

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCRA2020/0007

BETWEEN

CURT JOHN

Appellant

and

THE KING

Respondent

and

SVGHCRA2020/0008

BETWEEN

KENDOL CATO

Appellant

and

THE KING

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mde. Esco L. Henry
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Appellant Curt John in person
Mrs. Kay Bacchus-Baptiste for the Appellant Kendol Cato
Mr. Cornelius L. Tittle for the Respondent

2025: February 13
March 12.

Criminal Appeal – Robbery – Wounding with intent – Possession of firearm with intent to commit an offence – Appeal against sentence – Appeal against conviction and sentence – Whether the sentence imposed was manifestly excessive – Whether the conviction was unsafe and unsatisfactory

The prosecution's case was that on 25th November 2015 at around 9:00 a.m. while heading to Caratal, Georgetown the virtual complainant, Mr. Shawayne Smith ("VC") took a short cut and on the way encountered the appellant in **SVGHCRAP2020/0007**, Mr. Curt John. The virtual complainant greeted Mr. John who did not respond. As the VC kept going, a masked man who was later identified as the appellant in **SVGHCRAP2020/0008**, Mr. Kendol Cato, told him to 'give me what you got'. The VC inquired of Curt John what was going on, to which he retorted if he had not heard what the man said. At that moment the VC realized that Kendol Cato and Curt John were in cahoots. After giving some money from his pocket to Mr. John, the VC instantaneously lunged at Mr. Cato and during a struggle, the gunman shot him in his left leg. The gunman fired a second shot but missed the VC. The two appellants fled the scene on foot. The VC pursued Mr. Cato until they arrived at a river. From an embankment overlooking the river, the VC watched Mr. Cato take off his disguise and dispose of the disguise and firearm. The police were summoned to the scene and the VC informed them of the robbery. He was then transported to the Georgetown hospital. On the way there, roughly 40 minutes after the robbery, the VC saw Mr. Cato at the police station and identified him as one of the robbers. As a result, Mr. Cato was arrested. Mr. John was also subsequently arrested.

During the four-day trial in 2020 the appellants were unrepresented by legal counsel. They gave evidence denying involvement in the robbery. Mr. Cato testified that the VC had thrown two stones at him that morning and that he had gone to the police to report that assault when the VC pointed him out as one of his attackers. Mr. John presented an alibi defence in which he averred that at the time of the robbery he had gone to Miriam's Restaurant. Following the trial, both men were found guilty of robbery, wounding and possession of a firearm with intent to commit an offence. Kendol Cato was sentenced to 9 years imprisonment for robbery, 11 years 11 months and 2 days imprisonment for wounding with intent and 10 years' imprisonment for possession of a firearm with intent to commit an offence with the sentences to run concurrently. Curt John was sentenced to 13 years 3 months and 2 days imprisonment for robbery, 12 years' imprisonment for wounding with intent and 10 years' imprisonment for possession of a firearm with intent to commit an offence.

Dissatisfied with their convictions and sentences the appellants appealed. Mr. Cato appealed against sentence alone while Mr. John, as he indicated during the appeal, appealed against conviction and sentence. The issues to be considered by this Court were (a) whether the sentence imposed against Kendol Cato for wounding with intent was manifestly excessive and (b) whether Curt John's conviction was unsafe and unsatisfactory and whether the 12-year imprisonment term imposed against him for wounding with intent was manifestly excessive.

Held: dismissing both appeals and affirming the sentences imposed, that:

1. An appellate court will not lightly interfere with a sentence by a trial judge even if it would have imposed a different sentence. The Court must be satisfied that the sentence was manifestly excessive or wrong in principle. The Court must remain mindful that an appeal against a sentence is not a re-hearing but merely an evaluation of the sentence passed, and the steps taken to craft it, to inquire whether the sentencing judge failed to consider or apply any settled principles of law.

R v Ball (1951) 35 Cr App R 164 applied; **Gurrie v The Queen** GDAHCRAP2013/0004 (delivered 5th April 2022, unreported) followed.

2. When reviewing the sentence of a lower court, an appellate court is guided by the need to promote as far as possible and practical, consistency in sentencing and is enjoined to apply settled principles of law in light of the facts of the case under consideration. The primary factors to be considered in arriving at an appropriate sentence are the aims of sentencing, consideration of relevant mitigating and aggravating factors, sentence range, identification of an appropriate starting point and granting of credit for time spent on remand inclusive of the period spent awaiting sentence and other relevant circumstances. In other words, the sentencing court must have regard to all relevant factors in arriving at an appropriate sentence. In cases involving wounding, the court is required to take into account the severity of the attack, the types of injuries sustained and whether the facts indicated any premeditation by the offender.

Desmond Baptiste v R Saint Vincent and the Grenadines Crim Appeal No. 8 of 2003 (delivered 6th December 2004) followed; **Winston Joseph v the Queen** Saint Lucia Criminal Appeal No. 4 of 2000 (delivered 17th September 2001 and re-issued 31st October 2001, unreported) followed.

3. With regard to the appellant Mr. Cato, having considered the evidence, the submissions and the sentencing remarks of the learned trial judge, the Court considers that for the reasons articulated by him, the learned trial judge was entitled to apply a starting point of 12 years for the offence of wounding with intent. As to the appellant Cato's contention that he ought to have received a discount in light of the circumstances under which he was raised, there is nothing on the record from which to infer that the learned judge did not take those matters into consideration. The mere fact that the learned trial judge mentioned aspects of the Social Inquiry Report that stood out to him does not mean that he did not consider the entire report. In any event, even if he were to incorporate remarks about Mr. Cato's upbringing as a mitigating feature of the offender, it would not have displaced the balance in Mr. Cato's favour in view of several aggravating factors that clearly outweigh the mitigating aspects of his case. The learned trial judge therefore did not err in conducting the sentencing exercise and the sentence of 11 years 11 months and 2 days imprisonment for wounding with intent is justified and is not manifestly excessive. Mr Cato's appeal against sentence is accordingly dismissed and his sentence is affirmed.

4. The Court of Appeal is empowered to overturn a conviction on appeal if it is satisfied that the jury's verdict should be set aside by reason that it is unsafe or unsatisfactory. The Court must consider however, the advantage which a jury has in seeing and hearing the witnesses, and, if all the material was before the jury and the summing-up was impeccable, the Court should not lightly interfere. Mr. John was found guilty by a jury which is the sole arbiter on fact-finding. It was for them to decide whether the prosecution had satisfied them so that they felt sure that Mr. John had committed the offences with which he was charged. In doing so, the jury had to assess all of the evidence including the viability of his alibi defence. Clearly, the jury rejected the alibi and was satisfied that there was no legal or evidentiary basis on which to entertain reasonable doubt about the VC's credibility on relevant aspects of his testimony. The accounts of the witnesses as suggested by Mr. John cannot, without more, negate the account given by the VC which the jury clearly accepted. Further, the summation by the learned judge evidenced no misdirections or non-directions, was reasonable, comprehensive and clear and accordingly, there is no reasonable or justifiable basis on which to legitimately disturb the convictions against Mr. John. His appeal against conviction is therefore dismissed.

Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act

Cap. 24 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009 applied; **Nathaniel John v R** (1994) 47 WIR 122 applied; **Sean Cooper v R** (1969) 53 Cr. App R. 82 applied.

5. On the issue of sentence and Mr. John's contention that he did not have the opportunity to review the Social Inquiry Report and was therefore at a disadvantage; Mr. John not only had the opportunity to address the unfavourable aspects of the Report, he confronted them head on. He, however, advanced no contradictory account or helpful explanations that might have operated to improve his fate in terms of the sentence he received. Even if he did not have sight of the Report, he suffered no prejudice as a consequence as his plea in mitigation demonstrates that he clearly had in view the matters the learned judge took into account from that Report. The learned judge considered Mr. John's previous convictions, the absence of remorse, the fact that he acted jointly with Mr. Cato and the fact that the VC was injured by a firearm. He properly found that there were no mitigating features of the offence or offender and appeared to overlook certain aggravating factors such as the premeditated nature of the offence or the prevalence of firearm related offences in the State. Overall, the 12-year sentence is not out of the normal range for this type of offence and does not warrant disturbing. Accordingly, Mr. John's appeal against sentence is dismissed and his sentence is affirmed.

JUDGMENT

- [1] **HENRY JA:** This judgment relates to two appeals. The first by Kendol Cato was filed on 4th March 2020 against his conviction and sentence and the second by Curt John

was filed on 13th March 2020. Mr. John did not indicate in his notice of appeal whether he was appealing against conviction and/or sentence. However, at the hearing of the appeal on 13th February 2025, he stated that his intention was to appeal against both conviction and sentence. The Court of Appeal panel decided that in the interests of justice he should be permitted to proceed notwithstanding the formal defect on the face of his notice of appeal. The Court decided further to hear both matters at the same time.

- [2] By way of background, the appellants were indicted jointly¹ for the offences of robbery contrary to section 216 of the **Criminal Code**²; wounding with intent contrary to section 173 of the **Criminal Code** and possession of a firearm with intent to commit an offence contrary to section 19(1)(a) of the **Firearms Act**³.
- [3] The evidence led at trial revealed that sometime before the commission of the offences, the virtual complainant, Shawayne Smith had a conversation with the appellant Curt John in which he (Smith) disclosed that he had come into a sum of money. Around 9:00 a.m. on 25th November 2015, while heading to Caratal, Georgetown the virtual complainant took a short cut and, on the way, encountered the appellant, John. He greeted Mr. John who did not respond.
- [4] As Mr. Smith kept going, a masked man jumped out of some nearby bushes. Pointing a gun in his face, the masked man told him 'give me what you got'. The virtual complainant inquired of Curt John what was going on, to which he retorted if he had not heard what the man said. For the virtual complainant, that was the moment that it clicked that the masked man and Curt John were in cahoots. He removed some money from his pocket, gave it to Curt John and instantaneously lunged at the masked man. They struggled and in the process the gunman shot him in his left leg. The gunman fired another shot at Mr. Smith but thankfully he missed. The two

¹ On indictment filed on 4th April 2018.

² Cap. 171 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

³ Cap. 386 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

assailants then fled the scene on foot. Mr. Smith ran after the masked man and relentlessly pursued him until he got to a river.

- [5] From an embankment overlooking the river, Mr. Smith watched the gunman remove the mask, hoodie and glove that he had been wearing and throw them into the bushes. He also disposed of the gun. After he took off the disguise Mr. Smith recognized him to be Kendol Cato. Mr. Smith threw several stones at him but discontinued his pursuit because by then he was feeling weak from his injury. Mr. Smith testified that he knew both appellants for many years because they all hailed from Georgetown, Saint Vincent.
- [6] The police were summoned to the scene. When they arrived, the virtual complainant reported that he had been robbed by the appellants both of whom he identified by name. He described the clothing that Kendol Cato was wearing at the time and pointed out to the police where he (Cato) had discarded the mask, gloves and hoodie. The police recovered those items from that area but did not locate the firearm. Mr. Smith was transported to the Georgetown hospital. On the way there, roughly 40 minutes after the robbery, the virtual complainant saw Kendol Cato at the police station and pointed him out to the police as one of the robbers. As a result, Mr. Cato was arrested. Curt John was also subsequently arrested.
- [7] Mr. Smith was admitted into the hospital for three days. On being discharged, he was unable to return to work and this adversely affected his family since he was the main breadwinner. His partner who worked only part-time was pregnant at the time. Being unable to effectively support his family as before, Mr. Smith resorted to selling his livestock at an undervalue. A lifelong avid footballer, he had to discontinue playing the sport due to the injury to his leg. He complained that he still gets cramps in his leg because of the gunshot wounds he received that day.
- [8] During the trial in 2020 the appellants were unrepresented by legal counsel. They gave evidence denying involvement in the robbery. Mr. Cato insisted that he was

innocent. He testified that the virtual complainant had thrown two stones at him that morning and he had gone to the police station to report that assault when Mr. Smith pointed him out to the police as one of his attackers. For his part, Mr. John presented an alibi defence in which he averred that around 10:00 a.m. the day of the robbery he had gone to Miriam's Restaurant.

[9] Following a four-day trial, the jury returned a unanimous verdict on 14th February 2020, finding both men guilty of the three offences. They were sentenced on 13th March 2020.

[10] **Kendol Cato** was sentenced as follows:

- (a) on the robbery count to **9 years** in prison;
- (b) on the wounding charge to **11 years 11 months and 2 days imprisonment**; and
- (c) for possession of a firearm with intent to commit an offence to **10 years' imprisonment**, the sentences to run concurrently.

[11] **Curt John** was **sentenced** as follows:

- (a) on the robbery count to **13 years, 3 months and 2 days** in prison;
- (b) on the wounding charge to **12 years' imprisonment**; and
- (c) on the possession of a firearm charge to **10 years' imprisonment**, the sentences to run concurrently.

[12] Being dissatisfied with their conviction and sentence the appellants appealed. By Notice dated 10th February 2021, Mr. Cato withdrew his appeal against conviction. His legal counsel confirmed this at the beginning of the hearing of the appeal.

Issues

[13] The issues are whether a) the sentence imposed against Kendol Cato for wounding with intent was manifestly excessive; b) whether Curt John's conviction was unsafe and unsatisfactory and whether the twelve-year imprisonment term imposed against him for robbery with intent was manifestly excessive.

Appeal against sentence – Kendol Cato
Appellant's submissions

- [14] On Mr. Cato's behalf, learned counsel Mrs. Kay Bacchus-Baptiste took issue with some of the conclusions drawn by the learned judge from the Social Inquiry Report. She argued that Mr. Cato did not have the report prior to the sentencing hearing, was therefore not afforded an opportunity to interrogate the contents of the report and be able to refute certain allegations made in it at the hearing and as a result he was prejudiced. She submitted further that the learned judge had regard to factors that he should not have and ignored some that he should have taken into account. In this regard, she said that the report is deficient in that it stated that Mr. Cato had been transferred from one school to another due to conflict with other students. It was submitted that this statement is vague and misleading and that had he been asked about it, Mr. Cato would have been able to bring a different perspective to bear on the situation, which would likely have gained him a further downward revision of his sentence.
- [15] It was argued further that the court failed to and should have given consideration to whether Mr. Cato could be rehabilitated. It was submitted that this factor appears not to have featured in the learned judge's evaluation.
- [16] Another bone of contention was that Mr. Cato's poverty extending to lack of meals as a child and absence of a real father figure in his younger days should have been but were not taken into account. Learned counsel stated further that the appellant was negatively impacted by the fact that preparation of the report is conducted by a government institution and not an independent body.
- [17] Learned counsel submitted that the withdrawal of the appeal against conviction should be interpreted as demonstrating that Mr. Cato is remorseful and that his remorse is further evidenced by his statement to the social worker that he regrets what happened to the virtual complainant. It was submitted further that having regard to that fact that he was only 19 years old when he committed the offences and had

no prior convictions he should have benefitted from a further reduction of two years from his sentence.

Respondent's submissions

- [18] For the Crown, learned counsel Mr. Cornelius Tittle accepted that the learned judge made no conclusions as to the possibility of rehabilitation for Mr. Cato. He submitted that nonetheless the sentence of 11 years 11 months and 2 days imprisonment for wounding with intent falls well within the usual range and was not excessive.
- [19] He stated that in the absence of sentencing guidelines with respect to wounding with intent the learned trial judge quite properly considered cases from the region, in particular **Winston Joseph and Others v The Queen**⁴ and was also assisted by the UK Sentencing guidelines. He noted that the usual benchmark for such sentences is 10 years imprisonment. However, in this case because of the aggravating factors and overall criminality the court was justified in adjusting the sentence upwards.
- [20] Learned counsel cited a number of cases that suggest a benchmark of 10 years as the appropriate sentence. These included **Patrick Facey and Michael Facey v The Queen**⁵, **Jahbarry Charles v The Queen**⁶ and **Swann Nichols v The Queen**⁷. He submitted that in the case at the appeal bar, it is important to bear in mind that the appellant made use of a firearm as a result of which the virtual complainant was injured. The prevalence of firearm offences in the State was advanced as another aggravating feature.

Discussion

- [21] It is settled law that an appellate court will seldom interfere with the sentencing decision of a trial judge and would do so only if satisfied that the sentence was

⁴ Saint Lucia Criminal Appeal No. 4 of 2000 (delivered 17th September 2001 and re-issued 31st October 2001, unreported).

⁵ BVICRAP2013/0009 (delivered 18th May 2015, unreported).

⁶ SVGHCRA2012/0022 (oral judgment delivered 30th September 2013, unreported).

⁷ SVGHCRA2011/0011 (oral judgment delivered 25th January 2011, unreported).

manifestly excessive or wrong in principle. The Court is guided by this principle of law in relation to the appeals against sentence in these two matters.

- [22] The maximum penalty fixed for the offence of wounding with intent is life imprisonment. As correctly noted by the learned judge, this is generally taken to be a term of 20 years.
- [23] It is a well-established principle of law that an appellate court will not lightly interfere with a sentence by a trial judge even if it would have imposed a different sentence - **R v Ball**⁸. It would do so seldomly and only if satisfied that the sentencing judge committed an error of law or principle or misapplied a principle of law and thereby arrived at an erroneous decision.
- [24] As stated by this court in a number of cases including **Gurrie v The Queen**⁹, in approaching this revision exercise the Court remains mindful that an appeal against a sentence is not a re-hearing but merely an evaluation of the sentence passed and the steps taken to craft it, to inquire whether the sentencing judge failed to consider or apply any settled principles of law. This Court is cognizant that a range of appropriate sentences is always available to a sentencing judge in coming up with an appropriate and just sentence and there is no magic, mathematical or other scientific formula which can be applied.
- [25] When reviewing the sentence of a lower court, an appellate court is guided by the need to promote as far as possible and practical, consistency in sentencing and is enjoined to apply settled principles of law in light of the facts of the case under consideration. As stated in **Desmond Baptiste v R**¹⁰ it is well-known and established that the primary factors to be considered in arriving at an appropriate sentence are the aims of sentencing, consideration of relevant mitigating and aggravating factors, sentence range, identification of an appropriate starting point and granting of credit

⁸ (1951) 35 Cr App R 164.

⁹ GDAHCRAP2013/0004 (delivered 5th April 2022, unreported).

¹⁰ Saint Vincent and the Grenadines Crim Appeal No. 8 of 2003 (delivered 6th December 2004).

for time spent on remand inclusive of the period spent awaiting sentence and any other relevant circumstances.

[26] In **Winston Joseph v The Queen**, this Court provided guidance regarding the approach a sentencing court should adopt in calculating the sentence. Byron CJ stated:

‘The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors, It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark upon an evaluative process. It must weigh the mitigating and aggravating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.’¹¹

[27] The court’s sentencing exercise must involve an assessment of the aggravating and mitigating features of the offence and any peculiar personal circumstances of the offender that could alter the final sentence in a substantial way. Among the aggravating factors that the court should consider are whether the defendant has previous convictions for serious offences; the prevalence of that type of offence in the State and whether the victim is very old or very young. Mitigating factors include whether the defendant is a first offender and/or is a youth; has shown remorse and/or whether a guilty plea was entered thus eliminating the need for a trial.

[28] In summary, the sentencing court must have regard to all other relevant factors in arriving at an appropriate sentence. In cases involving wounding, the court is required to take into account the severity of the attack, the types of injuries sustained and whether the facts indicate any premeditation by the offender.

[29] The cases cited by learned counsel for the Crown suggest that a benchmark of 10 years imprisonment is recognized in relation to wounding caused by the use of a machete or sharp instrument. In **Patrick Facey**, the Court of Appeal affirmed the

¹¹ Paragraph [17].

sentence of 10 years imposed in respect of the defendant's conviction for the unlawful and malicious wounding of the virtual complainant with a machete inflicting wounds to the shoulder and head. By contrast, in **Jahbarry Charles** a sentence of imprisonment for 20 years was considered to be unduly harsh and was reduced to 10 years which was considered to be the benchmark. **Swann Nichols** who pleaded guilty to wounding with intent had his 12-year sentence reduced to 10 years' imprisonment. In that case, the appellate court used a benchmark of 12 years and discounted it by 1/3 for the guilty plea. It was then revised upwards by reason that the aggravating factors outweighed the mitigating factors. In light of those authorities, a range of 10 years to 12 years emerges as a reasonable benchmark for wounding with intent and will be adopted in these appeals.

[30] The learned trial judge in the cases at the appeal bar noted that no sentencing guidelines existed in relation to wounding with intent. He noted further that the UK sentencing guidelines attract a starting point of 12 years in prison. He was mindful that in other similar cases he had adopted a starting point ranging between 10 and 12 years and therefore chose a starting point of 12 years in these matters.

[31] The learned judge pointed out that Mr. Cato was the one with the gun and he fired the shot wounding Mr. Smith. As the sole mitigating factor he noted that Mr. Cato had a clean record. He concluded that the mitigating and aggravating factors cancelled out each other, no guilty plea was entered, and consequently no upward or downward adjustment was merited. Therefore, the final sentence would remain at the starting sentence of 12 years' imprisonment with time spent on remand to be deducted.

[32] In this regard, the learned judge stated:

"Kendol Cato is now 23 years old. He has no previous convictions, he soon to become a father for the first time. Social Inquiry Report reveals that he has a history of using violence to settle conflicts, which was back to his time at secondary school. He had to be transfer (sic) from one school to another to complete his education. I noted that there is a suggestion that he suffered some mental trauma during his last year at secondary school, which would have affected his performance at school. But, he too continues to deny the offences for which he is convicted, he shows no remorse for his actions. His

parents also proclaimed his innocence, that was in (inaudible) contrast to the attitude of the fellow villagers who were asked about his character. Some thought he had a reputation as a robber while others declined to comment. One view expressed is that the prisoner Cato had his tendency towards deviant behavior encouraged by his parents. It was said that they failed to reprimand him for any wrongdoing. ... in sentencing a ... judge must bear in mind the classical aims of criminal punishments. ... the Court aims to show the view that society has about the way in which the prisoner has behave (sic), this is retribution. Sentences are also aimed at deterring other persons from behaving that way and deterring the prisoner from repeating his behavior. By a criminal sentence the Court tries to protect the public from offenders by removing them from society. The Court must also bear in mind that the offenders come from our society and must return them at the end of the sentence. So that rehabilitation to prepare offenders for reintegration is another consideration of criminal punishment. ...".¹²

[33] He continued:

"In this case there was physical harm caused to the complainant. ... Persons who plead guilty at a (sic) early stage before our Courts benefit from a discount of up to one third (1/3) of a sentence. These prisoners did not plead guilty and therefore there is no discount to be applied. For the offence of wounding with intent the maximum penalty is as I have said imprisonment for life. ... The sentencing court must evaluate the aggravating and mitigating features of the offence under considerations. Peculiar personal circumstances of each offender must also be kept in mind, as this would impact significantly on the final sentence. ... As noted before, John has a previous conviction for possession of a firearm, while Cato has a clean record. However, it was Cato who had the gun in his hand and it was he who fired the shot which wounded the complainant. I consider that the aggravating and mitigating features therefore cancel each other out I will remain at a notional sentence of 12 years in prison for both offenders on this count."¹³

[34] It is to be noted that when considering an appropriate sentence for the robbery offence, the learned judge applied the draft sentencing guidelines. One of the factors he considered was the joint nature of the robbery. He stated:

"The offence of robbery is aggravated by the use of a mask, to conceal the identity of one of the robbers, it was done by two men acting together. I can find nothing mitigating about this offence."¹⁴

¹² Record of Appeal, pgs. 346 – 347.

¹³ Record of Appeal, pgs. 347 and 349.

¹⁴ Record of appeal, pg. 348.

He did not mention again in his sentencing remarks in relation to the offence of wounding with intent the fact that both men acted jointly in this criminal enterprise.

[35] In reviewing the learned judge's evaluative assessment, I note that contrary to Mr. Cato's submissions, the sentencing remarks included reference to Mr. Cato's upbringing as reflected in the Social Inquiry Report and outlined in the extract above¹⁵. I make the observation that the learned judge did not consider the prevalence of firearm offences in the State. He was entitled to take judicial notice of this. While he noted that the offence was committed by two men acting together, he did not expressly apply that as an aggravating feature of the offence when calculating the final sentence for wounding with intent. This might have warranted an upward revision of the sentence. Likewise, the clear evidence of premeditation is a glaring and aggravating feature of the offender.

[36] I note that the learned judge commented on the absence of remorse in passing. In light of certain submissions advanced, it is important to point out that remorse is not demonstrated by withdrawal of an appeal against conviction (which might be actuated by any number of factors) but rather by a genuine expression of regret for being the perpetrator of the crime under consideration and of the harm occasioned to the victim. Furthermore, the expression of remorse would not attract a reduction in sentence.

[37] Regarding Mr. Cato's claim that he had no opportunity to respond to the adverse statements in the Social Inquiry Report, I make the further observation that immediately after the jury returned with their verdicts, the learned judge informed both appellants that he was requesting a Social Inquiry Report to assist with the sentencing exercise and that they should bring to his attention anything else that they wished him to know about that would be of assistance to him, and further that they

¹⁵ At paragraph [32] of this judgement.

should also let the persons interviewing them for the report know of any such concerns.¹⁶ He said to them:

“Alright. This is what we will do. I need to find out more about you so that I can decide what is a proper sentence in this case. So, what I will do is I will ask the Authorities to prepare a Social Inquiry Report for me. The Officers will visit you both and speak with you, they will speak with your relatives and your neighbors and they will bring back a report which will give me a better picture of who you are and that will help me to determine what is the proper sentence in this case, you understand?”

and

“... By that time, I will have gotten the Social Inquiry Report and if there is anything else that you want me to know about you, that will help me in the sentencing exercise. When you are interviewed with this - - by the people, you will let them know as well, it will be included in the report.”

[38] Once again before he sentenced the appellants, he gave each of them an opportunity to address him on such matters. He asked each of them in turn:

“... morning gentlemen, you have been found guilty of the offences for which you were charged... You have anything to say to the Court before the sentence of the Court is passed on you according to law. Mr. John?”¹⁷

and of Mr. Cato:

“I am asking is there anything you want to say to the Court before the sentencing of this Court is pass (sic) on you according to law?”¹⁸

[39] In my view, Mr. Cato had ample opportunity to alert the learned judge to any further matters he deemed significant. He chose not to do so. In his plea in mitigation, he merely said:

‘I am begging (inaudible) for mercy and leniency. My Lord, I haven’t been convicted - - I haven’t been convicted in prison. I don’t normally be arrested, My Lord. I always keep myself out of trouble, from the time I was charged for this offence, My Lord. From now - - I am begging for some mercy, My Lord.’

In all of the circumstances, Mr. Cato’s belated claim that he was not allowed to respond to the adverse representations about him in the Social Inquiry Report or

¹⁶ Page 340-341 of Record of Appeal.

¹⁷ At pg. 342 of the Record of Appeal.

¹⁸ At pg. 343 of the Record of Appeal.

provide another perspective to the social worker or to the learned judge about his upbringing is not borne out by the record.

- [40] As to whether the sentence takes account of the prospects of rehabilitation, in my view although the learned judge did not state that he factored in the prospects of rehabilitation in arriving at the sentence, he clearly had rehabilitation in mind as an aim of sentencing. This is reflected in the extract at paragraph [32] above. In any event, in my view, he would have had enough information to assess the prospects of rehabilitation. That material is reflected in his sentencing remarks and reproduced above at paragraph [32]. Moreover, the learned judge solicited information to assist him in this regard and Mr. Cato was given the opportunity to address him. His representations to the court were neither helpful nor persuasive on this count.
- [41] Furthermore, lack of inclusion of a specific rehabilitative component in sentencing does not translate to the sentence being manifestly excessive. The fact of the matter is that it does not exclude State-led rehabilitation efforts. In my opinion, there is nothing inherent in the term of imprisonment which prevents the appellant from engaging in activities geared towards his rehabilitation while serving his sentence, whether such activities are organized by the prison officials or through Mr. Cato's own initiative. This is to be encouraged and commended to the extent that is reasonably practicable.
- [42] Having considered the evidence, the submissions and the sentencing remarks of the learned trial judge, I am of the considered opinion that for the reasons articulated by him, he was entitled to apply a starting point of 12 years for the offence of wounding with intent. As to the appellant Cato's contention that he ought to have received a discount in light of the circumstances under which he was raised, there is nothing on the record from which to infer that the learned judge did not take those matters into consideration. The mere fact that he mentioned aspects of the Social Inquiry Report that stood out to him does not mean that he did not consider the entire report. I make no finding therefore that he erred in principle by not expressly referencing that part

of the report. In any event, even if he were to incorporate remarks about Mr. Cato's less-than-ideal upbringing as a mitigating feature of the offender it would not in my opinion have displaced the balance in Mr. Cato's favour, in view of the several aggravating factors that clearly outweigh the mitigating aspects of his case.

- [43] I am fully satisfied that the learned judge did not err in conducting the sentencing exercise. For all of the foregoing reasons I am of the opinion that the sentence of 11 years 11 months and 2 days imprisonment for wounding with intent is justified and is not manifestly excessive. I would accordingly dismiss Mr. Cato's appeal against sentence.

**Appeal against conviction and sentence – Curt John
Appellant's submissions**

- [44] The main thrust of Mr. John's appeal against conviction is that the virtual complainant was not credible. He stated that he does not doubt that Mr. Smith was shot. However, he stressed that he (John) was not there that morning, therefore, Mr. Smith should not have been believed when he placed him at the crime scene. Mr. John submitted that Mr. Smith's credibility was undermined by the testimony of the two witnesses who Mr. Smith said were at the nearby cemetery the morning – Brian Charles and Conroy Jarvis. He stated that both men denied seeing him (John) in that area that particular day. Mr. Smith's testimony that the appellant was present should therefore be rejected as a fabrication.
- [45] Mr. John's second line of attack relates to the investigation conducted by the police. He described it as poor. He pointed out that the police made no inquiries and produced no records of call logs to prove that he telephoned Mr. Smith. He accused the police of accepting and presenting Mr. Smith's account without question and characterized that approach as being unfair to him. He pointed to his alibi of being in the city that day as constituting exculpatory evidence which further undermined the prosecution's case.

- [46] On the issue of sentencing, like Mr. Cato, Mr. John claimed that he did not have the opportunity to review the Social Inquiry Report before sentencing and was therefore placed at a disadvantage. He stated that there were other points he could have raised had he been given a chance to address those matters.

Respondent's submissions

- [47] Learned counsel for the Crown submitted that the evidence produced at trial by the prosecution was sufficient to secure a safe conviction, there being among other things, strong identification of the appellant John. He emphasized Mr. Smith's evidence that he knew Mr. John for several years and was well acquainted with him; saw his face immediately before, during and after the commission of the offences for an uninterrupted and extended period during the morning hours; and identified him to the police as one of his assailants early in the investigation when he was taken to the police investigator. It was submitted further that the conviction is neither unsafe nor unsatisfactory.
- [48] With respect to the appeal against sentence, it was stated that there were some aggravating factors which justified the upward adjustment of the sentence to 12 years from the usual benchmark of 10 years. The aggravating factors highlighted by the Crown were that Mr. John had previous convictions including one for possession of a firearm without a license. It was submitted that there were no mitigating factors which would justify a lesser sentence in the circumstances.
- [49] The **Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act**¹⁹ at section 35 empowers the Court of Appeal to overturn a conviction on appeal if it is satisfied that the jury's verdict should be set aside by reason that it is unsafe or unsatisfactory: **Dookran and another v The State**²⁰. It is interesting to note that in **Dookran**, the Board opined that in some cases an appellant may formulate his appeal against conviction by using the expression that there is 'a lurking doubt about

¹⁹ Cap. 24 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009.

²⁰ [2007] UKPC 15.

its safety' and this should merely be considered one way for the appellate court to address 'the fundamental question: Is the conviction safe?'. Lord Rodger of Earlsferry who delivered the judgment explained:

"In the vast majority of cases the answer to that question will be found simply by considering whether the rules of procedure and the rules of law, including the rules on the admissibility of evidence, have been applied properly. Very exceptionally, however, even where the rules have been properly applied, on the basis of the "general feel of the case as the Court experiences it", there may remain a lurking doubt in the minds of the appellate judges which makes them wonder whether justice has been done: *R v Cooper* [1969] 1 QB 267, 271, per Widgery LJ. See Archbold, *Criminal Pleading Evidence and Practice* (2006), paras 7-47 – 7-49. In reality, Mr Jennings was submitting that this was an exceptional case of that kind."²¹

[50] In such exceptional cases, the appellate court may allow the appeal if left with a lurking, subjective or reasonable doubt that justice was not done by the verdict in light of all the circumstances including the evidence, the directions given to the jury, the general feel of the case and all relevant aspects of the proceedings. In **Nathaniel John v R**, Sir Vincent Floissac explained it thus:

"the ultimate question to be decided ... is whether [the] Court has a subjective reasonable or lurking doubt that justice may not have been done by the verdict and has been left in doubt as a result of considering all the circumstance of the evidence, the summing up and the general feel of the case."²²

[51] Another consideration is that unlike the jury, the appellate court has not had the benefit of seeing and hearing witnesses testify. In the words of Widgery LJ in **Sean Cooper v R**:

"it has been said over and over again ... that [the] Court must recognize the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, [the] Court should not lightly interfere."²³

²¹ At para. 28.

²² (1994) 47 WIR 122.

²³ (1969) 53 Cr. App R. 82.

- [52] Mr. John was found guilty by a jury which is the sole arbiter on fact-finding. It was for them to decide whether the prosecution had satisfied them so that they felt sure that Mr. John had committed the offences with which he was charged. In doing so the jury had to assess all of the evidence including the viability of his alibi defence. Clearly, the jury rejected the alibi, and they were satisfied that there was no legal or evidentiary basis on which to entertain reasonable doubt about Mr. Smith's credibility on relevant aspects of his testimony. The accounts of the witnesses Brian Charles and Conroy Davis notwithstanding, cannot without more, negate the account given by Mr. Smith which the jury clearly accepted. In my judgment there was sufficiency of the evidence for purposes of making a finding of guilt against Mr. John for any of the offences charged; or of the safety or satisfactory nature of Curt John's convictions for robbery, wounding with intent or possession of a firearm with intent to wound.
- [53] I am also satisfied that the summation by the learned judge to the jury evidenced no misdirections or non-directions, was reasonable, comprehensive, cogent and clear. Accordingly, there is no reasonable or justifiable basis on which to legitimately disturb the convictions against Mr. John. Additionally, to the extent that his appeal is based on a lurking doubt argument, this is in my opinion not a case where a lurking doubt exists. I would therefore dismiss his appeal against conviction.
- [54] As regards the sentence, Mr. John was 33 years of age at the date of sentencing. Unlike Mr. Cato, he would have earned no discount on account of his age. In view of the fact that the sentences are to run concurrently, the court need only concern itself with reviewing the highest sentence - 12 years' imprisonment imposed for wounding with intent.
- [55] The learned judge applied the same starting point of 12 years as with Mr. Cato. He noted Mr. John's prior convictions for unlawful possession of a firearm, possession of ammunition without a licence and unlawful wounding for which custodial sentences were imposed.

[56] There was nothing in the record from which to ascertain that Mr. John had sight of the Social Inquiry Report before sentencing. What is clear is that he was told by the judge before it was prepared, that he would be interviewed by someone who would prepare a Social Inquiry Report for the Court's consideration, and he should inform that person of anything that he wished the learned judge to take into account when sentencing him. The learned judge referred to the contents of the report in sentencing, noting that:

"... Mr. Curt John is 33 years old, he tells me. It appears that he has been convicted of criminal offences in Canada but in his interview with the social inquiry preparers he claims to have forgotten the surrounding circumstances of those offences. But, he was deported from Canada consequence (sic) of his convictions there at the age of 28. Since his returned (sic) to Saint Vincent and the Grenadines he accumulated three criminal convictions they are for unlawful possession of a firearm, possession of ammunition without a license and unlawfully wounding. All of these offences were all committed within two years of his return to Saint Vincent and the Grenadines. He continues to deny any involvement in the offences for which he has been convicted. He shows no remorse. His close relatives were spoken to, ... and they spoke of Mr. John as having been caught up and (inaudible) company. They say that they encouraged him to take advantage of a chance to start anew after he returned ... but he seems to have (inaudible) that opportunity. They (sic) were person (sic) in his community who were afraid to comment on his character or indeed on the case whey there (sic) were asked. And to my mind that speaks volumes as to his reputation in the village in which he resided."²⁴

[57] In his plea in mitigation, Mr. John told the court:

"... I am 23 (sic) years of age I have had a (sic) ugly past. I am not going to request but (inaudible) back to St. Vincent (inaudible) I was on the verge of turning my life around. There is a saying that every - - every sinner has a past (inaudible) there is a future. My Lord, the reasons I am asking for leniency is (inaudible) right now and with these offences that is before you is very serious and you sending me to jail. My Lord, I am on the verge of reconsidering where I am going to take myself as where they're going to put me ten steps back to what I already - - I have already like accomplish in terms of building myself as a, as a, as a law abiding citizen (inaudible) I do have a past and I am sure that My Lord is aware of that. And I am begging My Lord when you are considering your mitigating factors and (inaudible) you passing judgment (inaudible) for example, if I was a teacher ten years ago and to this present day I am, I am, I am a criminal. You cannot

²⁴ Record of Appeal, pg. 346.

judge me from a teacher's prospective (sic) cause I was (inaudible) ten years ago judge (inaudible) what this person is about presently not what the person has do (sic) in his past. And am - - My Lord, I am (inaudible) I am so much (inaudible) to do and just - - My Lord, I am just asking for a second chance."²⁵

- [58] It appears to me that Mr. John not only had the opportunity to address the unfavourable aspects of the Social Inquiry Report, he confronted them head on, yet advanced no contradictory account or helpful explanations that might have operated to improve his fate in terms of the sentence he received. Even if he did not have sight of the Social Inquiry Report I am satisfied that he suffered no prejudice as a consequence, because his plea in mitigation demonstrates that he clearly had in view the matters that the learned judge took into account from that report. He commented on them.
- [59] The learned judge had regard to Mr. John's previous convictions since his return to Saint Vincent and the Grenadines; the absence of remorse; the fact that he acted jointly with Mr. Cato and that Mr. Smith was injured by a firearm. He found quite properly that there were no mitigating features of the offence or offender. Other aggravating features that the learned judge appeared to overlook was the premeditated nature of the offence and the fact that Mr. John had knowledge of Mr. Smith's newly acquired monies as well as the prevalence of firearm related offences in the State.
- [60] I note that a salient feature of this case is that the two appellants acted jointly and share culpability for the serious wounding suffered by Mr. Smith. This was a factor that the learned judge took on board in arriving at his sentence. I am satisfied that the aggravating features in Mr. John's case warranted a starting point of 12 years which was applied by the learned judge and the final sentence of 12 years imprisonment. Overall, the 12-year sentence is not out of the normal range for this

²⁵ Record of Appeal, pgs. 342-343.

type of offence, and I would therefore not disturb it. Accordingly, I would dismiss Mr. John's appeal against sentence and affirm the sentence.

Disposition

[61] **It is ordered that:**

(1) Kendol Cato's appeal against sentence is dismissed and the sentences are affirmed.

(2) Curt John's appeal is dismissed, and the sentences are affirmed.

[62] I am grateful to both counsel for their submissions.

I concur.

Vicki Ann Ellis

Justice of Appeal

I concur.

Gerard St. C. Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar