriate to consider whether or not it adds significantly to other more probative evidence directed at the same issue.

...

Now, the Defence has not stated what conduct they are relying on based on any of the pending matters or convictions to support a propensity of the witness to behave in a particular way, whether that behaviour is carrying guns, shooting at persons or otherwise being violent to others. Clearly, therefore, they are not relying on propensity as an issue between the State and the Defence. The application mentioned motive. The State does not have to prove motive and the Defence has disclosed no motive of the witnesses.

²⁴ Transcript dated September 1, 2021 at page 8, line 29 to page 9, line 36.

Motive is not a substantial issue between the State and the Defence; therefore, the bad character evidence cannot be admitted to prove motive. But it's not probative -- right? -- highly probative." (sic) (emphasis added)

120. We note that in her **second** Oral Ruling on the Application to adduce Bad Character Evidence of Mitchell and Brown²⁵ (in which she admitted Mitchell's previous conviction for possession of marijuana for the purpose of trafficking and Brown's previous conviction for possession of marijuana), she did not specify whether those previous convictions were being adduced for the purpose of an assessment of the witnesses' credibility or propensity. It is reasonable to deduce however, having regard to the nature of these previous convictions, the judge's prior bad character ruling and her written reasons, that she also considered them to be relevant to the issue of credibility only.

121. The previous convictions of Mitchell were for the offences of trafficking of dangerous drugs namely marijuana and cocaine, housebreaking and larceny and robbery with violence. The previous conviction of Brown was for the offence of possession of marijuana. These previous convictions were not relevant to establish the identity of the person who discharged the firearm on the day in question, nor did they establish a propensity to commit the offence of murder or any ingredient thereof. As well, in the absence of any particulars surrounding Mitchell's previous conviction for robbery with violence, this evidence was grossly insufficient to demonstrate that he had a propensity to commit acts of violence of the nature suggested by the Appellant. In our view, there was an absence of a clear, causal connection between the witnesses' previous convictions and their propensity relative to the offence of murder, for which the Appellant was charged, or any ingredient of that offence.

²⁵ See the Judge's Ruling - Transcript dated September 10, 2021 at pages 3-4.

122. Thus, even though the previous convictions of a non-defendant, admitted solely on the basis of credibility, are capable of being used for any other purpose for which they are relevant²⁶, including issues of propensity, based on the factual scenario of this case, there was no scope for the application of a bad character propensity self-direction in relation to Mitchell and Brown's previous convictions.

123. Based on the foregoing, we are of the view that the judge was correct in limiting the use of the bad character evidence of the prosecution witnesses, Mitchell and Brown, to an assessment of their credibility only. No nexus was established between those previous convictions and the core issues in this case.

The reprehensible conduct

124. The judge admitted the Appellant's evidence of the incident which was alleged to have occurred on April 7, 2008 (referred to at paragraphs 16-18 above) as reprehensible conduct as she considered it to be important explanatory evidence. The judge at paragraph 83 of her reasons stated that,

"[83] This evidence was adduced because King is saying that without it, I would find it difficult to understand the case and this evidence is important in understanding the case as a whole. I have to determine if these allegations are true. If I find that these incidents occurred, then I can use them to assist me in understanding the events of April 12, 2008, otherwise I can place no reliance on it. The incident of April 7, 2008 does not make it any more or less likely that Brown behaved in the manner alleged by King and provides no support for the case for the

²⁶ Marlon King v The State (supra); R v Highton [2005] 1 WLR 3472 at para 68.

Defence. It also does not make it more or less likely that Brown was the aggressor.”

125. Counsel for the Appellant submitted that this evidence, if accepted, tended to show that the basis for the dispute between the Appellant and Brown, Mitchell and the deceased was as a result of the Appellant preventing Mitchell from selling drugs on his property and his refusal to side with Brown in a war. According to him, this was evidence of a motive of Brown, Mitchell and the deceased in attacking the Appellant on April 12, 2008. Counsel for the Appellant further submitted that the evidence was also capable of showing a propensity on the part of Brown, Mitchell and the deceased in acting aggressively towards the Appellant.

126. Counsel for the Appellant’s submissions on this issue completely elides the consideration that the trial judge at paragraph 91 of her reasons stated that she did not accept that the incidents related by King which were alleged to have transpired on April 7, 2008, occurred. The judge found that his account of the incidents was implausible, incoherent and inconsistent. No complaint was raised as to this finding. This, in our view, is dispositive of Counsel for the Appellant’s contention in relation to the issue implicated in this part.

127. For all of these reasons, we find no merit in this ground of appeal.

Ground 7: The trial judge erred in misusing the particulars of the bad character evidence relative to the prosecution witness and failed to address her mind to the fact that such evidence severely undermined the credit-worthiness of the said witnesses.

128. In cross-examination, the prosecution witness, Mitchell, admitted that he had four previous convictions – one for possession of marijuana for the

purpose of trafficking, one for possession of cocaine for the purpose of trafficking, one for housebreaking and larceny and one for robbery with violence. He however tried to downplay the circumstances of these convictions, which were referred to by the trial judge at paragraph 55 of her reasons,

“[55] ...He (Mitchell) countered that the conviction for possession of marijuana for trafficking was long after the incident, which resulted in his brother’s death. At the time of the shooting, he was not involved in the illegal drug trade. He contended that the robbery with violence was not what it seemed. **Although he pleaded guilty, for the possession of cocaine, the cocaine did not belong to him and he pleaded guilty to assist a friend who had a young child.** His more recent conviction for trafficking in marijuana was not for trafficking but he smoked marijuana and he preferred to buy in bulk for his personal use.”
(emphasis added)

129. In cross-examination, defence counsel probed Mitchell’s evidence that he only pleaded guilty to the offence of possession of cocaine for the purpose of trafficking in order to assist a friend who had a young child. Counsel’s interrogation eventually led to an admission by Mitchell that in effect, he had no difficulty in lying to the court if it suited him. The trial judge specifically took into account this evidence and stated at paragraph 120 of her reasons:

“[120] **Mitchell admitted that he had at least four convictions and tried to downplay them. He also admitted that he had no difficulty in lying to the court if it suited him. I took this into account, when assessing his evidence and I approached his evidence with caution.** Because Brown supported his evidence on how the shooting unfolded and I accepted his evidence on this issue. Shafeer Ali, Natasha Ali and Lennox Seebaran, witnesses who had no interest in the outcome of this

matter, supported Mitchell on what transpired after the shooting. Therefore, despite Mitchell's bad character I accepted his evidence on how the shooting unfolded." (emphasis added)

130. It is Mitchell's evidence that he had no difficulty in lying to the court and the trial judge's manner in treating with it which is the subject of the complaint in this ground of appeal. Counsel for the Appellant submitted that Mitchell's bad character and his admission of dishonesty had the effect of severely undermining his creditworthiness and that the judge's mere statement that she approached his evidence with caution was wholly insufficient in dealing with this evidence. He submitted that the judge provided no or no adequate analysis capable of showing how she found Mitchell to be a reliable witness despite his convictions and admission of dishonesty.

131. The judge in her reasons factored into account Mitchell's previous convictions and his admission of dishonesty to the court in respect of one of them. It is evident from her reasons that she was acutely aware of Mitchell's character, which would have precipitated her decision to approach his evidence with caution. The judge at paragraph 56 of her reasons was mindful of the position of the defence in relation to the previous convictions of the prosecution witnesses, that it was less likely that they were speaking the truth. She stated that when deciding whether what the witnesses said in relation to the shooting was true, she took into account their respective convictions. The judge went on to say at paragraph 57 that,

"[57] The fact of the convictions did not mean that these witnesses were incapable of speaking the truth; neither did it make their testimony inherently unreliable. I had to determine if and to what extent the convictions assisted me in deciding whether the witnesses were speaking the truth in this case. Their convictions were one of

many factors I took into account in determining whether they were speaking the truth.” (emphasis added)

132. The judge stated at paragraph 113 that she was satisfied that the prosecution witnesses Mitchell and Brown were being truthful in respect of the material issues in the case. In her assessment of whether Mitchell and Brown were credible and reliable witnesses, the judge at paragraphs 113 to 121 meticulously marshalled the matters which she factored into account. In summary, she found that,

- (i) Their evidence was plausible and coherent and their version of the events was compelling and provided the only logical explanation for the incident.
- (ii) Even though the previous convictions of Mitchell and Brown made it less likely that they would be truthful, it did not render them incapable of speaking the truth.
- (iii) The prosecution witnesses Lennox Seebaran and Shafeer Ali, who were not connected to the incident, supported their evidence as to the direction in which they ran off and who was present at the material time. As well, Natasha Ali, who was also unconnected to the incident, supported Brown’s evidence that he “flagged down” a car after the shooting occurred.
- (iv) Any inconsistencies in their evidence were inconsequential as they did not go to the major issues in the case. As well, the judge considered their explanations for the inconsistencies to be reasonable and plausible.

- (v) Mitchell and Brown's evidence were consistent in relation to how the shooting unfolded.

133. Counsel for the Appellant contended that the trial judge found that Mitchell's evidence was supported in certain aspects by the evidence of Brown but failed to assess this in light of the case advanced by the Appellant, that they colluded to fabricate the evidence against him to absolve themselves. The judge explicitly gave consideration to the position of the defence, that in light of the previous convictions of these witnesses it was less likely that they were speaking the truth. Implicit in this assertion was an allegation of collusion between the witnesses. In any event, it is manifest that the fact that Mitchell's evidence was supported in material aspects by Brown's evidence was only one factor which the judge took into account in finding that they were truthful witnesses.

134. Having regard to the foregoing, we are of the view that the trial judge's finding, that the prosecution witnesses Mitchell and Brown were credible and reliable, cannot be assailed. In arriving at her decision in respect of these witnesses' credibility and reliability, the judge took into consideration all of the relevant matters and accurately directed herself on the applicable legal principles where necessary. In relation to the witness Mitchell, in particular, the judge was careful to apply the relevant caution direction having regard to what was revealed in his evidence and explained with sufficient particularity her reasons for finding him to be a truthful witness, notwithstanding his previous convictions and explicit admission of dishonesty to the court in relation to one of those convictions.

135. This ground of appeal is therefore without merit.

Ground 8: The trial judge’s failure to give consideration as to whether the prosecution witnesses Mitchell and Brown were witnesses with an interest to serve

136. Counsel for the Appellant submitted that the trial judge erred in failing to direct herself as to whether the prosecution witnesses Brown and Mitchell had an interest to serve and failed to give consideration as to whether their evidence ought to have been approached with caution.

137. In **Blackstone’s Criminal Practice**²⁷, under the *rubric “Witnesses whose Evidence May be Tainted by an Improper Motive”*, the learned authors stated that,

“At common law, a judge is obliged to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, the strength of advice varying according to the facts of the case (Beck [1982] 1 All ER 807).”

138. The learned authors go on to state at **F5.5**, under the *rubric “Care warnings”*, that,

“In appropriate circumstances the jury should be warned to exercise caution before acting on the evidence of certain types of witness, if unsupported. Whether a warning is given is a matter of judicial discretion dependent on the particular circumstances of the case, and failure to give a warning therefore will not necessarily furnish grounds for a successful appeal, even if all members of the appellate court would have given a warning (see, e.g., BJ [2020] NICA 5). Equally, if a warning is given, the strength of warning and the extent to which the judge should elaborate upon it, also turn on the particular

²⁷ 2021. at F5.14

circumstances of the case. The categories of witness that fall to be considered, for the purposes of considering whether to give a care warning, are:

- (a) accomplices giving evidence for the prosecution and complainants in sexual cases (which fall to be considered together);
- (b) other witnesses whose evidence may be unreliable;
- (c) witnesses whose evidence may be tainted by an improper motive;
- (d) children; and
- (e) patients at a secure hospital.”

139. In the decision of **Soman Rampersad and Ors. v The State**²⁸, this Court addressed the issue of the necessity for a care and caution warning in cases involving a witness with an interest to serve. In that case, it was alleged that the Appellants went to the home of Ashook and Geeta Singh and, among other things, set it on fire. Ashook and Geeta’s two young daughters perished in that fire. The Appellants were jointly charged with the murder of these two girls and were convicted. At the trial, Ashook was one of the prosecution’s main witnesses. There was evidence which suggested that there was a history of “bad blood” between Ashook and the Appellants. On appeal, one of the complaints raised by the Appellants was that the trial judge failed to direct the jury that Ashook had an interest to serve and therefore his evidence should be treated with special caution. At paragraph 48, the Court stated that examples of witnesses with an interest to serve include, “*those acting out of self-interest or motivated by prejudice or spite*”. The Court in that case referred to the decision in **R v Makanjuola; R v Easton**²⁹ in which Lord Taylor stated the principles relevant to the formulation of a care warning in respect of the unsupported evidence of accomplices and victims of sexual offences, who might have an interest to serve.

²⁸ Cr. App. Nos. 17, 18, 19, 20, 21 and 22 of 2015

²⁹ [1995] 1 WLR 1348

140. At paragraph 52 of **Soman Rampersad and Ors.**, the Court referred to the decision in **R v Pringle**³⁰ in which the Judicial Committee of the Privy Council provided further guidance on the treatment of witnesses with interests to serve. In that case, one of the Appellant's grounds challenging his conviction for murder related to the prosecution evidence of a statement from a former cellmate whom he claimed was a prison informer with an obvious interest to serve. It was contended that this was tainted evidence and should have been the subject of directions which were not given by the trial judge. The Court in **Soman Rampersad and Ors.** at paragraph 53 distilled the relevant principles which were stated in **Pringle** as it relates to the care and caution warning relative to a witness with an interest to serve:

“First, there must be an evidential basis for establishing that the witness has an improper motive. Second, where there is evidence of such motive, the trial judge must bring this to the attention of the jury. Third, the jury should be directed to be cautious before accepting that evidence.”

141. Further, the Court in **Soman Rampersad and Ors.** at paragraph 54 reiterated that a trial judge retains a discretion to warn the jury to exercise caution whenever he considers it appropriate to do so, whether in respect of an accomplice or a complainant or any other witness. In **Makanjuola**, Lord Taylor stated that where the trial judge has exercised this discretion, a superior court would be disinclined to interfere unless the trial judge's decision was unreasonable in the **Wednesbury** sense. In **Soman Rampersad and Ors.**, the Court ultimately concluded that the trial judge was justified in exercising her discretion and concluding that there were no special features in the case which required a special warning. The Court was satisfied that the issue as to the care and caution in which the jury

³⁰ [2003] UKPC 9

were to approach the evidence of Ashook was clearly and unequivocally conveyed to them in this case. The Court went on to state that the trial judge's cautions met with the minimum requirements and that there was no basis for interfering with her discretion.

142. Turning to the present case, Counsel for the Appellant contended that the trial judge ought to have directed herself as to whether the witnesses Mitchell and Brown were witnesses with an interest to serve based on the following:

(a) At the trial, it was suggested to these witnesses in cross-examination that they were fabricating their evidence because they were the ones who had attacked the Appellant, Brown being armed with a firearm, and were ultimately responsible for the deceased's demise.

(b) The Appellant gave evidence that on separate occasions, while in prison, he had a conversation with both witnesses wherein they allegedly made certain admissions of their involvement in line with the Appellant's version of events. These alleged admissions were referred to in more detail at paragraphs 22 and 23 above.

143. It is apparent that the basis for a consideration as to whether Mitchell and Brown were witnesses with an interest to serve and the requisite special caution contended for by Counsel for the Appellant, arose solely from the Appellant's assertions. Against that context, it is necessary to underscore that in this case, there was no overt, independent evidence which suggested that the witnesses had fabricated the case against the Appellant. On the contrary, there was evidence from witnesses called on behalf of the prosecution, who were unconnected with the shooting incident, who supported aspects of the evidence of these witnesses. It is also pertinent that, in relation to the Appellant's evidence of the alleged admissions made by the witnesses during their conversations in prison,

while the witnesses admitted that conversations took place between them, they categorically denied the statements attributed to them by the Appellant.

144. It is therefore unsurprising that at the Ensor Hearing³¹, neither the prosecutor nor the defence raised any issue of Mitchell and Brown being witnesses whose evidence was tainted by an improper motive or who had an interest to serve.

145. In the absence of any evidential basis for establishing that Mitchell and Brown had an improper motive and were witnesses with an interest to serve, we are of the view that this was not a live issue in the case. There was therefore no need for the trial judge to give consideration as to whether a special care and caution warning was required in weighing the evidence of these witnesses.

146. We are mindful however that the trial judge stated that she approached Mitchell's evidence with caution, although this caution was necessitated as a result of Mitchell's previous convictions and his admission of dishonesty to the court in relation to one of those convictions. Even if it could be said that the evidence in this case established an improper motive on the part of Mitchell and Brown (which we do not find) and that it was thus incumbent on the judge to treat them as witnesses with an interest to serve, we are of the view that in the factual milieu of this case, such a warning would have satisfied the minimum requirement of the self-direction in respect of Mitchell. Although no similar caution was applied in relation to Brown, we are of the view that no prejudice would have accrued to the Appellant. We considered this based on the fact that the prosecution's case, on the face of it, would have been capable of being

³¹ See the Transcript dated November 8, 2021 at pages 36-39.

sustained based on the evidence of Mitchell and the other witnesses who were not involved in the shooting incident.

147. Accordingly, this ground of appeal is without merit.

Ground 9: The learned trial judge misdirected herself by juxtaposing the evidence of Brown and Mitchell with that of the Appellant, without considering the evidence of the neutral witnesses Shafeer Ali and Kathleen Mitchell insofar as there were aspects of their evidence which tended to support material aspects of the case for the Appellant.

148. The Appellant submitted that one of the prosecution's witnesses, Shafeer Ali, gave evidence that supported the Appellant's case. Aspects of Ali's evidence was that he knew the Appellant for a few months but were not friends; he knew Brown, the Mitchells, and Goliath; and the Appellant asked Ali to monitor his house two days before the incident because he feared that the deceased, and the three others were looking for him. While the prosecution and the defence gave different motives for the altercation on April 12, 2008, the Appellant submitted that the evidence of Shafeer Ali, an impartial witness, who conversed with the Appellant on April 7, 2008 favours the version put forward by the Appellant. In that version, the Appellant feared for his life after he refused to side with Brown in a dispute he had with others and when he stopped Brown, Mitchell and the deceased from selling drugs in his yard.

149. Further, the Appellant submitted that the evidence of Kathleen Mitchell, the mother of Mitchell and the deceased, did not support the case of the prosecution. In particular, Kathleen Mitchell's evidence was that on April 10, 2008 she did not find anything wrong with either of her sons. This, the Appellant suggests, casts doubt on Mitchell's evidence that he was kidnapped and beaten. The judge did not take into account the

evidence of Shafeer Ali or Kathleen Mitchell supported the Appellant's case.

150. At page 44 of the notes of evidence dated September 6, 2021, during the examination of Shafeer Ali, he indicated that he knew the Appellant for a few months. The Appellant had moved into a house two houses away from Shafeer Ali's bar. Ali also indicated that the Mitchell brothers were always together and did not fear anyone. He said the Appellant was a good-natured person. He further stated that the Appellant had called him two days before the incident. The Appellant seemed afraid and stated to Ali that he was trying to avoid the Mitchell brothers and their accomplices.

151. During the cross-examination of Kathleen Mitchell, the mother of Mitchell and the deceased, stated that on the day the deceased was kidnapped she did not notice anything unusual about the deceased nor did she know if he went to the hospital.

152. Mitchell's evidence was that on April 10, 2008 he was at a football pitch playing football with friends. A green coloured vehicle stopped next to the pitch and three men exited the vehicle, the Appellant, another person by the name of Richie and a third whom he could not identify. He knew the Appellant for a few months but not well. The men forced him into the vehicle. The person he did not recognize held onto his arms while the Appellant made remarks to him about him telling others that the Appellant was with a ten-year-old girl. The Appellant was armed with a firearm which he pointed to Mitchell's face. He was eventually released. During cross examination Mitchell was asked whether he was specific in his statement to the police that he was hit in the face or ribs and he said he was not specific.

153. The Appellant's evidence was that on April 10, 2008 he was at his home cleaning. He saw two men known as Praydi and Hamza. One of the men

told him that they were in a dispute against two other persons and they wanted the Appellant's support against the two. He refused and they left. Later that day Mitchell and the deceased showed up at his house with two other men. The deceased was selling drugs and he told the deceased not to do so. Mitchell threatened him and threw a stone at him. Mitchell, the deceased and the two men left. They eventually returned and broke windows to the Appellant's house. They left afterwards. The Appellant then made his way to a friend's house. The Appellant eventually returned to his home. He was accosted by Mitchell, the deceased and two others. All four of the men approached him. One had a knife, the other a hockey stick. The men threatened the Appellant and a fight started. During the altercation a gun shot was discharged and the Appellant ran away and went to the home of another friend. During cross-examination, the Appellant stated that he did not kidnap Mitchell.

154. At paragraphs 113 to 116 and 122 of the ruling, the judge found that the evidence of Mitchell and Brown was credible. While there were some inconsistencies amongst the various witnesses such as Shafeer Ali and Lennox Seebaran, overall the judge felt that it did not touch on the major issue that the Appellant shot the deceased. The judge accepted that Brown knew the Appellant and vice versa to provide a solid basis for recognition.

155. With respect to the incident on April 12, 2008, the judge found as a fact that the Appellant did kidnap Mitchell because of the rumours Mitchell were spreading. The kidnapping led to the confrontation on the 12 April. Mitchell and the deceased approached the Appellant and Brown followed thereafter. Brown stood between the Appellant and the deceased. The Appellant pulled out a firearm, and stated something to the effect that they were going to do him something and let us start this. The Appellant fired a shot. The shot went through Brown's arm and into the chest of the deceased. There was only one shot.

156. This is what the judge said:

“Are the witnesses Mitchell and Brown credible and reliable?”

[113] I found that the evidence of the prosecution witnesses were plausible and coherent. Their version of events made sense and provided the only logical explanation for the incident. Their version was coherent and compelling. Even though the convictions of Mitchell and Brown made it less likely that they would be truthful, it did not render them incapable of speaking the truth, in this case, based on how they recounted what happened on April 12, 2008 I was satisfied that they were being truthful on the material issues.

[114] Seebaran and Ali supported their evidence as to in what direction they ran off and who was present and was running after the shooting. Natasha Ali supported Brown’s evidence that he flagged down a car after the incident. These witnesses did not mention seeing two other persons or anyone with a hockey stick. In other words, I found support for parts of their evidence from persons not connected to the events.

[115] There were apparent inconsistencies in some of the testimony but I found they did not go to the major issue, which was whether King had shot the deceased and whether he had done so in self-defence or accidentally. I started first with the witness Jim Brandon Brown.

[116] Brown was inconsistent on the length of time that he had known King. I placed no weight on this inconsistency because King acknowledged that he knew Brown for at least eight years. The length of time Brown knew King therefore became a non-issue and nothing turned on it. I was satisfied that both King and Brown knew each other well enough to provide a solid basis for recognition in what can only be described as ideal circumstances.

...

[122] I have already found as a fact that King kidnapped Mitchell on April 10, 2008. Having accepted the evidence of these witnesses I made the found the following facts. The kidnapping was about Mitchell allegedly accusing King of being with a ten-year-old girl. On April 12, 2008, King was near his home around after 2 p.m. when Farai the cousin of Mitchell and the deceased approached King. While speaking to Farai, Mitchell and the deceased approached King. King pulled out a gun but Farai persuaded him that there was no need to use the gun. Brown arrived shortly thereafter and observed the group from a distance. Brown formed the opinion that King was quarrelling with Mitchell and the deceased. Brown was of the view that if the argument escalated Mitchell and the deceased were no match for King. Brown walked up to the group, went, and stood directly in front of King. Brown said nothing. Almost immediately, King remarked that he feared that the men had come to do him something. He said let us start this and he fired a single shot before walking away. All the men ran. That shot went through the shoulder of Brown and entered the chest of the deceased ultimately causing his demise. Whilst there is no direct evidence that the bullet that exited Brown's shoulder entered the deceased chest, there being only one shot that is the only reasonable inference to be drawn."

157. A judge is not required to recount all of the evidence of each witness and to state what use is made of each aspect of it. The judge's task is to focus on the relevant evidence to make findings on the key issues of the case.

158. The evidence of Mr Ali at its highest indicated that there was a conversation before when he was asked whether the deceased, Brown, Mitchell and Farai were looking for him. He was asked to keep an eye on the accused's house. Mr Ali's impression was that the Appellant did not seem to him to be afraid. At its best Mr Ali's evidence was that the

Appellant told him the men were looking for him. This did not make the Appellant's version of what occurred on the 12 April when the offence took place to be any more likely. It was a neutral conversation.

159. Regarding Kathleen Mitchell, she did not notice anything unusual about the appearance of Mitchell. His evidence was that he was cuffed in the face and rib cage area. There was no evidence that he was seriously injured or that he had visible injuries that his mother must have noticed. There was no evidence that he sought medical attention. The severity of the incident lay in Mitchell being kidnapped, not on being beaten to the extent that it must have been noticeable. This therefore also did not add materially to the Appellant's case.

160. The judge undertook an assessment of the relevant witnesses and came to a conclusion concerning the value of each witness. She rightly focused on the evidence of what took place on the day of the incident and came to firm conclusions on those matters. She found Mr Ali's evidence was supportive of Mitchell.

161. The key witnesses were undoubtedly Brown and Mitchell. Both Mr Ali and Mrs Mitchell were at best supportive of some of the facts adduced by the prosecution, but their evidence was not determinative of anything. The judge recounted their evidence and demonstrated that she was aware of it. She choose to focus on a detailed comparison of the evidence of Mitchell and Brown with that of the accused and to make findings accordingly. She was right to do so. In this regard, no material error can be discerned in how the evidence of Mrs Mitchell and Mr Ali was evaluated and the value placed on it. This ground of appeal is therefore without merit.

DISPOSITION

162. Based on the success of grounds 1, 2 and 3, the appeal is allowed, the conviction is quashed and the sentence is set aside. We now proceed to invite submissions on whether it is appropriate to apply the proviso under section 44 (1) of the Supreme Court of Judicature Act. We also proceed to invite submissions on whether it is appropriate to order a retrial in this case.

.....

M. Mohammed
Justice of Appeal

.....

M. Wilson
Justice of Appeal

.....

R. Boodoosingh
Justice of Appeal