Neutral Citation Number: [2026] CA (Bda) 22 Crim

Criminal Appeal No. 1 of 2024

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON JUSTICE JUAN WOLFFE
CASE No. 13 of 2021

Dame Lois Browne-Evans Building
58 Court Street
Hamilton HM 12
Bermuda

Date: 20 November 2026

Before:

THE HON IAN KAWALEY, PRESIDENT
THE HON NARINDER HARGUN, JUSTICE OF APPEAL
and
THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

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Between:

KAMAL WORRELL

Appellant

-and -

THE KING

Respondent

Appearances: **Mr Richard Horseman, Wakefield Quin Limited, for the Appellant**
Ms Cindy Clarke, Director of Public Prosecutions, with Daniel Kitson-Walters, Senior Crown Counsel, for the Respondent

Hearing date(s): **4-5 November 2026**
Draft Judgment circulated: **12 November 2026**
Date of Judgment: **20 November 2026**

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Manslaughter as alternative to murder-adequacy of directions-abuse of process-use of nolle prosequi to stay assault and wounding charges in Magistrates' Court-subsequent joinder of same charges to murder charge-whether further prosecution of charges should have been stayed- whether trial should have left provocation and/or self-defence to the jury-whether hearsay evidence improperly admitted-whether late service of phone record evidence by the Prosecution deprived the appellant of a fair trial-whether evidence of appellant's former employer wrongly admitted- adequacy of good character direction-Criminal Code section 255, 287(1), 288 (2), 289, 295, 296, 314; Criminal Jurisdiction and Procedure Act 2015 sections 62, 80 ; Police and Criminal Evidence Act 2006 sections 75 (1), (2)(c)

JUDGMENT

Kawaley P

Introductory

1. This appeal arises out of one of the most complicated murder trials in Bermuda's modern legal history. The Appellant appeals against his conviction following a trial before Hon Juan Wolffe J (the "Judge") and a jury by the verdict of the jury delivered on 10 January 2024 on the following counts on the Indictment:

    (a) murder contrary to section 287 (1) of the Criminal Code (Count 1); and

    (b) seven offences of common assault contrary to section 314 (1) of the Criminal Code (Counts 3-9).

2. The jury found (by a majority) that the murder was committed between 10 April 2020 and 11 June 2020.The jury acquitted the Appellant unanimously on the single count of unlawful wounding alleged to have been committed on 1 June 2019 (Count 2). The jury found unanimously that the Appellant was guilty of six counts of common assault (Counts 3-8) committed on 1 June 2019 (count 3), 14 November 2018 (Counts 4-8) and by a majority that the Appellant was guilty of committing the same offence on the same date (Count 9). On 13 March 2024, the Appellant was sentenced to life imprisonment with a minimum term of 27 years for murder and concurrent terms of six months imprisonment for each of the common assaults. The trial was complicated by three

significant factors. First, the fact that this was an entirely circumstantial murder case where Chavelle's body was never found. Second, the summary only assault charges, initially instituted in the Magistrates' Court and stayed by the DPP when Chavelle withdrew her complaints, were joined with the murder charge to support the Prosecution's case on Count 1. Third, the Appellant represented himself, assisted by a legally trained McKenzie Friend (Mr Michael Scott). On the hearing of the present appeal, the Appellant was represented by Mr Richard Horseman and Ms Cindy Clarke, the DPP, was lead counsel for the Respondent. It is necessary at the outset to express the gratitude of the Court to counsel for the clear and concise way in which they martialled their respective arguments in a difficult and far from straightforward appeal.

3. Before considering the grounds of appeal, it may be helpful to set an overview of the key events, provide a brief outline of the course of the trial, summarise the main evidence given at trial, the parties' respective cases and provide an overview of the summing-up.

Key events

4. In the Respondent's written submissions, the following table of key events was set out which I gratefully adopt:

DATE	**EVENT**
15 November 2018	The complainant gives a statement to the police.
16 November 2018	Information 18CR00536 which included the charges arising from the facts and matters in Counts 4-9 of the eventual indictment is sworn. At first appearance, the defendant pleads not guilty.
9 January 2019	A nolle prosequi is entered. A note indicates that the complainant withdrew the complaint in the interests of the child she shares with the defendant.
12 June 2019	The complainant gives a statement to police about an incident on 1 June 2019. She also provides a statement requesting that proceedings under Information 18CR00536 recommence.
21 August 2019	The defendant appears on summons. He indicates that he intends to challenge the proceedings as an abuse of process or challenge the Director's decision to reinstitute proceedings.
28 August 2019	Information 19CR00291[1] which included the charge arising from the facts and matters in Counts 2 and 3

[1] This Information was not placed before us.

	of the eventual Indictment comes before the Court for the first time.
14 October 2019	The defendant indicates that he is withdrawing his application challenging the Crown's decision to reinstate proceedings.
7 November 2019	The matter under Information 18CR00536 is joined with Information 19CR00291 by consent. Amended Information is filed.
21 January 2020	The complainant provides a withdrawal statement concerning the 2019 incident.
6 February 2020	The matter is listed for trial. The complainant fails to attend, and a warrant is issued.
2 March 2020	The matter is listed for trial. The complainant fails to attend, and a warrant is issued.
16 March 2020	The matter is listed for trial. The complainant attends and gives evidence.
17 March 2020	A nolle prosequi is entered after lunch. An issue arises concerning the date. An amended nolle is filed at 3.05 pm. The Crown requests the return of original nolle, but Worrell refuses to return it.
1 March 2021	Information 21CR00064 which included all the counts on the Indictment is sworn. The first hearing takes place in Plea Court.
1 April 2021	The matter appears in the Supreme Court for Arraignments.
11 January 2022	The defendant requests the return of his laptop and phone but refuses to provide the password.
19 and 20 October 2023	The stay application is made and dismissed.
6 and 7 November 2023	Section 31 Application made and dismissed. The Defendant is arraigned.
8 November 2023	The trial commences.

Course of the trial

5. On 7 November 2023, an application was made to dismiss the proceedings under section 31 of the Criminal Jurisdiction and Procedure Act 2015 (the "CJPA") that application was dismissed by the Judge on the same date for reasons delivered on 14 November 2021. The Appellant was then arraigned and the jury was sworn in two days later on 9 November 2023 when the trial proper commenced. On 7 December 2023 the Appellant made a no case submission and that application was, perhaps unsurprisingly, dismissed by the Judge on the same date. The trial proceeded until the 8th of January 2024 when the Judge commenced his summing-up. The jury retired two days later on the 10 of January 2024 and, after raising a question in relation to the intent element of the murder count, the jury ultimately delivered their verdicts.

The Prosecution's evidential case

6. The Prosecution case was that during the 'lockdown' phase of the Covid19 Pandemic in the Spring of 2020, the Appellant, against a history of previous domestic violence, killed his partner Chavelle Dillon-Burgess ("Chavelle", as she was referred to at trial). The Prosecution opened its evidential case by reading into evidence Chavelle's Witness Statement dated 15 November 2018. She described arguments in relation to their baby son in which the Appellant criticised her competence as a mother. On the night that Police attended her residence, she stated that the Appellant dragged her out of the house, hit her with a tin pot and sat on her until she could not breathe. He dragged her out of the house twice and once she broke back in. She stated: "*We were fighting. This meant him hitting me and me hitting* [him][2] *back. I was hitting him in his face and chest. He's pushed me down on the ground, I got on top of him … he got on top of me*…" A Second Witness Statement dated 12 June 2019 made by the Chavelle was read into evidence, which withdrew an earlier withdrawal statement explaining that although she had wanted to give the Appellant a chance to be in their son's life she now wished to proceed with her original complaint. In a third Witness Statement on the same date, the Chavelle stated that she had been permanently "kicked out of" the house and was attempting to get her baby back. The fight on this occasion was witnessed by a neighbour and Chavelle admitted throwing stones at the Appellant while he was holding the baby. The Prosecution next called Chief Inspector Rollin, who interviewed Chavelle in November 2018 and Detective Constable Lawrence who gave evidence (including a video) about an interview with the Appellant on 29 June 2019 in connection with Chavelle's assault allegations. A Ms Williams, a friend of Chavelle and godmother of the baby son, was called to describe her interactions with Chavelle. She described being on the phone with Chavelle when she went to the Appellant's home to attempt to get their son and overhearing the Appellant verbally abusing Chavelle. She described exchanging phone messages with Chavelle on 11 April 2020, which was the last time she heard from her. They were normally in regular contact. Lawyer Mark Pettingill gave evidence about the fact that the Appellant had once worked for him on a murder case involving the disposal of the body wrapped in a rug at sea and the fact that the body was pierced so it would

[2] The "*me*" at this point in the Transcript (pdf page 134 line 31) appears to be a typographical error.

sink and not float to the surface. Mr Pettingill also testified that Chavelle had on some occasion reported to him that the Appellant had choked her.

7. Police Constables Harvey and Raposa described going to the Appellant's residence on 30 April 2020 to conduct a welfare check on Chavelle. The Appellant told them he had last seen Chavelle approximately 2 weeks earlier when she left following an argument which began verbally but turned physical. Pc Harvey described the Appellant's demeanour as follows: "*To me, he appeared nonchalant. He didn't really care – it appeared like he didn't care about the welfare of Chavelle, and he was very vague with his answers towards us*." Police Constables Abraham and Raynor attended the Appellant's residence on 23 May 2020 together with a Ms Wilson, a friend of Chavelle. PC Abraham returned with Ms Wilson again (with Detective Sergeant Raposa and PC Hayward) on 24 May 2020. Two bags identified by Ms Williams as belonging to Chavelle were seized and produced as exhibits. Ms Wilson indicated that a mat was missing from the residence. A good friend of Chavelle, Ms McDermott, gave evidence via video-link about being told about the Appellant being violent to Chavelle. She testified that she communicated regularly with Chavelle by phone and on one occasion actually advised her to leave the Appellant and return to Jamica before she ended up getting killed. Chavelle's grandmother, Ms Wong, explained that Chavelle came to Bermuda from Jamica in 2014 and initially studied at the Bermuda College. She stated that Chavelle had reported being physically abused by the Appellant on one occasion being "*stifled with a pillow*". She only communicated directly with the Appellant by telephone after Chavelle went missing and described one conversation as follows:

> "*That was like asking him days after days, 'Is Charvelle come back? Have you heard from Charvelle?' and then, you know, one day he just said 'Nanna, there's something I didn't tell you. I didn't tell you that we had a fight and Charvelle put some clothes into a bag and leave,' and then one day I said to Mr Worrell, I said, 'Mr Worrell, I believe that the fight that you and Charvelle had, you knock her out, didn't meaning to kill her but you kill her and you dump her,' and Mr Worrell never answer me like two days after that and when he did answer, he said, ' Nanna, I never hurt Charvelle.*"

8. On another occasion after Chavelle went missing, the Appellant came to her house and dropped off the baby. Ms Wong described him behaving unusually, and pacing up and down before he said "*that friends told him to get rid of Charvelle*". She did not think about the significance of that statement until sometime later when Chavelle was still missing. Under cross-examination. Ms Wong denied being mistaken about her recollection as to what the Appellant had said. It was not seemingly put to her that she was deliberately lying. DS Raposo testified about her visit to the Appellant's residence with Ms Wilson and finding a purse containing $3757 in cash in a mattress found in a closet. Chavelle's debit card (which the Appellant admitted using after her disappearance) was not found. Detective Inspector Jason Smith testified that Chavelle's mother reported her missing on 30 April 2020 and that the Police commenced proof of life investigations. These investigations included medical inquiries which provided no

basis for believing she may have died from natural causes, banking enquiries (which revealed $250 being withdrawn from Chavelle's account by the Appellant from an ATM machine on 12 April 2020), press conferences from around 6 May 2020, searches by the Police and the public and the offering of a $50,000 reward for information leading to the finding of Chavelle. No evidence of her leaving Bermuda was found, nor were any cell phones linked to her found. Ms Loryn Bell, an intelligence analyst with the Bermuda Police Service, was asked on 18 May 2020 to analyse electronic data in connection with the case. She explained the report she compiled in relation to , *inter alia*, usage of the Appellant's phone between April and May 2020, produced screenshots of WhatsApp communications between Chavelle the Police and her friends. The Prosecution made various other witnesses available for cross-examination.

The Appellant's evidential case at trial

9. The Appellant denied the wounding charge in part by averring that as a lawyer he would not be so stupid as to inflict such a visible injury on Chavelle. In relation to the November 2018 assault charges, he testified that the video of her withdrawal statement contained no suggestion that he had pressured her to withdraw the charges. He testified that he had only belatedly received the cell phone data and Officer DeSilva agreed that disclosure requests had been made by the Defence since 2022. He considered these records to be important and no explanation for the delay in providing them had been proffered. He denied killing Chavelle. Much of his evidence bordered on argument about the inadequacies of the Police investigation and the absence of direct evidence of Chavelle's death. He averred that all the phone evidence which the Prosecution had presented was adduced at his insistence: "*Why? Because I would like all the facts to be out. Why? Obviously, I have an interest in clearing my name.*" The Appellant challenged the prosecution case that he was a "wife beater" averring that this was entirely inconsistent with his own family background, growing up in a volatile home and being encouraged to respect women by the positive influence of many matriarchs. He attributed the disputes that they did have after the birth of the baby in part to learning that Chavelle had considered an abortion and initial doubts about whether the baby was actually his. He explained that the history of their relationship was relevant to why he did not attend any of the searches or vigils for Chavelle. He stated that in the Magistrates' Court when the trial was brought to an end by the DPP entering a *nolle prosequi*, Chavelle had said in her evidence that the complaints she had made were untrue. He addressed Mr Pettingill's evidence about his working on a murder case which involved the disposal of the strangled victim's body in the sea and the suggestion made in discussion with the Appellant that the body would not have floated if it had punctured. He agreed that he did work on such a case. However, he averred that it was wrong that this evidence was admitted against him and explained that he and Mr Pettingill had parted on bad terms. He also testified that he and Inspector Smith "*had history*" and suggested that the Police investigation had been compromised by this. In advancing this point he disclosed that he had been charged but acquitted of an offence relating to his role as counsel in a case in which Inspector Smith had been involved.

10. The Appellant concluded his own examination-in-chief by asserting that the Prosecution had no evidence. As regards the 11 April 2020 voice note on Ms Wilson's phone where his voice was heard in the background, he stated: "*I trust you would see the state from my tone of voice that I was in, not confrontational, not aggressive, not angry at all, notwithstanding what Ms. Dillon-Burgess was saying.*" He agreed that they had had a verbal argument and averred that Chavelle was simply venting to her friend. He said the recording on his own phone he knew was there and insisted the Prosecution produce it. He was simply cooking with classical music on in the background; the rustling sound was him wrapping some of the chicken he had cooked. As it was lockdown, he spent a lot of time at home cooking, cleaning and gardening. He deliberately placed his phone on record on the fridge to protect himself because he and Chavelle had been involved in Court proceedings. At some point in the daytime Chavelle just left, not saying where she was going, and leaving their son behind. He thought at the time she might have gone to see a boyfriend who worked in Khyber Pass. She came back later that same evening (11 April) and had another verbal fight. Separation was discussed and she said he was not keeping various things such as linens that she had purchased and put them in the fireplace to burn before she finally left. He added further items including old files himself later to ensure it burned "*all the way*" That is why a witness (a neighbour, whose statement was read in) described seeing smoke twice, once white and once dark, on a warm day.

The Prosecution closing

11. The Prosecution case on the murder charge was focussed on by the DPP in her closing speech as strong based on the following main elements:

    (a) it was clear Chavelle was dead as it made no sense that she would leave her baby, bank card and money in the Bank behind and exhaustive searches had been carried out;

    (b) there was a history of domestic violence (including incidences of him stifling her). The Appellant had the means and opportunity to kill the victim as well as the knowledge of how to dispose of the body; and

    (c) the Appellant's response to Chavelle's disappearance, including his demeanour throughout the trial was incriminating.

The Defence closing

12. The Appellant's closing address included the following noteworthy points:

    (a) it made no sense for the Prosecution to suggest material on his phone was incriminating because if it was he had adequate time to delete the material they relied upon;

(b) the belated production of the phone data suggests that the Prosecution did not initially intend to rely on the material and the unexplained late disclosure was unfair;

(c) Chavelle had given evidence in the Magistrates' Court, as he had testified, that the assault complaints she had made were untrue;

(d) the recorded withdrawal statement contained nothing explicitly saying that her allegations were true;

(e) on one occasion when the Police came, on 18 November 2018, the Appellant himself had dialled 911. He did not press charges, but the following day Chavelle did. She did this because he had asked her to leave. Subsequent communications between them preserved on his phone were inconsistent with her allegations being true;

(f) the June 2019 wounding complaint was a false allegation when the Appellant himself had several scratches. Chavelle told the truth when she recanted the allegations in 2020;

(g) the Pettingill evidence amounted to no more than speculation in the absence of positive evidence of the Appellant disposing of a body in the present case;

(h) Chavelle had told her friend Ms Williams that she was planning to leave Bermuda after lockdown;

(i) it made no sense to suggest he had accidentally recorded something incriminating on his phone on 11 April 2026. In fact at the end of the recording (which was replayed to the jury) he could be heard talking to his son about getting some fresh air;

(j) he submitted: "*I hope that I've done enough to assist you to be clear on your determination in this case that there is no way, in my respectful submission, that the prosecution can make you or indeed anybody to feel sure -- feel sure -- that I did anything - assault, choke, kill, clean up, anything - but the charge is murder on the 11th or at any time. There is just simply no evidence of that…*"

The summing-up: overview

13. The Appellant's grounds of appeal, considered below, primarily focussed on abuse of process or admissibility complaints rather than seeking to impugn the adequacy of the generally impressive summing-up. Both Prosecution and Defence were content to invite

the jury to approach Count 1 on a 'murder or nothing' basis. On appeal, the Appellant, now legally represented, complained that the manslaughter direction fell short of what was required, that the defence of provocation should have been left to the jury and that a more fulsome good character direction should have been given. That self-defence to murder should be left was a formal ground of appeal which was not pursued in oral argument When the parties were consulted on the appropriate jury directions by the Judge, their positions on these three issues were as follows:

(a) **manslaughter**: the Prosecution agreed with the Judge that the alternative offence of manslaughter should be left to the jury. The Appellant suggested it was not necessary for that alternative to be left as the Crown was not advancing such a case at all;

(b) **provocation**: the Judge was initially concerned as to whether provocation might arise from the 11 April 2020 voice note in which the Appellant was being berated by Chavelle to her friend. The Prosecution after initially viewing the point as a marginal one (that manslaughter could perhaps be left in the context of provocation) agreed with the Judge's revised position that provocation did not arise. The Appellant was consistently clear that in his view provocation need not be left to the jury;

(c) **good character**: the Prosecution contended a "*modified*" good character direction was appropriate since the Appellant had put his own character into issue. The Appellant contended for "*a complete and fulsome*" good character direction.

14. The Judge's summing-up covered all of the requisite topical terrain. He began by explaining the respective functions of judge and jury, described the burden of proof, and explained that only Ms Bell had been admitted as an expert qualified to give opinion evidence. He touched upon demeanour, circumstantial evidence and the need to avoid speculation. The following important direction was given in relation to inferences:

> "*I also want to talk about inferences. You must decide this case only on the evidence which has been placed before you, and no more. In doing so, you are entitled to draw inferences. That is, come to common sense conclusions based on the evidence which you accept. But you may not speculate about what evidence there might have been, or allow yourselves to be drawn into speculation. Such inferences may only be drawn from the facts provided, and those inferences flow logically and reasonably from the facts you find. If two or more inferences may be drawn from the same set of facts, you must draw the inference that is most favourable to the accused. The reason is simply this. It is the duty of the prosecution to make you feel sure of the guilt of the accused. What conclusions you reach from the evidence is entirely for you to decide. Having decided what evidence you accept, consider whether, looking at it as a whole, it drives you to conclude so that you are sure that the accused is guilty. Guilt should not only be a rational inference, but should be*

> *the only rational inference that could be drawn from the circumstances. If there is a reasonable hypothesis consistent with innocence, your duty is to acquit the accused.*" [Emphasis added]

15. The Judge then proceeded to give preliminary examples of the inferences of guilt the Prosecution invited the jury to draw, juxtaposed against the Defendant's case that he never struck Chavelle and that she was always the aggressor. He warned the jury not to be influenced by sympathy or prejudice. He directed the jury to take into account the fact that the Appellant was representing himself and this might explain why, despite his legal training, he had failed to put certain matters to witnesses. Having dealt with these general matters, he then moved into the heart of the summing-up taking the jury through the Indictment. As regards the pivotal intention limb of the murder charge. The following initial guidance was given as to the basis of the Prosecution's case:

> "*The prosecution also says that evidence of the accused's intention to kill or cause grievous bodily harm to Chavelle is his efforts to lie to police officers about when she left the residence and about her whereabouts, saying that she left the residence with Twylia. The prosecution says that the accused well knew that Chavelle was dead and that he had murdered her, and that the lies to the police were an attempt by him to divert the police's attention away from him as being the person who murdered Chavelle. In essence, the prosecution are saying that if you are satisfied that Chavelle is dead and that there are no other rational hypotheses except that she is dead, that she did not die by natural causes and that she died by violence, and that her body was disposed of by the accused, then you can conclude that the prosecution have proven beyond a reasonable doubt that the accused murdered Chavelle and that he intended to do so. If you are not satisfied of this, then you will conclude that the prosecution have not proven that the accused murdered Chavelle, or that he intended to do so.*" [Emphasis added]

16. This appears to be an accurate summary of the Prosecution theory on the element of intent required to prove Count 1. Viewed in the sheltered appellate harbour, sheltered from the turbulent currents of the trial seas, a gap in the chain of logic is immediately apparent. It is easy to see how being satisfied that death was caused violently and the Appellant disposed of the body supports proof of unlawful killing by him in one form or another. It is more difficult to see how the only reasonable inference from such facts should be that the Appellant committed the unlawful killing with murderous intent. The totality of the directions given on this issue will be considered further below. The Judge summarised the Prosecution and Defence evidential case in terms which have not been the subject of any complaint.

The Jury's verdicts

17. After twice seeking guidance on the intent elements of the murder charge, the Jury indicated they could not arrive at a unanimous verdict on Count 1 but returned a majority verdict of guilty. They entered a unanimous not guilty verdict on Count 2 (wounding) and unanimous guilty verdicts on 4-8 with a majority guilty verdict on Count 9.

The Grounds of Appeal

18. The Appellant advanced the following Re-Amended Grounds of Appeal: (1) re-charging the Appellant with the common assault and wounding charges initially laid in the Magistrates' Court and stayed by the *nolle prosequi* entered on 8 January 2019 and 17 March 2020, respectively was an abuse of process; (2) the assault charges were time-barred; (3) provocation should have been left to the jury; (4) the manslaughter direction was inadequate; (5) the witness statement of Chavelle was inadmissible hearsay which was wrongly admitted; (6) inadequate directions were given about the admissibility of the evidence of prior assaults, in particular because a failure to direct on the extent to which the allegations supported the alternative offence of manslaughter; (7) the Appellant's fair trial rights were prejudiced by Judge's failure to direct the prosecution to assist with timely disclosure of the phone data; (8) the evidence of Mark Pettingill was more prejudicial than probative and was wrongly admitted; (9) the good character direction was deficient; (10) the Judge wrongly declined to order the disclosure of the Witness Protection Officer's notes.

19. A complaint that self-defence should have been left to the jury was asserted (by way of an addition to Ground 3) in the Appellant's Submissions, but was sensibly not pursued in oral argument. Ground 10 was also not pursued in oral argument. By the end of the hearing, the strongest ground of appeal appeared to me to be Ground 4 and the complaint about the manslaughter direction. I accordingly propose to deal with that ground first, followed by the other grounds in sequential order.

The manslaughter direction

20. The criticisms made of the directions were carefully calibrated by Mr Horseman and focussed on the way the evidence was analysed by the Judge rather than the law. In the Appellant's Submissions, the following pivotal points were made:

> "*72. The learned Judge recited the standard direction on range of acts as specified in the Queensland Bench Book but he failed to explain that the prosecution had to prove the required intent at the time of the various acts that may fall in the range of acts taking the hypothetical example above the directions did not cover any acts that the appellant may have done and then tie those acts in with intent or lack of intent the thrust of the directions was that all killing was unlawful and neither the appellant nor the prosecution were relying on defences of self-defence or provocation to refute the unlawfulness of the killing and therefore the killing was clearly unlawful.*
>
> *73. The omission of a clear fact-tailored route to manslaughter by reference to a range of possible acts caused the jury confusion the jury was uncertain about intent and they were plainly troubled when they asked the judge for a second time for further directions on intention see page 2443 of the record:*

> *'Could we have clarity once more about the meaning of element (6) intent and premeditation, because we are mixed as to murder versus manslaughter and actions of intent versus premeditation, and when you read out the counts will you mention manslaughter second if we are not unanimous on murder.'*
>
> *74. The jury was clearly torn between manslaughter and murder it is telling when they question the learned judge about actions of intent versus premeditation the judge directed them on intent and then went on to suggest various acts put forward by the prosecution as evidence of intent to murder see page 2445 where the learned judge repeated the same acts as evidence of intent to murder.*" [Emphasis added]

21. The Jury's question implies that if they were asked having indicated they were not unanimous as to murder, they would have been unanimously agreed on manslaughter. Quite properly, they were asked whether a majority were agreed on murder and not invited to consider manslaughter. But the question brings into sharp focus the importance of a clear fact-centred manslaughter direction in the context of the present case. It is not possible to overstate how difficult it was for this to be appreciated by the Judge at the time. Both the Prosecution and the Defence were committed to a 'winner takes all' approach with the focus being on murder alone. The initial directions given on manslaughter were as follows:

> "*Members of the jury, you will see on the indictment that the prosecution have charged the accused with one offence in relation to what they say occurred on an unknown date between April 2020 and June 2020, i.e. that the accused committed the offence of murder. However, I am obliged to tell you that sometimes in criminal trials it can be established by the evidence heard at trial that it may be open to a jury to also consider whether an accused person is guilty or not guilty of an alternative but lesser offence, even though the lesser offence is not on the indictment. By law, the offence of manslaughter is an inherent alternative charge to the offence of murder. In this regard, section 288(2) of the Criminal Code states that: "Where any person is charged upon indictment with the offence of murder, he may be convicted of manslaughter if any such offence is established by the evidence, but not, except as herein provided, of any offence other than that with which he is charged." So as I said earlier, in certain cases, and where it can be established on the evidence, a judge can invite a jury to consider an alternative charge to the charge which is on the indictment. This is such a case. So I am inviting you to also consider the offence of manslaughter as an alternative to the offence of murder, which is count 1 on the indictment. But you should only do so in the event you find the accused not guilty of murder. I will say more about this later. I should say at this stage that it is not the prosecution's case, nor has it been their case throughout this trial, that the accused is guilty of the offence of manslaughter. Their case is that he is guilty of the sole offence of murder, and the fact that I have decided to put this alternative count of manslaughter 1 to you for your consideration does not change the prosecution's position of murder which they have maintained throughout this trial. Further, it is of course important to say that it is the accused's case that he is not guilty of any offence, whether it be murder or manslaughter. With this in mind, section 293 of the Criminal Code defines the offence of*

> *manslaughter as: 'A person who unlawfully kills another person under such circumstances as not to constitute murder is guilty of manslaughter.' So our law provides that any person who unlawfully kills another person is guilty of a crime which is called manslaughter. As I said earlier, proof of any offence requires proof of the elements of the offence. The elements of an offence are the essential ingredients of it, all of which must be proved beyond a reasonable doubt to prove the offence. Therefore, for an accused to be found guilty of manslaughter, the prosecution must prove all of the following elements beyond a reasonable doubt: (1) the date of the offence; (2) that the offence took place in the Islands of Bermuda; (3) that Chavelle Dillon-Burgess is dead; (4) that the accused caused Chavelle Dillon-Burgess' death; and (5) that the accused did so unlawfully. You will appreciate that the five elements of the offence of manslaughter is common to the first five elements of the offence of murder. From this, it is important to point out that unlike the offence of murder, with the offence of manslaughter the prosecution do not have to prove beyond a reasonable doubt that the accused intended to cause death or grievous bodily harm to Chavelle.*"

22. This was legally sound. So were the directions given shortly before this on the general approach to the element of intent in Count 1. Reference was made to the Queensland Benchbook because Bermuda's Criminal Code is substantially based on the Queensland Code. The passage relied upon (at page 185) addressed a point of general principle not informed by any specific statutory provisions: "[…*identify the main areas of evidence which may aid consideration of the defendant's intention and issue sin dispute regrading them*]". Mr Horseman complained that in response to the jury question unbalanced directions were given by the Judge repeating those which had previously been given:

> "*The prosecution therefore says that they have proven beyond a reasonable doubt that the accused intended to kill or cause grievous bodily harm to Chavelle by reference to the accused's conduct before and after 11th April 2020, which was the last time anyone had seen Chavelle. To this, the prosecution says that the accused's intention is clear when you consider that on 11th April 2020 there is cogent evidence to illustrate that the accused was engaged in activities to clean up any remnants of any evidence of Chavelle's death and to dispose of her body. The prosecution says that if it were not his intention to kill Chavelle or to cause her grievous bodily harm, then the accused, as he had done on other occasions, would have made a 911 call to the police to come to the residence to intervene, or at the very least threaten to do so. The prosecution say that the reason the accused did not do so is because he intended to kill, or to cause grievous bodily harm to Chavelle. The prosecution also says that the accused's intention to kill or cause grievous bodily harm to Chavelle can be obtained from the evidence in the recording taken from the accused's phone on 11th April 2020 of him cleaning, wrapping and zipping, and the evidence of Miss Dion Glassford and the accused himself of burning items in the fireplace. The prosecution says that this is evidence of the accused getting rid of any evidence of Chavelle's death and of him disposing of her body. The prosecution also says that evidence of the accused's intention to kill or cause grievous bodily harm to Chavelle is his efforts to lie to police officers about when she left the residence and about her whereabouts, saying that she left the residence with Twylia. The prosecution says that the accused well knew that Chavelle was dead and that he had murdered her, and that the lies to the police*

> *were an attempt by him to divert the police's attention away from him as being the person who murdered Chavelle. In essence, the prosecution are saying that if you are satisfied that Chavelle is dead and that there are no other rational hypotheses except that she is dead, that she did not die by natural causes and that she died by violence, and that her body was disposed of by the accused, then you can conclude that the prosecution have proven beyond a reasonable doubt that the accused murdered Chavelle and that he intended to do so. If you are not satisfied of this, then you will conclude that the prosecution have not proven that the accused murdered Chavelle, or that he intended to do so.*"

23. The problem with these directions is not that it was impossible for the jury to potentially infer the requisite intent from the evidence the Prosecution relied upon. The problem lies in the fact that, as the Judge properly directed at the outset, adverse inferences can only be drawn against the accused where they are the only reasonable inference. And reaching such a conclusion requires the jury to evaluate competing potential inferences with reference to the factual matrices of the present case. In this instance, the possibility that the Appellant had killed the victim unlawfully without intending to murder her or cause her grievous bodily harm was far from a fanciful one. There was evidence that Chavelle, despite her diminutive stature compared to the Appellant, was physically aggressive and that he would subdue her by lying on top of her, making it impossible for her to breathe. By the Appellant's own account he was not stupid enough to inflict physical injuries on her. This was not a case where the historic domestic violence relied upon by the Crown was inherently indicative of an intention to cause grievous bodily harm and the Appellant was only convicted of the historic common assaults. As Mr Horseman pointed out in the course of argument, even if Chavelle had been killed accidentally (*a fortiori*, unlawfully but without a murderous intent), the Appellant might well have feared that no one would believe his explanation and he had a similar motivation to conceal her death. The jury were not assisted to evaluate the murder/manslaughter options with practical evidential examples. Only the Prosecution's examples were put. Because the Appellant was hoping to be acquitted of both murder and manslaughter, he gambled on not inviting the jury to consider the alternative verdict option. But the Judge was obliged to put the manslaughter option fairly and squarely before the jury in a fact-focussed manner.

24. The Respondent's written submissions at [40]-[44] did not advance any coherent answer to these complaints. Instead, it was merely correctly pointed out that "*even a misdirection does not automatically vitiate an unaffected conviction*" ([41]) and that the "*jury question cannot safely be treated as proof of confusion caused by error, nor ignored where it reveals a material ambiguity*". Reliance was placed on *Roberts and Duerr* [2017] CA (Bda) 9 Crim at [29]-[30] for the proposition that misdirections do not automatically vitiate a conviction. That case merely illustrates that where a misdirection does not undermine the safety of a verdict the proviso will be applied (Roberts); when the misdirection is material the conviction may be set aside a convictions for appropriate lesser offences (Duerr). Section 21 (1) (a) of the Court of Appeal must be applied in a context-specific manner:

> "*21 (1) Upon the hearing of an appeal under section 17(1)(a) or (b), the Court of Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Supreme Court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a mis-carriage of justice, and in any other case shall dismiss the appeal: Provided that the court may—*
>
> *(a)notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred…*"

25. Ms Clarke submitted in oral argument that provocation as a formal legal defence did not arise on the evidence. However she fairly accepted that the Judge should ideally have, as she elegantly put it, left provocation with a small "p" to the jury. This was because the 11 April 2020 voice note which recorded Chavelle verbally abusing the Appellant to her friend in his hearing provided some basis for believing that some form of physical altercation may have ensued thereafter in which he lost control to some extent. However, the DPP submitted that if any error of law occurred the Court should apply the proviso. If the Court did not propose to do so, the Prosecution would wish to address the Court as to whether a retrial should be ordered.

26. In my judgment the directions given in relation to manslaughter were sufficiently flawed to justify allowing this ground of appeal. The jury's verdict and question make it clear that the jury were satisfied to the requisite criminal standard that the Appellant unlawfully killed Chavelle, but were torn between murder and manslaughter and would potentially have entered a unanimous guilty verdict on the alternative count had the legal and factual elements of the offence been explained with adequate clarity. No question of applying the proviso on the basis that no substantial miscarriage of justice occurred possibly arises in the present circumstances where the evidence supporting the intention limb for murder was far from straightforward or clear. One cannot overstate the difficulty of the position the Judge was placed in with both the Prosecution and Defence implicitly inviting him to direct the jury in the way he did. The position is somewhat analogous to the case Mr Horseman relied upon in support of the provocation ground where both counsel persuaded the judge not to leave provocation to the jury based on the way their respective cases where being put. In *R-v- Dhillon* [1997] 32 Cr. App. R. 104, Ward LJ in the English Court of Appeal held that a material misdirection had occurred but observed: "*We have considerable sympathy for the uncomfortable predicament which faced the learned judge*."[3] The legal position is, as the Judge himself well appreciated, that while the views of Prosecution and Defence should be sought if possible before directions are given to the jury, it is ultimately for the trial judge to decide what directions are required to be given to the jury in the circumstances of the particular case.

[3] By the time of the appeal judgment, the trial judge (Sir Charles Mantell) had been elevated to the Court of Appeal. He would later servetas a Bermuda Justice of Appeal.

27. I deal with the disposal of the appeal below (see [65]-[72]).

Abuse of process: re-charging the Appellant with the common assault charges

28. On 20 October 2023, the Judge dismissed the Appellant's application for a stay of the Indictment on the grounds that it was an abuse of process to proceed with six common assault charges under a 1 November 2021 Information. This occurred after the DPP entered a second *Nolle Prosequi* dated 17 March 2020 in respect of the original 16 November 2018 Information containing the same charges. That Information had been continued by Notice dated 28 July 2019. The main grounds for the appeal were that:

    (a) the Judge erred in dealing the application summarily;

    (b) the Judge erred in finding that the *Nolle* could only be challenged in separate judicial review proceedings; and

    (c) further prosecution of the assault charges should have been stayed on either or both because their inclusion on the Indictment made a fair trial impossible and/or undermined the integrity of the legal system.

29. The nub of this ground of appeal was that (1) it was an abuse of process to file the second *Nolle* in circumstances where Chavelle at trial had testified that her allegations were untrue and accordingly (2) it was a further abuse of process for the Prosecution to rely on the charges in support of the murder charge especially without placing before the Court before and at trial the fact that the complainant had resiled from her initial assault allegations. The Prosecution played a video recording of the earlier withdrawal statement taken on 13 December 2018. The merit of most legal arguments is measured not by their superficial linguistic lustre but by the ability of the arguments to withstand the stress-testing of contextual analysis. This ground had two strands, one of which can readily be shown to be tenuous and the other of which requires more nuanced scrutiny. The governing legal provision in the Criminal Jurisdiction and Procedure Act 2015 (the "CJPA") provides as follows:

> "***Nolle prosequi***
> *62. In any proceedings instituted before a magistrates' court, the Director of Public Prosecutions may at any stage of the proceedings, by writing under his hand, enter a nolle prosequi to stay proceedings on any information or summons, and upon receipt of such nolle prosequi the magistrate shall cause the accused person to be discharged from any further proceedings in respect of such information or summons; and such discharge shall operate as a bar to further proceedings on the same information or summons, unless the Director of Public Prosecutions by writing under his hand, consents to such further proceedings.*" [Emphasis added]

30. Was the *Nolle* procedure abused? There are two strands to this question, one a jury point and the second a more legalistic response. The jury point is this. It is a notorious fact that victims of domestic violence who in long-term relationships with the accused frequently withdraw complaints for a variety of reasons but not infrequently a desire to repair that relationship in the hope that the abuse will not recur. Such hopes are often dashed with the victims ending up sustaining worse injuries or death and questions are subsequently asked as to why the Police, prosecuting authorities and the courts could not have done more to protect the seriously injured or deceased victim at an earlier stage. In light of the fact that Chavelle ended up being killed by the Appellant, as the jury decided at the subsequent murder trial, it seems absurd to view the DPP's decision to enter the second *Nolle* and Magistrate Attridge's decision to accept it as anything other than reasonable steps designed to assist an apparently vulnerable victim from future harm. The efficacy of these steps was seemingly undermined by unforeseeable and destabilizing impact of the Covid19 Pandemic and the introduction of an unprecedented 'Shelter in Place' policy in early April 2020. Analysing the position more legalistically, the circumstances in which the second *Nolle* was entered (at the end of the complainant's evidence and before the Prosecution formally closed their case) fell well within the parameters of section 62 of CJPA. There may well be circumstances in which entering a *nolle* might be an abuse (e.g. to deprive an accused person of an acquittal at the end of a trial on indictment when there was no obvious public interest in preserving the right to continue the proceedings). Mr Horseman cited *R-v- Smith et al* [2024] SC (Bda) 39 Crim[4] and *R-v-Jell, ex parte Attorney General* [1991] 1 Qd. R. 48. The former case was an instance of witnesses not coming up to proof; the latter case was an instance of an attempt to enter a *nolle* after a ruling had already been made that there was no case to be left to the jury.

31. Accordingly, on any basis there was no valid basis for a complaint that the *Nolle* was improperly accepted by the Magistrates' Court on abuse of process terms. The Judge was correct to find that the proper procedure for directly challenging the decision the Magistrate made or the decision to continue the prosecution made on 1 March 2021 was by way of judicial review although the time for seeking such relief had surely long expired. This is why the only issue properly before the Supreme Court in October 2023 was whether the Prosecution's decision to renew the prosecution of the assault charges was an abuse of process on any legally cognizable grounds. The Appellant was represented by Mr Scott at the abuse of process hearing and the assault joinder point was one of several grounds argued. On this issue, the Judge ruled as follows:

> "*In respect of the defendant being charged with counts 2 to 9, the defendant probably should have brought JR proceedings (Judiciary Review proceedings) into fruition in respect of the prosecution decision to bring charges against him which he says should not have been done as they arise out of a nolle prosequi. He could have done this quite some time ago; he chose not to do so. Further, applications to settle counts 2 to 9 in the indictment was attempted to be advanced but they*

[4] Upheld in a judgment delivered during the hearing of the present appeal: *R-v- Smith and DeSilva* [2026] CA (Bda) 20 Crim.

> *were dismissed earlier. Furthermore, I see no evidence before me to suggest that the DPP using her discretion to reinstate the charges was driven by any oblique motive to be oppressive or abusive, nor do I see it her decision to do so as amounting to such.*
>
> *The trial process (inaudible) of the jury, we will deal those issues and those matters of counts 2 to 9, and they shall be dealt with vis-à-vis the murder charge.*"

32. In essence the Judge implicitly summarily determined that it was possible for the Appellant to have a fair trial on an indictment which included the historic assault charges. The mere fact of their being prosecuted was not inherently unfair. However, Mr Horseman validly complained that the Prosecution should have made it clear that on the witness stand in the Magistrates' Court, Chavelle had positively said that hercomplaints were untrue. This argument initially seemed to me to be a potentially significant one. The suggestion that the Prosecution had itself acted unfairly was not altogether answered by Ms Clarke pointing out that the Appellant testified to this himself at trial. However, having considered this in the round, taking into account the totality of the evidence and the jury verdicts, it is clear that the failure of the Prosecution to explain precisely how the initial Magistrates' Court trial came to an end neither resulted in any material unfairness nor undermined the integrity of the criminal justice system in any material way. Three significant factors which support this conclusion are the following:

    (a) the December 2018 withdrawal statement in which Chavelle explained her reasons for not proceeding with her assault complaints at that time potentially explained why in 2020 she should decide not to proceed again;

    (b) having regard to the nature of the allegations, the family relational background and her migrant worker status, Chavelle's assertion that the allegations were not true on the witness stand was not as evidentially significant as such statements might have been in other scenarios. This is particularly the case because the jury was provided with an abundance of potentially credible evidence from Chavelle's close friends and family which supported the truth of the assault allegations in a general way; and

    (c) the jury clearly accepted the Appellant's evidence that the wounding allegation was false because they recorded a unanimous verdict of not guilty on that count. This suggests that the jury took care to evaluate each physical abuse allegation charged on its merits and did not simply accept the entirety of the Prosecution case.

The common assault charges were time-barred

33. This ground of appeal was a potential knock-out point which if valid would undermine the safety of all convictions including the murder charge. Mr Horseman correctly

submitted that common assault was a summary offence and the following limitation period applies such offences under the CJPA:

> "***Limitation of time for commencing summary prosecutions***
> *80.(1) Subject to subsection (2), a prosecution for a summary offence must, unless otherwise expressly provided, be begun within a period of—*
>
> *(a) 12 months after the offence is committed; or*
> *(b) 6 months of the date when facts sufficient in the opinion of the Director of Public Prosecutions to justify the institution of criminal proceedings first come to his notice,*
>
> *whichever period last expires.*
>
> *(2) Unless otherwise expressly provided, no prosecution for a summary offence shall be begun more than 18 months after the offence is committed.*
>
> *(3) For the purpose of subsection (1)(b), a certificate purporting to be under the hand of the Director of Public Prosecutions and specifying the date upon which such facts first came to his notice shall be evidence that such facts first came to his notice upon such date.*"

34. Mr Horseman submitted without reference to any direct authority that the section 62 *nolle* jurisdiction was constrained by the section 80 time limits. He relied, in part, on the fact that continuance of the old assault charges was signified on a new information, which included additional charges (murder and 2019 assault and wounding charges). Ms Clarke countered that the effect of section 62 was to stay proceedings so that if they were continued after the expiry of the limitation period, no question of fresh proceedings being "*begun*" arose. The original case number from the 2018 Information appeared in the heading of the 2021 Information. In response, Mr. Horseman contended that if the Magistrates' Court proceedings were truly being continued, the prosecution could not simply disregard the sworn testimony of Chavelle given in Magistrates' Court on the 16th and 17th March 2020, in which she testified that her allegations in reference to the assault charges and the unlawful wounding charge were untrue, and her testimony should have been put before the jury at the Supreme Court trial.

35. In my judgment on a straightforward reading of section 62 of the CJPA, the effect of a *nolle prosequi* being filed is to "*stay proceedings on any information or summons*". The 1 March 2021 information that was sent up to the Supreme Court was clearly intended, not to commence new proceedings, but rather to lift that stay (which required certification by the DPP which was given on the face of that document). Section 80 (1) imposes a standard time limit for commencing proceedings for summary offences of 12 months from the date of the offence or six months from the date when facts sufficient to warrant prosecution first came to the DPP's attention. Section 80(2) imposes an upper time limit of 18 months from the date of the offence. Section 80 clearly applies to the initial commencement of the prosecution for a summary offence and it makes no sense to

construe its provisions as applying in any way to proceedings commenced within time, stayed and then continued after the time limit for beginning new proceedings has expired.

36. I would dismiss this ground of appeal.

Provocation

37. I have already indicated when dealing with the manslaughter ground above, that I consider that the Judge was ultimately correct in declining to formally leave the legal defence of provocation with the jury for their consideration in relation to the murder charge. In distinguishing provocation in a general, layman's sense, it is helpful to remember how the Criminal Code defines the defence in relation to murder:

> "***Killing on provocation***
> *295 Subject as hereinafter provided, when a person who unlawfully kills another person under circumstances which, but for…this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only. Provided that the foregoing provisions of this section shall have no effect so as to reduce an unlawful killing to manslaughter where the force used or the mode of retaliation is not reasonably proportionate to the provocation given.*" [Emphasis added]

38. It is readily apparent that the defence is only available where it is open to the jury assess evidence of both the nature of the provocation, its impact on the accused and the proportionality of the response. The high point of the Appellant's case on this ground was that the colourful abuse (in Jamaican patois) of the Appellant in a voice note Chavelle sent to a friend may have provoked him to kill her on 11 April 2020. The Appellant clearly overheard the indirect abuse because he was recorded telling her to "*shut up*". If this was the only operative provocation, it was clearly a disproportionate response to kill her. So the defence of provocation did not properly arise as a defence to murder on the evidence in this case.

39. I would for these reasons dismiss this ground of appeal.

Hearsay evidence was wrongly admitted

40. This ground had two limbs to it. Firstly, the evidential requirements for admitting Chavelle's Witness Statement prepared for the Magistrates' Court proceedings were not met (section 75 (2) of the Police and Criminal Evidence Act ("PACE")). Secondly (and this point was only advanced in oral argument) the Judge failed to consider the discretionary factors governing admissibility under section 77 (2) of PACE. Both can be disposed of shortly.

41. Section 75 (1) of PACE provides that a statement in a document of which oral evidence could be given is admissible if it complies with one of the requirements in section 75(2) or subsection (3). Mr Horseman contended that the requirements of the following provisions of section 75 (2) of PACE had not been complied with:

> "*(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness…*"

42. The argument was that evidence had to be adduced before the statement was formally admitted to support the admission of the hearsay evidence. Ms Clarke replied that evidence was before the Court (in the form of the Prosecution witness statements) of the steps taken to try and locate Chavelle before the murder charges were laid and she took the Judge to this. This why when he later gave reasons for admitting the witness statement and withdrawal statement the Judge concluded by stating:

> "*From this it is patently obvious to me that all reasonable steps have been taken to ascertain the whereabouts of Mrs Dillon-Burgess and it is surprising to me that the defendant would submit otherwise."*

43. Although it is clear from those reasons that the Judge was only addressing the objection made in relation to whether the requirements of section 75 (2) (a) had been met, Mr Horseman secondarily complained that the Judge applied the wrong test. He relied on a failure of the Judge to expressly consider the discretionary duty imposed on the Court by section 77 (1) to consider whether or not admissible hearsay should be excluded in the interests of justice. Section 77 (2) provides:

> *"(2) Without prejudice to the generality of subsection (1), it shall be the duty of the court to have regard—*
>
> *(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;*
>
> *(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;*
>
> *(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and*
>
> *(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."*

44. The Judge was duty bound to consider these matters even though no application was seemingly made to exclude the evidence on unfairness grounds; on the contrary, the witness statement was admitted by consent. Fairness was considered in relation to the somewhat unpredictable question of the extent to which oral hearsay would be admitted from witnesses called by the Prosecution. And no objection was raised to admitting the evidence on section 77 (2) grounds. Apart from advancing the bare complaint that the Judge did not explicitly address the section 77 (2) factors and applied the wrong test, Mr Horseman did not identify any substantive basis on which the statement (and/or the supporting evidence of the assaults) could or should have been excluded. This was, clearly, a case where it was obvious that no arguable grounds for excluding the hearsay evidence existed which is presumably why the Appellant did not oppose the application in relation to the witness statement and expressed concern only about dealing with oral hearsay. As to that, the Judge expressly stated that he would not allow the DPP to lead hearsay evidence from her witnesses which went beyond what was in their statements. There was no need in the circumstances for this admissibility limb to be explicitly addressed by the Judge. In fact it appears from the record (page 376, lines 20-23) that the statements were ultimately admitted by consent with the Appellant only expressing concerns about additional unidentified hearsay being admitted:

> "*JUSTICE WOLFFE: Is that by consent, the prosecution's application to admit specific hearsay is granted. Yes?*
>
> *THE DEFENDANT: One thing I have to agree with you, my learned friend pointed at one instance, I wonder if she would set out which issue is which. I am interested to know.*"

45. The second limb of the hearsay ground of appeal is, on analysis, also entirely without substance or merit. This ground of appeal must accordingly be dismissed.

Refusal of the Prosecution to assist/late disclosure of the phone record evidence

46. This ground of appeal complained that the Judge failed to order the Prosecution to return the Appellant's phone and disclose the phone record evidence upon which they relied until it was too late to enable the Appellant to fairly prepare his defence (a constitutional right). Nothing turned on the late return of the Appellant's laptop because no evidence sourced from it was deployed in the trial. Ms Clarke accepted that phone data evidence was disclosed shortly before and during the trial and that while there was an IT explanation for the delay in downloading the data from the Appellant's phone, there was none in relation to the data from Ms Wilson's phone. The Appellant's Submissions on this ground concluded as follows:

> "*112. The cumulative effect of (a) prolonged retention without meaningful access, (b) late service of voluminous digital material and (c) the refusal to disclose the password denied the appellant a fair hearing within a reasonable time and adequate time and facilities to prepare a defence in breach of Section 6 of the*

> *Constitution. The Judge failed to enforce these constitutional safeguards by declining to make any disclosure/assistance orders. The Appellant did not have a fair trial and the conviction is unsafe*."

47. Mr Horseman referred to section 6 of the Constitution which provides:

> "*(2) Every person who is charged with a criminal offence-*
> *...*
>
> *(c) shall be given adequate time and facilities for the preparation of his defence…*"

48. This constitutional right is ancillary to the overarching right guaranteed by section 6 (1) to "*a fair hearing within a reasonable time by an independent and impartial court established by law*". Accordingly, establishing a breach of section 6 (2) (c) implicitly requires an evaluation of the extent to which the preparation impairment compromised the right to a fair hearing. This mirrors the position under the general law whereby even if a ground of appeal is made out on the merits, this Court can apply the proviso to section 21(a) of the Court of Appeal and dismiss the appeal. Mr Horseman also complained that the requirements of section 21 of PACE (providing a record any seized items within a reasonable time) had not been met and pointed out that some requests for further particulars of what had been accessed and when were still outstanding.

49. In my judgment, the highly relevant material should have been served earlier than it was, just before and during the trial which began three years after the Police expert was first instructed to examine the relevant phone data. It is unclear precisely what orders could have been made by the Court to expedite the process, but is common ground that numerous requests were made by lawyers for disclosure which had no effect. However, that is not in itself enough to make good a ground of appeal. Such a procedural failure will only result in a conviction being unsafe if either it led to unfairness to the defendant or was such an exceptional egregious nature that, even if it did not lead to such unfairness, it could not be countenanced by the Court. I do not consider that the failure here fell into the latter category of exceptional case for example, there is no suggestion that the late disclosure was deliberate, designed to conceal critical exculpatory evidence or gratuitously cause prejudice to the accused. The DPP said that her office received the material at the same time as the Appellant. Judicial notice can be taken of the exceptional pressures the Police were under during the Pandemic and how normal functioning of various public and private agencies (including the Courts) were disrupted. The critical question is whether the impact of the late disclosure was such as to undermine the safety of the conviction because it led to unfairness.

50. Mr Horseman was unable, in answer to questions from Hickinbottom JA during the hearing of the present appeal, to add flesh to the bones of the bare assertion that the prosecution disclosure failings led to any identifiable unfairness to the Appellant so as to render the conviction unsafe. He submitted that prejudice could be presumed and

described what occurred as "*a horrible example of late disclosure in a case of such seriousness.*" Over 2 ½ years after the trial, any specific and material prejudice which was caused ought reasonably to be identifiable by the Appellant. No potentially pivotal and/or exculpatory passage in the data transcripts which he was unable to explore at trial because of lack of preparatory time was identified by the Appellant in his grounds of appeal or in his counsel's written or oral submissions. In these circumstances, I am bound to conclude that no material prejudice sufficient to undermine the safety of the conviction flowed from the undoubted abuse of process which occurred.

51. For those reasons, although procedural deficiencies on the part of the Prosecution have been identified, they do not render the conviction unsafe and I would consequently apply the proviso to section 21 (a) and dismiss the appeal.

The Pettingill evidence

52. The Appellant complained that the evidence of Mark Pettingill was (1) wrongly admitted on the grounds that it was more prejudicial than probative and (2) dealt with unfairly in the Judge's directions to the jury. The evidence which was objected to was evidence about Mr Pettingill's experience with forensics and discussions he had with the Appellant in the capacity of an employee about how a body was disposed of at sea. Mr Pettingill had already in his examination-in-chief given evidence about Chavelle alleging to him that she had been assaulted by the Appellant. Before the controversial part of the witness's evidence was given the Appellant objected that it appeared that Mr Pettingill was being introduced by the Prosecution as an expert witness. He further argued that the proposed evidence to the effect that he had knowledge of how to dispose of a body was irrelevant and prejudicial, accepting that it might have been relevant if there was evidence in this case that the body had been disposed of at sea. This argument was rejected by the Judge in a short ruling in which he concluded that "*what is more probative than prejudicial is that the defendant had knowledge of how to dispose of a body through his work as a lawyer*". At first blush the objection seems a valid one and the Judge's reasoning appears to be entirely circular. He amplified the ruling later which concluded as follows:

> "*… So to reiterate, Mr Pettingill can give evidence as to, one he had a client who was charged with the murder and the allegation was that he disposed of that body and, two, that he had a conversation with the defendant about various ways and methods by which a body can be disposed of. This can be done without actually going into detail about what those matters are my decision may have been different if there was some evidence pointing to one of these methods and since there is none I will not allow it. Therefore again it goes to show that the defendant had knowledge about how to dispose of a body.*"

53. The logic of this revised approach was clear. However, the Judge rowed back from this more cautious position (we were not referred to a formal ruling to this effect) and permitted Mr Pettingill to give evidence about some but not all of the disposal methods

in the case discussed between the witness and the Appellant at some point in the past. In summing to the jury, the following pertinent directions were given:

> "…I should say to you, members of the jury, that Mr Pettingill was not putting himself forward as an expert in forensic science, and nor was the prosecution tendering him as such. He said that in his capacity as a defence lawyer he had gained a particular knowledge and interest in cases involving forensic science and that he often did cases involving forensic science. To this, I should explain to you that accused persons who have cases involving forensic science will often seek out lawyers who have had extensive experience or specialty in doing such cases. Not many lawyers have this experience, but it would appear that Mr Pettingill does. It was in this context that he gave his evidence and it is for this very limited purpose that you should use his evidence. He said that in 2011 he represented a man by the name of David De Silva who was accused of murdering his victim. Part of the facts of that case was that Mr De Silva disposed of the body in a particular way and that the cause of death was by choking, specifically the victim had a fractured bone in her neck. At the time the accused worked with him on that case and he spoke to the accused about the case and about the cause of death. He also discussed with the accused about the disposal of the body and that in that case the victim was wrapped in a green and white tablecloth which had been purchased from Gibbons Company along with matching tablecloth and napkins. I should say to you in the most strongest of terms, members of the jury, that the purpose for which you use this evidence is very limited. That is, it shows that the accused, unlike most people, would have had knowledge from his work as a defence lawyer about how a body can be disposed of. You are therefore not to use this evidence, and I repeat you are not to use this evidence to automatically conclude that because the accused worked on a case in which a body was disposed of then (1) in practical terms he knows how to dispose of a body, or (2) that he must have killed Chavelle and then disposed of her body. Lawyers work on cases all the time in which crimes are committed in certain ways, but that does not mean that they with that knowledge would then go on to commit the said crimes. So I repeat: do not use the evidence of the accused knowing about how the body can be disposed of to automatically conclude that he must have killed Chavelle and disposed of her body…" [Emphasis added]

54. The directions assist in explaining why the Judge admitted the evidence. It does not dispel the concern that adducing the evidence that was objected in this way was an unusual way of establishing a somewhat obvious common sense proposition that could have been advanced by way of argument or, if the Appellant testified as he ultimately did, put to him in cross-examination. The potential prejudice flowing from the evidence is obvious: the jury may have been, no doubt unintentionally, encouraged to speculate that the Appellant had in fact used the specific knowledge he acquired in the *DeSilva* case to kill Chavelle by strangling and dispose of her body in a similar way. The risk of this speculation was exacerbated by the fact that Mr Pettingill testified that Chavelle had reported to him instances of being choked by the Appellant. If the specificities of the *DeSilva* case had not been mentioned, the potential prejudice would have been minimal. In effect the jury would merely have been told that the Appellant had worked on a murder case which involved the disposal of a body, and like many other criminal lawyers who worked on such cases (and indeed fans of murder mystery stories) would have knowledge

about disposing bodies that the average person would not have. The Judge's directions were clearly intended to limit the prejudicial effect of the evidence and to ensure that the jury only used it to a limited extent. But the directions repeated the evidence about the mode of disposal in *DeSilva* which the Judge had previously ruled he would not permit to go before the jury.

55. That said, the Appellant in his own evidence gave details about his discussions with Mr Pettingill about a body being disposed of at sea and Mr Pettingill saying that if it was punctured, the body would have sunk. This not only went beyond what the Judge contemplated being admitted in evidence; it seemingly went beyond what Mr Pettingill actually testified to and potentially aggravated the prejudice his original objection was designed to prevent.

56. Ms Clarke in oral argument supported the admission of the evidence about the cause of death in *DeSilva* by reference to Mr Pettingill's evidence about Chavelle's report about choking. This in my judgment highlighted, rather than diminished, the risk of the jury speculating about the cause of death in the absence of any actual evidence and was not responsive to the complaint made on appeal. The directions of the Judge were also supported by the DPP. In the Respondent's written submissions, the Court was invited (if the Judge's directions were found to be deficient) to follow the approach in *Myers, Brangman and Cox* [2015] UKPC 40 in deciding whether the verdict was affected. In that case, where some gang evidence was inadmissible and other evidence was properly admitted (Myers and Brangman), the Privy Council evaluated the prejudicial impact of the inadmissible evidence alone on the safety of the verdicts and concluded that the convictions were safe.

57. In my judgment, consistently with the Judge's own view before the witness took the stand, Mr Pettingill's evidence about the modes of body disposal which he discussed with the Appellant was more prejudicial than probative and should have been excluded. This ground of appeal therefore succeeds. It remains to consider whether the prejudice is so great as to render the murder conviction unsafe, taking all of the other admissible evidence in the case into account. Central to this analysis is the adequacy of the Judge's directions in relation in relation to the inadmissible evidence. Did the directions make things worse or make them better? Despite Mr Horseman's valiant efforts to demonstrate that the directions were unfair, in my judgment it is clear that the directions mitigated the risk of prejudicial speculation by the jury about how the victim's death may have occurred and how the body may have been disposed of. Firstly, the Judge made it clear that Mr Pettingill was not an expert witness. Secondly, the Judge directed the jury in the strongest possible terms about the limited extent to which the Appellant's body disposal discussions could be used. This was, in substance, a warning to the jury not to leap to speculative conclusions such as the notion that the Appellant had "*practical knowledge*" about how to dispose of a body or must have committed the offence. For these reasons, I am bound to conclude that this ground of appeal should be dismissed applying the proviso on the grounds that no substantial miscarriage of justice flowed from the

inadmissible portions of Mr Pettingill's evidence. In other words, the wrongful admission did not undermine the safety of the conviction on Count 1, taking into account the strength of the Prosecution case overall on all elements of the murder charge save for intent.

The good character direction

58. The essence of this ground of appeal is that the Judge unfairly gave the jury a good character direction that was less than full. In Mr Horseman's written submissions, it was argued:

> "*122. The Judge's direction on good character was materially deficient and misleading as it framed the Appellant's good character by reference to prior prosecutions (EMD damage, perjury, fabricating evidence) followed by acquittals, thereby risking prejudice and diluting the protective effect of good character on credibility and propensity.*
>
> *123 The Appellant, with no prior convictions was entitled, to a full good character direction comprising: (a) credibility a credibility limb (that good character may support the defendant's credibility); and (b) a propensity limb (that good character may make it less likely the defendant committed the offence). He got neither.*
>
> *124. The Judge's direction did not provide a clear positive explanation of the dual limbs showing how good character could assist the Appellant by making it less likely the accused committed the offences and by supporting the truthfulness of his evidence/ exculpatory statements but rather reduced good character to a neutral 'framework' consideration leaving it to the jury to assign what weight the jury thought reasonable, which in light of the previous directions meant very little.*"

59. Ms Clarke replied that the direction did in fact address both the propensity and credibility limbs and was adequate. It was the Appellant himself who damaged his own character at trial. The Respondent's written submissions set out the terms of the character direction actually given and referred the Court to, *inter alia*, *Hunter et al -v- R* [2015] EWCA Crim 631. The direction was in the following terms:

> "*Members of the jury, I want to say more about the good character direction of the accused. You will have heard evidence that the accused would have been charged and prosecuted for offences in relation to damage to an EMD device, for perjury and for fabricating evidence. However, you have also heard that the accused was acquitted of those offences. Therefore, as it stands you will have heard that the accused does not have any previous convictions, meaning that prior to the incidents mentioned in this trial that he had not been convicted of any offences, including of a violent nature. This evidence is part of the evidence to be taken into account when deciding whether you are satisfied beyond a reasonable doubt of his guilt... The influence of this evidence on you is a matter for you. It is relevant in two respects. The first is in considering whether a person with the kind of reputation sworn to by the accused would do the acts alleged by the prosecution. The second is in*

> *considering the credibility of the accused's evidence and any exculpatory statements he may have made elsewhere. When considering his evidence, do you think that his general reputation adds weight to it? Evidence of general reputation, like any other evidence, is simply part of the framework within which you reach your decision. You consider it in the context of the other evidence. How much weight you give it in that context and using it for the purposes I have told you about is a matter for you.*"

60. This was a full good character direction but qualified by reference to the charges the Appellant himself disclosed he had been acquitted of. It included both propensity and credibility limbs, but in terms that did not echo the more 'full-throated' version of a full good character direction that is often given. *Hunter* is a helpful case, but must be read with care because the English statutory landscape in relation to good character has recently altered the previously binary good and bad character divide. However, Hallett LJ (at [23]) cited a passage from an older House of Lords case, *R-v-Aziz* [1996] AC 41 reflecting traditional character direction position*:*

> *"Lord Steyn addressed the question of what amounts to good character on the part of a defendant and when s/he is entitled to a good character direction in the following way at page 488 B:*
>
> > *'The certified question, although phrased in very general terms, was intended to raise the problem whether a defendant without any previous convictions may 'lose' his good character by reason of other criminal behaviour. It is a question which was not directly before the Court of Appeal in Vye. It is a complex problem. It is also an area in which generalisations are hazardous. …*
> >
> > *A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with Vye in a case where the defendant's claim to good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give character directions in the case of the defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with Vye. I am reinforced in thinking that this is the right conclusion by the fact that after Vye the Court of Appeal in two separate cases ruled that such a residual discretion exists: H. [1994] Crim.L.R. 205; Zoppola-Barrazza [1994] Crim. L.R.*
> >
> > *That brings me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. <u>The residual discretion of a trial judge to dispense with character directions in respect of a defendant of good character is of the more limited variety. Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions</u>*

> *in accordance with Vye and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with Vye the judge may in his discretion dispense with them. Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of trial judges. It is worth adding, however, that whenever a trial Judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions.*" [Emphasis added]

61. In my judgment, the Judge in the present case complied with his duty to give a good character direction. In light of the fact that the Appellant put his own character into issue, it fell within the ambit of his discretion to qualify the direction in the manner that he did. I would dismiss this ground of appeal.

Conclusion

Count 1

62. I would allow the appeal on the grounds of an unfair manslaughter direction and quash the Appellant's conviction for murder.

63. I would dismiss all other grounds of appeal, applying the proviso in relation to the late disclosure ground and the wrongful admission of portions of Mr Pettingill's evidence (on the hypothesis that the latter two grounds were the only grounds of appeal which had potentially succeeded, which they are not).

Counts 3-9

64. To the extent that may be necessary, I would dismiss all grounds of appeal in relation to the common assault charges.

Disposal

65. In relation to Ground 1, I have concluded that (a) on the findings of the jury, the jury must have been satisfied that the Appellant was guilty of unlawful killing in one form or another, i.e. murder or manslaughter (see [26] above), but (b) the murder conviction should be quashed on the grounds of an unfair manslaughter direction (see [62] above).

66. Following circulation of the draft judgment in respect of the substantive issues to the Crown and the Appellant on 12 November 2026, the Court invited submissions on the appropriate disposal of the appeal in those circumstances. Each made written and, today, oral submissions on what consequential orders that should be made, the obvious options being

(1) substituting a conviction for manslaughter (and sentencing afresh) and (2) ordering a retrial for murder.

67. On 16 November 2026, Ms Clarke DPP and Mr Kitson-Walters Senior Crown Counsel filed the '*Crown's Submissions on Retrial and Manslaughter*'. The submissions helpfully summarised the Court's jurisdiction under sections 21 and 22 of the Court of Appeal Act 1964 where it allows an appeal in the circumstances of this case, which provide the options of (a) acquitting the appellant altogether, (b) ordering a retrial for murder and (c) substituting a conviction for the offence of manslaughter which was clearly accepted as proved by the jury and imposing a fresh sentence in substitution for the sentence imposed for murder. The Crown's primary submission was that:

> "*....having regard to the circumstances of this case, the findings necessarily made by the jury, the practical difficulties associated with ordering a retrial, and the interests of justice, the appropriate course is for this Honourable Court to exercise its jurisdiction under section 22 (2) of the Court of Appeal Act 1964 and substitute a conviction for manslaughter contrary to section 293 of the Criminal Code…*
>
> *...when these considerations are assessed cumulatively, the balance favours substitution of a conviction for manslaughter rather than an order for a retrial. Such an order would not diminish the seriousness of Chavelle's unlawful killing. Nor would it suggest that the prosecution's original decision to charge murder was not justified.*" ([3], [70])

68. On 19 November 2026, Mr Horseman filed short written submissions confirming that the Appellant would accept the substitution of a conviction for manslaughter and agreeing that this Court should impose a fresh sentence.

69. I have considered the Crown's carefully reasoned written submissions which evaluate the competing considerations relevant to what course is most consistent with the interests of justice. These include, particularly:

    (a) . the jury's established findings concerning the unlawful killing. As indicated above, on the basis of their verdict, the jury were clearly satisfied of all of the essential elements of the offence of manslaughter, because they only sought further directions from the Judge in relation to intention elements of the offence of murder. That finding of the jury is not undermined in any way by the deficiencies in the manslaughter direction I have identified that make the guilty verdict on murder unsafe;

    (b) the availability of a statutory power to substitute manslaughter;

(c) the strength of the prosecution case and the fact that the prosecution case at trial relied wholly upon circumstantial evidence, and any retrial would be similarly reliant;

(d) the length and complexity of the original trial, and that a retrial would likely be lengthier and more complex;

(e) the challenges posed in ensuring that any retrial would be fair;

(f) that any retrial would not be heard until, at the earliest, late 2027 and possibly later;

(g) the emotional burden on (amongst others) the victim's family which would ensue if a retrial were ordered;

(h) the burden of a retrial on the criminal justice system (in terms of Court time and resources); and

(i) the public interest in finality.

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70. All relevant factors have been considered with especial case and scrutiny, together with the short supplementary oral submissions made by counsel at the hand-down hearing on today's date. I have concluded that it is not in the interests of justice for there to be a retrial. The Prosecution case on murder is not sufficiently strong to justify a retrial. In drawing that conclusion, of course, I have not formed the view that the decision to prosecute for murder at trial was in any way wrong.

71. Accordingly, I would quash the Appellant's conviction and sentence for murder, substitute a conviction for manslaughter and remand the Appellant in custody pending a sentencing hearing before this Court at a future date.

Hargun JA

72. I agree.

Hickinbottom JA

73. I, too, agree.