

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCRA2021/0003

BETWEEN:

MARIUS WILSON

Appellant

and

THE KING

Respondent

Before:

The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. Alberton Richelieu and Mr. Jeannot-Michel Walters for the Appellant.
Ms. Tanya N. Alexis-Francis for the Respondent.

2023: March 24;
July 25.

Criminal Appeal – Intentionally causing dangerous harm – Using a deadly instrument with intent to cause grievous harm – Appeal against conviction – No case submission – Whether the trial judge erred in law in failing to uphold the no case submission on the basis that the evidence adduced by the prosecution was so manifestly unreliable that no reasonable tribunal could safely convict – Summing-up – Directions to the jury on hostile witnesses – Whether the trial judge failed to direct the jury on the evidential value of hostile witnesses – Good character direction – Credibility limb – Whether the trial judge’s good character direction derogated from the credibility limb – Appeal against sentence – Whether the appellant’s sentence was excessive due to the judge’s consideration of irrelevant matters and his failure to adequately take into account the 9-year delay before the commencement of the trial

Marius Wilson ("the appellant") was convicted of intentionally causing dangerous harm and using a deadly instrument with intent to cause grievous harm to Winsbert Alexander ("Winsbert" or "the virtual complainant"). He was sentenced to 5 years on count one and 4 years on count two, both sentences to run concurrently.

The prosecution's case was primarily based on evidence given by Winsbert's girlfriend, Rita Demar ("Rita"), as well as Police Constables Mathurin and Jawahir. There were other witnesses who were deemed hostile and they provided limited assistance to the prosecution's case. The evidence of Rita was that on 7th June 2012, she saw the appellant shoot Winsbert to his upper body while at Spinners Night Club ("Spinners"). PC Mathurin's evidence was that he was performing security duties at Spinners where he admitted the appellant into the club. As the night progressed, he heard a gunshot coming from inside the club and persons were saying that "Mouse" (which is the appellant's nickname) fired the shot. He said that the appellant denied firing the shot and that when he searched the appellant shortly after, he found a firearm on him. PC Jawahir stated that when he arrived on the scene, he observed a 9mm shell on the floor and that later at the Criminal Investigation Department, PC Mathurin handed the appellant over to him along with a black 9mm Walther firearm and a magazine containing 5 rounds of 9mm ammunition.

The appellant's case was that he knew Winsbert to be the uncle of Lloni Alexander who was his girlfriend at the time, and that around the time of the incident, he and Winsbert were not on speaking terms due to several altercations which occurred between them. He further stated that on 7th June 2012, he was at Spinners, and he heard a group of men alert him to turn around; when he did, he saw Winsbert charging towards him with an object appearing to be a firearm. In order to defend himself, he shot Winsbert in the right area of his upper body. The appellant maintained at trial that he was acting in self-defence.

On appeal, there were four issues arising from the grounds advanced by the appellant for the Court's consideration, which are as follows: 1. whether the trial judge erred in law in failing to uphold the no case submission; 2. whether the trial judge erred in failing to direct the jury on the evidential value of the hostile witnesses; 3. whether the trial judge's direction on the appellant's good character was inadequate; and 4. whether the sentence imposed was excessive. The parties' position on these issues will be set out in brief.

In relation to the first issue, the appellant's position was that the evidence adduced by the prosecution was insufficient to establish a *prima facie* case. He submitted that all but one of their civilian witnesses were deemed hostile and the evidence of these witnesses was unhelpful because the parts of their witness statements which they accepted had no probative value. In relation to Rita's evidence, the appellant stated that it was "manifestly contrary to reason" as she gave no context to her bald statement that the appellant shot Winsbert. The prosecution's position in response was that Rita clearly identified that the appellant was the one who shot Winsbert, that the admissible evidence of the hostile witnesses established that Winsbert was unarmed at the time of the shooting, and that the evidence of the police witnesses showed that a firearm was found in the appellant's possession.

In relation to the second issue, the appellant's position was that the trial judge's directions could have confused the jury because even though he said that the witness statements were not evidence, he also invited them alternatively, to form the view that these statements represented their recollection at a time when the evidence was fresher in their minds. The prosecution's position was that this single statement could not have confused the jury because the trial judge's direction on this issue had to be looked at holistically, and on several occasions the trial judge said that the jury could not rely on those matters which the hostile witnesses could not recall.

In relation to the third issue, the appellant's position was that the credibility limb of the good character direction was seriously diluted, particularly when the trial judge said that the fact that the appellant was a lawyer did not mean that he was more or less credible than any other witness. The prosecution disagreed with the appellant's contention and further submitted that the trial judge fulsomely directed the jury on the propensity and credibility limb, explaining the relevance of both.

In relation to the fourth issue, the appellant's position was that in determining sentence, the judge took irrelevant matters into consideration, he failed to consider whether the appellant was a danger to society or the virtual complainant, and he failed to consider that there was a 9-year delay before the commencement of the trial. The prosecution's position was that the sentence was fair and just. They noted that the appellant did partly add to the delay and the judge would have correctly exercised his discretion in determining the extent to which the said delay should operate as a mitigating factor.

Held: dismissing the appeal against conviction, allowing the appeal against sentence and varying the sentence imposed by the learned judge by substituting a sentence of 3 years for the offence of intentionally causing dangerous harm and 2 years for using a deadly instrument with intent to cause grievous harm, both sentences to run concurrently, that:

1. A no case submission is hung on one of two limbs: (i) that the prosecution has failed to establish an essential element of the offence; or (ii) that the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict. In the present case, the no case submission presented to the trial judge was grounded on the second limb. If a prima facie case depended on only the evidence of the hostile witnesses in this case, then the trial judge would have been bound to uphold the no case submission because the hostile witnesses said nothing to implicate the defendant in the commission of the offences. However, in addition to the evidence of the hostile witnesses, the prosecution led uncontradicted direct evidence from Rita Demar that the appellant was seen to have shot Winsbert, and contrary to the appellant's contention, the failure of the prosecution to lead evidence providing context as to how or why the crimes were committed was not fatal to their case. There was also evidence from police witnesses that the appellant was found with a firearm moments after the shooting.

R v Galbraith [1981] 2 All ER 1060 followed; **R v Maw** [1994] Crim LR 841 distinguished; **McPherson v R** Supreme Court Criminal Appeal No. 87/2004 (delivered 7th April 2006) distinguished.

2. A witness may be deemed as hostile where that witness gives evidence adverse to the party calling them or fails to make a genuine effort to give evidence on matters reasonably supposed to be within their knowledge. Once a witness is deemed hostile, they may be cross-examined on previous statements they have made, the purpose of which is to show inconsistency between the witness's present testimony and their previous statement, which can have the effect of undermining their credibility. In St. Lucia the trial judge is required to direct the jury that the previous statement is not evidence in the case and they cannot treat it as such unless the witness confirms specific parts of their previous statement. The trial judge in the present case discharged this requirement and left the jury in no doubt that they could not act on those parts of the hostile witnesses' statements which they claimed not to remember. The additional statement made to the jury that they may form the view that the statements represented the hostile witnesses' recollection at a time when the events were fresher in their minds, must be viewed in the context of the summing up as a whole. When the summing up is viewed as a whole, the jury could not have been in any state of confusion, nor could they have reasonably thought that it was open to them to act on the contents of the witness statements where the hostile witnesses claimed not to remember or which they did not accept. The trial judge had done sufficient to disabuse them of any such notion.

Section 35 of the **Evidence Act** Chapter 4.15 of the Revised Laws of Saint Lucia, 2019 applied; **R v Stoddart** (1909) 2 Cr. App. R. 217, 246 followed; **Kayvon McPherson v R** Supreme Court Criminal Appeal No. 87/2004 (delivered 7th April 2006) distinguished; **R v Maw** [1994] Crim LR 841 followed; **R v Pestano and others** [1981] Crim LR 397 followed.

3. A defendant who has no previous convictions or who is deemed to be a person of effective good character is entitled to the benefit of a good character direction. The trial judge in delivering such a direction must explain the relevance of the defendant's good character to their credibility and their propensity to commit the offence with which they have been charged. In that regard, the good character direction yields two limbs: a credibility limb; and a propensity limb. In the present case, the trial judge delivered both limbs of the good character direction adequately. The appellant's submission that the credibility limb was "seriously diluted" when the trial judge said that "the fact that the appellant was a lawyer did not mean that he was more or less credible than any other witness", did not operate to attenuate in any way the credibility limb of the good character direction. That statement made by the trial judge showed that he was alive to the varying perceptions which people hold of lawyers and the impugned direction was intended to disabuse the jury's mind from the inclination to view lawyers in a discreditable light.

R v Vye [1993] 1 WLR 471 followed; **The Crown Court Compendium Part I: Jury and Trial Management and Summing Up** (Judicial College 2023), 11-1 followed;

R v Miah [1997] 2 Cr. App. R. 12 followed; **Singh v The State** [2005] UKPC 35 distinguished.

4. An appellate court will not interfere with the judicial discretion of the sentencing court unless: the sentence passed is not justifiable by law; it is passed on the wrong factual basis; it failed to properly take into account some matter; or it was wrong in principle or manifestly excessive. In the instant case, the trial judge did err in sentencing on a wrong factual basis when he had regard to the contents of a pre-sentence report, which suggested that the appellant committed the offences when under the influence of alcohol or drugs, in circumstances where no such evidence had emerged at the trial and was not admitted by the appellant at the sentencing hearing. However, practically, that error did not cause the appellant to suffer prejudice because the trial judge regarded it as both a mitigating and aggravating factor which cancelled out each other thereby producing no adjustment to the 12-year starting point.

Dillon Saul v The Queen SVHCRA2008/020 (delivered 25th January 2011, unreported) followed; **R v Newsome**; **R v Browne** [1970] 2 QB 711 followed.

5. Delay can be a mitigating factor resulting in a reduction of sentence. This is a discretionary matter for the sentencing judge and requires the judge to make an assessment of the facts to determine if any discount should be made to the sentence. In the present case, the judge's assessment that the appellant contributed to the delay in "some small measure" warranting a reduction of 1 year was not founded in any satisfactory reasoning. The judge failed to adequately take into account the excessive length of delay of 9 years; his own finding that the prosecution did not satisfactorily explain why the appellant's matter went on hiatus for that lengthy period; and his own finding that the appellant contributed to that period in "some small measure". On that basis, the Court is justified in exercising its discretion to reduce the appellant's sentences by two years.

Violet Hodge v Commissioner of Police BVIMCRA2015/0005 (delivered 27th February 2018, unreported) followed; **Akim Monah v The Queen** GDAHCRA2021/0015 (delivered 23rd February 2022, unreported) followed.

JUDGMENT

- [1] **WARD JA:** On 7th June 2012, Winsbert Alexander was at the Spinners nightclub ("Spinners" or "the club") in Union Castries, in company with several relatives, including his niece Lloni Alexander and his girlfriend, Rita Demar. Without meaning any disrespect, I will refer to Mr. Alexander as "Winsbert" throughout this judgment as that is how he was referred to throughout the trial. Whilst at Spinners, Winsbert

sustained a gunshot injury to his right chest wall. The prosecution's case was that Marius Wilson ("the appellant"), was the person who shot him. The appellant was charged and convicted of: (i) intentionally causing dangerous harm to Winsbert Alexander, contrary to section 99(1) of the Criminal Code¹ ("Criminal Code"); and (ii) using a deadly instrument, a firearm, with intent to cause grievous harm to Winsbert Alexander contrary to section 101(1)(b) of the Criminal Code. He was sentenced to 5 years on count one and 4 years on count two, both to run concurrently.

The prosecution's case

- [2] Despite calling seven witnesses, the prosecution's case turned principally on the evidence of Winsbert's girlfriend, Rita Demar ("Ms. Demar" or "Rita"). This is because, save for her, Winsbert and all of his relatives who were present when he was shot seemed to have experienced a bout of amnesia as each claimed not to know who shot him or claimed not to recall any material details of the events at the nightclub - even after refreshing their memory from their witness statements - except the fact that he was shot. Not surprisingly, the prosecution sought and obtained leave to treat them as hostile witnesses. The summary of the prosecution's case which follows is constructed from the evidence given by Ms. Demar, Police Constable 237 Severius Mathurin ("PC Mathurin") and the Investigating Officer Police Corporal 622 Nigel Jawahir ("PC Jawahir"), with limited input from the hostile witnesses.
- [3] Ms. Demar testified that on 7th June 2012 at about 12:45 a.m. she was at Spinners with her boyfriend Winsbert, his sister Jennifer Dujon, and his nieces Lloni and Corinthia Alexander. Whilst standing next to Winsbert, she saw the appellant, whom she had known for about 3 years prior to that day. He passed in front of her and went in the direction to her right. Ms. Lloni Alexander ("Lloni") was about fourteen feet to her right. At the time Winsbert was standing next to her, he wasn't doing anything. Ms. Demar testified that she saw the appellant shoot Winsbert to his upper

¹ Cap. 3.01 of the Revised Laws of Saint Lucia, 2004.

body while at Spinners. She accompanied him to the Tapion Hospital. Ms. Demar was asked a single question in cross-examination: whether she would agree that the area where she was standing with Winsbert was a little dark. She agreed that it was.

- [4] From the hostile witnesses, the prosecution was able to establish that: Lloni had been the appellant's girlfriend for some eight months at the time of the incident; the appellant had spoken to her briefly at Spinners, after which she continued enjoying herself; and Winsbert was about 8 feet away from Lloni and had nothing in his hands at that time. Apart from these meagre admissions, these witnesses claimed to lack recollection of a number of matters which they had related to the police in their witness statements. I will deal in greater detail with their evidence later in this judgment.
- [5] PC Mathurin testified that he was performing security duties at the gate of Spinners when the appellant approached him at about 2:15 a.m. seeking to get in. After some discussion, he was eventually let in. At about 3:10 a.m. PC Mathurin heard a gunshot coming from inside the club. As he ran towards the entrance of Spinners, he saw the appellant walking towards him. Persons in the crowd were saying "Mouse did it". He knew the appellant by the alias "Mouse". The appellant walked past him saying, "Mathurin, I didn't do anything." He led the appellant to the side of the club and repeatedly asked him what had happened, but the appellant repeatedly said, "Mathurin, I did not do anything" while trying to free himself from Mathurin's grip. Police Constable Charlemagne went to his assistance, and together they subdued the appellant. PC Mathurin searched the appellant and recovered a firearm.
- [6] PC Jawahir's evidence was that he received a report of the shooting at the club at about 3:30 a.m. and responded. On arrival, Winsbert was lying on the floor being treated by emergency response personnel. PC Jawahir observed a spent 9mm shell on the floor, which was recovered by another officer. By his observation, nothing

else was recovered at the scene. He left the club and proceeded to the Criminal Investigation Department ("CID"), where PC Mathurin handed over the appellant to him. PC Mathurin also handed to him a black 9mm Walther firearm and a magazine containing 5 rounds of 9mm ammunition. PC Jawahir informed the appellant that he was investigating a report of discharging a firearm in public and causing dangerous harm and cautioned him. The appellant replied, "I did not do that." A caution statement was subsequently recorded from the appellant which stated simply, "I have nothing to say."

The appellant's case

- [7] The appellant gave evidence in his defence. He testified that he had built a house in Cacao, Babonneau, and in June 2012, resided there with his girlfriend Lloni with whom he had been in a relationship for 9 years. He knew Winsbert, who was Lloni's uncle. However, he and Winsbert were not then on speaking terms because of a number of incidents with him. The first incident was an occasion when he awoke at 4 a.m. only to discover Winsbert and two other unknown individuals "scrapping" a vehicle in his driveway. The appellant confronted Winsbert, who threatened to kill him. He called the police and Winsbert left. Winsbert repeated this activity on two other occasions and on each occasion threatened to kill the appellant. Matters reached a head on 3rd June 2012. The appellant had just completed the painting of the house in Cacao Babonneau for his girlfriend when Winsbert came to the premises. An altercation ensued between them, and the appellant called the police.
- [8] In relation to the incident at Spinners, the appellant testified that he and a group of friends arrived at Spinners sometime after 2:30 a.m. on 7th June 2012. They sought permission from the security officers on duty at the gate and were eventually allowed to enter when they saw that Sergeant Ermay was part of the appellant's group. The appellant entered the club and proceeded to a balcony area. After a few minutes he decided to go in search of his friends Calroy and Bernie. As he approached a group of men seated by the bar, one of them stood up suddenly and shouted to him, "Watch out, making 180-degree, fire." The appellant turned around instinctively, and

he saw Winsbert running toward him with his hands outstretched with an object that appeared to be a firearm with a black handle and silver body. Being the holder of a licensed firearm himself, the appellant quickly retrieved his firearm from the holster on his waist and fired one shot in the upper right area of Winsbert's body to stop his advance. He saw Winsbert fall. The appellant immediately went back to the entrance where the police were because that is where he had left Sergeant Ermay and the other officers. He met PC Mathurin who asked him if he had shot Winsbert. He told PC Mathurin he had not done anything wrong, he said: "The guy was the one who attacked me with a gun so I defended myself."

- [9] The officers then placed him in the police vehicle, took his firearm and removed the magazine, which contained 5 rounds of ammunition. He was then taken to the CID in Castries. When examined about the lighting conditions in the club, the appellant stated that the area to his right where the main activity was going on was dark, because that's where the crowd was. He recounted that the area at the bar where the said group of men were, was lit by spotlights and that was how he was able to see them, one of whom he recalled was a Rasta, who he recognised by the name Barney. He noted that it was not very well lit in the area that Winsbert (who he recalled was nicknamed "Fire") was coming from. The appellant maintained that he did not pull out his firearm and shoot Winsbert. From the time he saw the group of men at the bar stand up, he was alerted and then he heard Barney say what he said. According to him, he was afraid, it happened quickly, he defended himself. He saw himself in imminent danger of an attack after he was alerted by Barney.

- [10] In cross-examination, the appellant denied going to Lloni's mother's house to get the keys to any jeep that Lloni was driving. He denied going to Spinners that night in search of Lloni and further denied seeing her at Spinners. The appellant denied shooting Winsbert after he came between Lloni and him preventing him from getting to Lloni. He maintained that he did not see Lloni at Spinners and could not have grabbed her hand. He stated that after he shot Winsbert he went outside in the direction of the police. When counsel put to the appellant that he was shaken up

because he realised that he had shot Winsbert for no reason, he responded in the negative and further stated that he was shaken up because Winsbert was the one who had attacked him. He told PC Mathurin, that he did not do anything wrong, and that, “The man just attack me with a gun.” He denied that the police had to subdue him after the shooting.

- [11] As is evident from the foregoing summary, the appellant did not dispute that he was the person who shot Winsbert; his case was that when he did so, he was acting in self-defence. That was the central issue for the jury to resolve.

Grounds of appeal

- [12] The appellant’s Notice of Appeal listed 13 grounds of appeal. Before this Court, however, learned counsel for the appellant, Mr. Alberton Richelieu (“Mr. Richelieu”), condensed these into 5 grounds: (i) the judge erred in law when he failed to uphold the no case submission made at the close of the prosecution’s case; (ii) the judge erred in that he failed to direct the jury on the evidential value of hostile witnesses in relation to the facts and circumstances of the instant case; (iii) the judge’s direction on the appellant’s good character was inadequate; (iv) the judge failed to put the appellant’s case fairly to the jury in that he did not direct them that an intention to cause dangerous harm is not inconsistent with self-defence; and (v) the appellant’s sentence was excessive. The appellant did not pursue ground (iv) having further reviewed the judge’s directions on intention and self-defence.

Ground (i) – Whether the trial judge erred in law in failing to uphold the no case submission

- [13] Mr. Richelieu submitted that the evidence adduced by the prosecution failed to match the case that was opened to the jury by the prosecutor, as all but one of the prosecution’s civilian witnesses were deemed hostile and gave evidence which was not in accordance with what they had stated in their witness statements. Such parts of their witness statements that they did accept were of no probative value. As such, the judge should have concluded that their evidence was insufficient to establish a

prima facie case. In relation to the evidence of the one witness who was not deemed hostile, Ms. Demar, Mr. Richelieu submitted that her evidence was insufficient to ground a prima facie case as it did not provide any context to the shooting and it was, “manifestly contrary to reason”.² In oral submissions, Mr. Richelieu further contended that Ms. Demar’s evidence constituted a bald statement that the appellant had shot Winsbert and it lacked context. Before the judge, the submission was that the evidence was, “standing on its own without any narrative from her”.³ They mean the same thing.

[14] Learned crown counsel, Ms. Tanya Alexis-Francis (“Ms. Alexis-Francis”), submitted that the evidence of Ms. Demar was sufficient to establish a prima facie case as it established that the appellant was the person who shot Winsbert. The admissible evidence of the hostile witnesses established that Winsbert was not doing anything and had nothing in his hands when he was shot. The evidence of the police officers established that the appellant was apprehended shortly after the shooting and when searched, a firearm was found in his possession. No other firearm was found at the scene.

[15] Ms. Alexis-Francis submitted that from this direct and circumstantial evidence, the jury would have been entitled to draw the inference that Winsbert was unarmed and did not attack the appellant and thus, the shooting was unlawful. Accordingly, the trial judge was right to overrule the no case submission.

Discussion

[16] A no case submission is hung on one of two limbs: (i) that the prosecution has failed to establish an essential element of the offence; or (ii) that the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict.

² See appellant’s written submissions, p. 6.

³ See Record of Appeal, p. 259, lines 20-21.

[17] Within the jurisdiction of the Eastern Caribbean Supreme Court, **R v Galbraith**,⁴ is regarded as the seminal authority on the approach that a trial judge should take when met with a no case submission. That authority guides judges in the following terms:

“How then should a judge approach a submission of ‘no case’? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises when there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown’s evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown’s evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury or and where on one possible view of the facts there is evidence upon which a jury can properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”⁵

[18] Lord Lane CJ noted that there will always be borderline cases but that these could safely be left to the judge.⁶ Nonetheless, in determining whether the evidence adduced by the prosecution taken as a whole is so manifestly unreliable or contradictory that no properly directed jury could convict, the judge must be acutely mindful not to trespass on the province of the jury.

[19] In the case at bar, the no case submission presented to the learned trial judge was grounded on the second limb⁷ namely, that the prosecution's evidence was so tenuous that no reasonable jury could convict on it.

[20] If a prima facie case depended on the evidence of the hostile witnesses only, then the trial judge would have been bound to uphold the no case submission. This is

⁴ [1981] 2 All ER 1060.

⁵ Ibid, per Lord Lane CJ at 1062.

⁶ Ibid.

⁷ See Record of Appeal, p. 258, line 9.

because these witnesses said nothing to implicate the defendant in the commission of any offence.

[21] I should say, with all due respect however, that unnecessary time was consumed before the trial judge on the no case submission arguing about the evidential value of the hostile witnesses. Unlike the situation in **R v Maw**⁸ and **Kayvon McPherson v R**⁹, on which the appellant placed much reliance, the prosecution's case did not depend solely on witnesses who were deemed hostile. As Mr. Richelieu argued then, and as I have found above, their evidence was of little to no probative value, and whether or not a prima facie case was established did not turn on anything they had said.

[22] Whatever the state of the evidence of the hostile witnesses, there was other uncontradicted direct evidence from Ms. Demar, who was not treated as hostile, that she saw the appellant shoot Winsbert. This assertion was not challenged in cross-examination. Neither was it even suggested to Ms. Demar that Winsbert was about to attack the appellant or was acting menacingly towards him. In fact, the appellant's case was never put to this witness to allow her to respond to it. Cross-examination consisted of a single question about the lighting in the club. There was nothing on the face of Ms. Demar's evidence that made it unreliable or self-contradictory, nor was it contradicted by the evidence of any other prosecution witness.

[23] In so far as it is said that the evidence lacked context or narrative, the simple answer is that the failure to lead evidence or provide a narrative of the background which might explain how or why the crime was committed is not fatal to the prosecution's case, although, where given, it would no doubt assist the jury to understand why it happened. Thus, the fact that Ms. Demar's evidence did not provide context or narrative or furnish any reason or motive for the shooting, does not render it devoid of probative value. In addition to Ms. Demar's evidence, it is worth noting the

⁸ [1994] Crim LR 841.

⁹ JM 2006 CA 15.

evidence of the police witnesses which showed that the appellant was found in possession of a firearm moments after the shooting. Further, at that stage of the proceedings, no question of self-defence had arisen on the prosecution's case

- [24] At the close of the prosecution's case therefore, there was uncontradicted evidence that the appellant was seen to have shot Winsbert and that he was found with a gun in his possession moments after the shooting. The elements of the offences had been made out, and counsel for the appellant had not argued otherwise. It was for the jury to determine whether Ms. Demar was a truthful and reliable witness. The learned trial judge was therefore right to overrule the no case submission. I would therefore dismiss ground 1.

Ground 2 – Whether the trial judge erred in failing to direct the jury on the evidential value of hostile witnesses in relation to the facts and circumstances of the case

- [25] Mr. Richelieu submitted that the trial judge's directions on hostile witnesses could have confused the jury. Although the trial judge correctly told the jury that the witness statements were not evidence, by telling them that they could form the alternative view that the statements represented their recollection at a time when the evidence was fresher in their mind, the trial judge could be seen to be inviting the jury to decide whether they accepted what the witnesses had said in their statements, as opposed to their evidence at trial that they could remember or did not know who shot Winsbert, among other details. The direction therefore blurred the distinction the trial judge was seeking to establish. It was submitted that the learned trial judge should have directed the jury to disregard their evidence altogether.
- [26] Ms. Alexis-Francis submitted in reply that the trial judge's directions on hostile witnesses had to be looked at as a whole. She drew attention to the structure of the judge's summation which entailed dividing the evidence of each of the hostile witnesses into those parts which they could recall and those which they could not recall after they were deemed hostile. He instructed the jury that the things which

the witnesses recalled were matters that they could take into account, whereas they could not consider those matters which the witnesses said they could not recall. Additionally, the trial judge directed the jury to adopt a three-step approach to the evidence of the hostile witnesses in accordance with the case of **Maw**.

- [27] Ms. Alexis-Francis further submitted that the trial judge's direction to the jury that they could form the alternative view that the statements represented the witnesses' recollection at a time when the evidence was fresher in their minds, could not have operated to convey to the jury that the contents of their statements constituted material on which they could rely. The trial judge had expressly directed them on more than one occasion that it was not evidence on which they could rely.

Discussion

- [28] The treatment of hostile witnesses is governed by section 35 of the Evidence Act¹⁰ which provides, so far as material:

"35. HOSTILE WITNESSES

- (1) Where a witness gives evidence that is hostile to the party who called the witness, that party may, with the leave of the court, question the witness about that evidence as though the party were cross-examining the witness.
(2) Where, in examination-in-chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about that matter as though the party was cross-examining the witness.
(3) A party who is questioning a witness referred to in subsection (1) or (2) may also, with the leave of the court, question the witness about matters relevant only to the credibility of the witness, and such questioning shall be taken to be cross examination for the purposes of this Act..."

- [29] A witness may therefore be regarded as hostile where that witness gives evidence which is adverse to the party calling them, for example, by giving evidence which is contrary to their witness statement, or where the witness fails to make a genuine effort to give evidence about matters reasonably supposed to be within their knowledge. It is not in dispute that the threshold was met for the various witnesses

¹⁰ Chapter 4.15 of the Revised Laws of Saint Lucia, 2019.

in this case to be deemed hostile, given that they appeared not to be making a genuine attempt to give evidence about matters of which the witnesses may reasonably be supposed to have knowledge, as gleaned from their witness statements, even after being given the opportunity to read them.

[30] Once leave is given by the judge to treat a witness as hostile, the witness may be cross-examined by the party calling them on previous statements they have made, such as their witness statement. It is permissible for the prosecutor to put to the witness those parts of their statement from which they have resiled or claim not to remember. The purpose of that exercise is to show inconsistency between the witness's present testimony and their previous statement, thereby undermining the witness's credibility. The previous inconsistent statements that are put to the witness are not evidence of the truth of their contents, save where the witness accepts them. The judge must direct the jury that the previous statement is not evidence in the case and they cannot treat it as evidence in the case, save where the witness adopts or confirms specific parts of their previous statement. Such a direction is necessary in St. Lucia because, unlike some other jurisdictions,¹¹ a previous inconsistent statement of a witness is not evidence of the truth of its contents. Thus, it is not open to a jury to treat what the witness said in their witness statement against an accused as the truth and act upon it. The bottom line is that the evidence is what the witness said in the witness box at trial and not what they said in their previous statement.

[31] Against this background I turn to consider first the evidence of the hostile witnesses and then the trial judge's directions with which issue is taken.

[32] Winsbert recalled being shot at Spinners but claimed not to remember giving a statement to PC Jawahir. He did not recall telling PC Jawahir that the appellant shot him or telling him that he was certain that it was the appellant who had shot him. He could not recall who shot him.

¹¹ See for example: section 43 of the Evidence Act Chapter 3.12 of the Revised Laws of St. Christopher and Nevis, 2017; and section 119 of the Criminal Justice Act 2003 of the United Kingdom (Chapter 44).

- [33] Ms. Jennifer Dujon ("Ms. Dujon") testified, inter alia, that she did not remember seeing the appellant at Spinners that night. She did not remember telling the police that she saw the appellant with a gun in his right hand and that the gun was about 5 inches long. She did not recall telling the police that the appellant had walked to Lloni and grabbed her. She did not remember telling the police that Lloni pushed the appellant away or that Winsbert intervened after the appellant rushed back toward Lloni. She did not remember telling the police that she saw the appellant shoot Winsbert. She agreed that she could remember some things but not everything that happened at Spinners. She maintained that she was not deliberately failing to recall certain things that had happened, and that she was not lying.
- [34] While Lloni recalled that Winsbert got shot at Spinners, she said she did not know who shot him. She could not recall the distance between Rita and Winsbert, nor the distance between herself and Rita. She couldn't remember the lighting conditions. She remembered giving a statement to the police when the event was fresher in her mind, and she had read over the statement when it was given to her before the trial. According to her, she did not see the appellant with anything in his hands at Spinners that night. She did not recall telling the police that the appellant pulled a gun and placed it by her waist. She did not recall telling the police that there was enough light for her to see or that the appellant had discharged a round. Neither did she recall saying in her statement that sometime between 8 p.m. and 10 p.m. on 6th June 2012, the appellant had come to her mother's house, quarrelling with her and asking her for his jeep. She did not remember giving any of these details in her statement.
- [35] Corinthia Alexander testified that she did not remember saying what she said in her witness statement although she was provided with and read her statement. Whereas she had told the police in her statement that she saw the appellant wearing a yellow stripe polo shirt, she testified that she could not recall that, and could not remember seeing the appellant at Spinners. Despite reading her statement, in which

she had said that she saw the appellant pull Lloni, she testified that she could not recall that. She remembered that Winsbert got shot at Spinners but did not see anybody with a gun at Spinners that night. Though she said in her statement that she saw the appellant with a gun that night, she testified that she could not remember that. She could not recall telling the police that Winsbert got shot when he was pushing the appellant away from Lloni. She could not recall telling the police that the appellant rested the gun on Lloni's stomach area. She did however recall that when Winsbert got shot he was hospitalised. According to her, she remembered some things, but she did not remember other things that happened that night at Spinners.

The trial judge's directions on hostile witnesses

- [36] The central criticism made in relation to the learned trial judge's directions on hostile witnesses is directed to the following passage of his summation:

"Now, these Witnesses have given an account in their statements which were given at a time when the events were fresher in their memory. In the witness box, they told you that they could not recall events that were in the statements that they read the Wednesday and Thursday before the case; that is Corinthia and Lloni Alexander. They were not asked about which version of events was true, that is to say whether the statement was true as to what happened; no one asked them what was the truth. Your task there is to decide whether these Witnesses are unable to recall the events in which case you may decide that their evidence is completely unreliable and worthless. Alternatively, you may form the view that their statement in which they had recalled the events of June seventh, twenty-twelve, represents their recollection at a time when the events were fresher in their minds. **[emphasis added]** You Jurors will come to a finding based on your review of all of the evidence and in coming to that finding, you are going to follow the following three step process which I am going to tell you now. Can you believe these Witnesses at all, that is your first question? Secondly, did these Witness contradict themselves? If you find that they have contradicted themselves, then I have to warn you that it would be dangerous to act on their evidence since they have proven themselves to be unreliable. Thirdly, if you are satisfied that the Witnesses are credible, then you should go on to consider the parts of their evidence which they did in fact accept and when I come to the evidence, I will tell you which parts they accepted.

Now, I also have to tell you re hostile witnesses that their statement to the police is not evidence, because if it were evidence then it would have been tendered in evidence for you to consider.”¹²

[37] Mr. Richelieu takes issue with the underlined words, which he argues could have confused the jury, who may have seen it as an invitation to view the witness statements as reliable evidence.

[38] Had the impugned directions stood alone, Mr. Richelieu’s submission that the trial judge’s directions could be seen as an invitation to the jury to act upon the contents of the statements of the hostile witnesses would have carried greater force. On the face of it, the directions may appear to do just that. The language in which the trial judge expressed himself was apt to mislead, especially since he had just told the jury that their task was to decide whether those witnesses were unable to recall the events, in which case it was open to them to decide that their evidence was completely unreliable and worthless. By immediately following this with a direction to the jury that, alternatively, they may form the view that the witness statements in which they had recalled the events at Spinners represents their recollection at a time when the events were fresher in their minds, the jury could have formed the impression that the statements could be acted upon. In truth, the trial judge may have only intended to convey what is surely a matter of common sense: that the events were likely to be fresher in the minds of the witnesses at the time they gave their witness statements.

[39] Notwithstanding this, in assessing the complaint made in relation to the impugned directions, those directions cannot be viewed in isolation. A summation must be viewed as a whole. As Lord Alverstone CJ reminds us in **R v Stoddart**:¹³

“Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been

¹² See Record of Appeal, pp. 369-370.

¹³ (1909) 2 Cr. App. R. 217, 246.

fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which might have led to a miscarriage of justice.”

- [40] Viewing the impugned directions in the context of the summing up as a whole, it is clear that the learned trial judge left the jury in no doubt that they could not act on those parts of their statements which the witnesses claimed not to remember. The first such warning can be seen in the following passage which follows immediately after the impugned directions:

“Now, I also have to tell you re hostile witnesses that their statement to the police is not evidence, because if it were evidence then it would have been tendered in evidence for you to consider. How then, are you to deal with what was suggested to the Witness in the statements when they were cross-examined? The short answer is this; the statement is not evidence and as such its contents. That [sic] is to say, the parts that were put to them is not evidence which you can’t consider in coming to your verdict. For example, when it was put to a Witness that he told the police something in their statement, and they said they could not recall saying that, then what matters is their answer to the question and not the question itself. Their answers were that they could not recall and that is what matters.”¹⁴
[emphasis added]

- [41] This direction made clear to the jury the limited parts of the evidence of the hostile witnesses to which they could have regard. The trial judge reiterated this on several occasions as seen, for example, when he rehearsed the evidence of Ms. Dujon. He told the jury:

“Just to be safe actually, I will just remind you bear in mind always what I said to you about hostile witnesses and what you can accept as their evidence. So, for example, when Miss Dujon in my recap I told you she did remember telling the police that Winsbert fell on his girlfriend and then fell down, she remembered saying she saw blood on his shirt and on the floor, she remembered him getting CPR; those are things that she did and said and those are things of course that you can take into account; yes. The things that she can recall when she was treated as hostile are things that you can take into account, the things that she cannot recall, you cannot; that’s the short answer.”¹⁵ **[emphasis added]**

¹⁴ See Record of Appeal, p. 370, lines 6-15.

¹⁵ See Record of Appeal, p. 375, lines 16 - 24.

[42] The trial judge repeated that approach when dealing with the evidence of Llani. He directed the jury:

“In her evidence, again, *ex abundanti*, [sic] just so we have it nice and clear, essentially, she did not recall any of the events and she did not remember giving any of the details in her Statement. So, again, you have to bear in mind my direction to you about hostile witnesses. The things she accepted was [sic] the things that she told you before she was treated as hostile. Once she has been treated as hostile, she did not recall or accept that any of the things put to her happened. Do you understand that, Jurors? You, you - - and, this is the third time we’ve gone through that exercise. I trust that you understand exactly what you are to consider and what you are not to consider.”¹⁶

[43] These directions served to reinforce the point that the witnesses’ statements to the police did not constitute evidence in the case, and to remind the jurors that they could not act on those matters which had been put to the witnesses, but which they claimed not to remember or did not accept. These directions are distinguishable from those given by the judge in **McPherson**, upon which the appellant relies. In that case, the judge had directed the jury on a number of occasions that what the complainant said at the preliminary enquiry was evidence at the trial where she was deemed hostile. No such complaint can be made here; the trial judge clearly directed the jury that the witness statements were not evidence in the case.

[44] Further, in the passages that immediately follow the impugned directions, the learned trial judge instructed the jury that they were to follow a three-step process in approaching the evidence of the hostile witnesses. Firstly, they needed to ask themselves whether the witnesses were credible at all; if not their evidence was to be disregarded. This direction conveyed to the jury that depending on the view they took of the witnesses’ credibility it was open to them to disregard their evidence in its entirety. Secondly, the trial judge instructed the jury to consider whether the witnesses had contradicted themselves. The trial judge warned the jury that if they so found, it would be dangerous to act on their evidence since they would have proven themselves to be unreliable. Thirdly, if they were satisfied that the witnesses

¹⁶ See Record of Appeal, p. 378.

were credible, then the jury should go on to consider the parts of their evidence which they did in fact accept.

[45] These directions, which were in accordance with the approach suggested in **Maw**, presented the jury with the option of disregarding the evidence of the hostile witnesses entirely, if they found them to be not credible or unreliable because of the inconsistencies between their testimony and their previous statements, and that it would be dangerous to act on their evidence in such circumstances; or, if they found them credible, they could consider and act upon those parts of their previous statements which the witnesses accepted.

[46] While it was helpful and correct for the trial judge to have deconstructed the evidence into those parts of their statements which the witnesses accepted and those parts which they did not, at the end of the day even when aggregated, the sum of those parts of their statements which the hostile witness accepted could take the prosecution's case no further. Frankly, it lacked any meaningful probative value relative to the guilt of the appellant, and the trial judge should have made this clear to the jury. It does appear, therefore, that there is some merit in the criticism that the judge did not tailor the directions to suit the circumstances of the case. In tailoring the directions, it would have been pertinent for the judge to consider that this was not a case where the hostile witnesses accepted any of the parts of their statements that were incriminatory of the appellant; they disavowed any recollection of them. At the same time, nothing said by them in their evidence exonerated the appellant. They did not say, for example, that someone else shot Winsbert or that Winsbert was acting menacingly towards the appellant. Those parts of their statements that they did accept were of negligible value as the appellant was not denying being present at the club and shooting Winsbert.

[47] Be that as it may, for the reasons discussed above, when the summing up is viewed as a whole, the jury could not have been in any state of confusion, nor could they have reasonably thought that it was open to them to act on the contents of the

witness statements of the hostile witnesses where they claimed not to remember or which they did not accept. The judge had done sufficient to disabuse them of any such notion. It has been held that a jury must be trusted to be faithful to directions given to them by the judge. This point is made emphatically in **R v Pestano and others**¹⁷ where the court stated:

“A Judge does not, in the course of summing up, time and time again tell a jury that they must beware how they treat this witness or that. In a passage, to which particular reference need not be made, it was made plain to the jury that all they were concerned with, so far as Blackford was concerned, was what he had said in the witness box and previous statements made by him were not evidence. It is wholly wrong to expect more of a Judge and offensive to regard juries as either being deaf or having no sense whatsoever”.

- [48] These observations are apt to capture what occurred in this case. The trial judge repeatedly directed the jury that the statements were not evidence in the case and there is no basis for saying that the jury were not faithful to those directions. I would therefor dismiss this ground of appeal.

Ground 3 – Whether the trial judge’s direction on the appellant’s good character was inadequate

- [49] The trial judge gave a good character direction, but Mr. Richelieu submitted that the credibility limb of that direction was “seriously diluted” and undermined when the judge went further to direct the jury that the fact that the appellant was a lawyer did not mean that he was more or less credible than any other witness. This was a serious defect because credibility was a central issue in the case. The appellant relied on **Singh v The State (Trinidad and Tobago)**.¹⁸

- [50] For the respondent, Ms. Alexis-Francis submitted that the trial judge properly directed the jury on both the credibility and propensity limbs, which directions were not undermined by the direction that being a lawyer did not make the appellant more

¹⁷ [1981] Crim LR 397.

¹⁸ [2005] UKPC 35.

or less credible than any other witness. Further, the judge had directed the jury in the following terms:

“Finally, having regard to what you know about this Defendant, and in particularly [sic] the nine years since the date of the alleged offence, and that no similar allegation has been made against him, you may think he is entitled to ask you to give whatever weight you think fit to his good character when deciding whether the Prosecution has satisfied you of his guilt and I will tell you more about good character in a little while.”¹⁹

Ms. Alexis-Francis argued that this demonstrates that the trial judge did not fail to explain the relevance of both limbs of the good character direction to the jury.

Discussion

[51] Generally,²⁰ a defendant who has no previous convictions or who is deemed to be a person of effective good character is entitled to the benefit of a good character direction. This requires a trial judge to direct the jury on the relevance of good character to the defendant’s credibility and their propensity to commit the offence charged. The credibility limb requires the judge to give an explicit positive direction that the jury should take the defendant’s good character into account in their favour when assessing their credibility. This limb is given when the defendant has testified or has testified or made pre-trial statements. The propensity limb is given whether or not the defendant testifies or has given pre-trial statements.²¹ The propensity limb directs the jury that the defendant, as a person of good character who has not offended in the past, is less likely to commit a crime, especially one of the nature with which he is charged.²² It is recognised however, that the failure to give a good character direction or a limb therefore is not necessarily fatal in every case. This was made clear by the Privy Council in **Singh**, where the Board stated at paragraph 30:

“The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on

¹⁹ See Record of Appeal, p. 368.

²⁰ There are exceptions to the general rule. For example, the judge has a residual discretion to decline to give a good character direction where a defendant has no previous convictions but has admitted reprehensible conduct which would make it an affront to common sense to give a good character direction.

²¹ See *R v Vye* [1993] 1 WLR 471.

²² See *R v Moustakim* [2008] EWCA Crim 3096 and *R v Hunter* [2015] EWCA Crim 631.

credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.”

[52] The good character direction give in the case at bar is in the following terms:

“Now, you would have heard that the Defendant is a man in his middle years with no previous conviction. Good character is not a defence to the charge but it is relevant to your consideration of the case in two ways. Firstly, he’s (sic) given evidence, his good character therefore is a positive feature for him which you should take into account in considering whether you accept what he told you. Secondly, the fact that the Defendant has not offended in the past, make (sic) it less likely that he acted as is now alleged against him. It has been submitted on behalf of the Defendant that for the first time in his life he has been accused of a crime. He is not the sort of man who is likely to cast aside his good character in this way. That is a matter to which you should pay particular attention. However, what weight should be given to his good character at the extent to which it assist (sic) you on the facts of this particular case are for you to decide. In making that assessment, you may take account of everything you have heard about him. The fact that he is a lawyer by profession does not make him any more or less credible than any other witness.”²³ **[emphasis added]**

[53] The trial judge had also told the jury having regard to what they knew about the appellant and particularly that no similar allegation has been made against the appellant, “you may think he is entitled to ask you to give whatever weight you think fit to his good character when deciding whether the prosecution has satisfied you of his guilt.”²⁴

[54] Mr. Richelieu accepts that the trial judge gave both the credibility and propensity limbs of the good character direction. In oral submissions, however, Mr. Richelieu contended that the credibility limb was inadequate because the judge did not explain the relevance of the credibility limb to the jury, in that, he failed to direct them that a person of good character is likely to be more truthful than one who is not. I do not consider that the failure to use that particular formulation of words renders the

²³ See Record of Appeal, pp. 389-390.

²⁴ See Record of Appeal, p. 368.

direction inadequate. The words used by the trial judge follow to the letter standard **Bench Book** directions on the good character direction.²⁵ The directions conveyed to the jury that they were to consider that the appellant was likely to be a truthful witness because of his good character.

[55] Secondly, it was said that the direction to the jury that they should take the appellant's good character into account in considering whether they accepted his evidence undermined the credibility limb because, the idea behind a good character direction is to show that the defendant is in fact a credible person and is speaking the truth. Thus, to leave it to the jury to decide whether to take good character into account leaves it to the jury to say that the appellant's good character was of no significance and therefore, to fail to take it into account.

[56] This submission is plainly wrong. The credibility limb of a good character direction does not seek to convey to a jury that they *must* find that a defendant is credible and is speaking the truth merely because he is a person of good character. What is required is that the direction should contain an explicit and positive direction to the jury that they should take the defendant's good character into account in his favour. Good character is therefore a factor to which the jury must have regard when considering whether or not they regard his evidence as truthful. It is for the jury to determine what weight to attach to a defendant's good character, having regard to the evidence as a whole.²⁶ Where for example, a defendant is thoroughly and manifestly discredited in cross-examination, his good character can hardly avail. As the standard **Bench Book** directions on good character recognise, good character is not a defence to a criminal charge.

[57] The appellant's reliance on **Singh** is misplaced. That case is easily distinguishable because the judge did not give the credibility limb at all. That is not the case here. The trial judge directed the jury that since the appellant had given evidence, his

²⁵ See The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (Judicial College 2023), 11-1.

²⁶ R v Miah; R v Akhbar [1997] 2 Cr. App. R 12.

good character was a positive feature in his favour which they should take into account in determining whether to accept what he had told them. The jury could not have failed to appreciate that they should regard the appellant's good character favourably and as a positive factor when assessing his credibility. I therefore see no basis for saying that the credibility limb of the good character direction in this case was inadequate. I turn then to consider whether it was undermined by the remark that the fact that the appellant was a lawyer did not make him any more or less credible than any other witness.

- [58] The question here is whether this direction derogates from the credibility limb which I have found to be unimpeachable. I do not consider that it does. It seems to me that the trial judge was alive to the varying perceptions which people hold of lawyers. Some may regard them as upstanding citizens while others may view them as rogues. The Privy Council in **Singh** adverted to this ambivalence towards lawyers when they stated at paragraph 23:

“It may be that the jury would incline to regard a practising lawyer as a man of probity whose word was prima facie worthy of belief. But the belief of lawyers in their own probity is not universally shared, and there are those who believe them to be capable of almost any chicanery or sharp practice. There can be no doubt that the appellant was entitled to the benefit of a conventional direction on credibility, and such was not given.”

- [59] It seems to me that the judge was alive to the reality some jurors may have come with preconceptions of lawyers, whether favourable or unfavourable. The trial judge made sure that the jury's mind was disabused of the inclination or predisposition to view lawyers in a discreditable light by directing them that the appellant was not to be regarded as less credible (or indeed more so) than any other witness. To my mind, the direction exhorts the jury to focus on the fact that the appellant was a person of good character when assessing his credibility and not on the fact that he was a lawyer, with the negative stigma that some attach to that profession. Such a direction cannot reasonably be seen to attenuate in any way the credibility limb of the good character direction. I would dismiss this ground of appeal.

Ground 4 – Whether the judge failed to put the appellant’s case fairly to the jury in that he did not direct them that an intention to cause dangerous harm is not inconsistent with self-defence

- [60] As previously indicated, Mr. Richelieu quite candidly and properly informed the Court that ground 4 was not maintainable, and that the appellant would not pursue it. He was right to do so.

Ground 5 – Whether the appellant’s sentence was excessive

- [61] As indicated previously, the appellant was sentenced to 5 years on count one and 4 years on count two, both to run concurrently.²⁷ The appellant’s complaint under this ground was threefold: (1) that the judge took irrelevant matters into consideration, namely that the appellant committed the offences when under the influence of alcohol or drugs when there was no such evidence before him; (2) that the judge failed to consider that the appellant was not a danger or a threat to society nor a threat to the virtual complainant; and (3) that the judge failed to consider that there was an excessive delay of 9 years before the matter came on for trial. Mr. Richelieu argued that this factor should have purchased a significant discount.

- [62] In reply, Ms. Alexis-Francis submitted that the judge did not take into account irrelevant matters. He correctly exercised his discretion as to the extent to which delay should operate as a mitigating factor in circumstances where the appellant had contributed in some measure to the delay. It was submitted that the sentence was fair and just in all the circumstances.

Discussion

- [63] An appellate court does not disturb a sentence imposed by the judge merely because it would have imposed a different sentence. This Court has previously stated that an appellate court must not substitute its opinion for the discretion of the

²⁷ See paragraph 1 of this judgment.

sentencing court as long as the sentence is not outside the generous ambit within which discretion could have been exercised.²⁸ This Court may however, impose a different sentence where: the sentence passed is not justified by law; is passed on the wrong factual basis; some matter has not been properly taken into account; or where it was wrong in principle or manifestly excessive.²⁹

[64] Mindful of the foregoing principles, I now turn to assess whether there is merit to the appeal against sentence.

[65] Mr. Richelieu contends that the judge wrongly took into consideration that the appellant committed the offences when under the influence of alcohol or drugs, when there was no such evidence. This is what the judge said in his sentencing remarks:

“This Court notes that there was no submission from the Defendant’s Counsel that his client’s offending was as a result of his alcoholism. The guideline provides that a serious medical condition if it helps to explain why the offence occurred is a mitigating factor. Alcoholism is clearly a serious medical condition. The pre-sentence report indicates that the Defendant was badly alcoholism (sic) at the time of the incident, but Mr. Richelieu submitted that there was no evidence at trial whether from the Crown’s witnesses or his client, that his client’s offending was related to or explained by his alcoholism or consumption of alcohol on the night in question. Defence Counsel’s reticence may be explained by the fact that an offence is aggravated if it is committed under the influence of alcohol or drugs, but this would in turn have been balanced by the fact that the offence was explained by a serious medical condition, ergo his alcoholism. All the same, this means that the starting point of 12 years imprisonment is reduced to 11 years imprisonment, after credit is given and deducted for the aggravating and mitigating factors of the offence as discussed above. It is common ground that there are no aggravating factors of the offender...

The pre-sentence report referred to a report from a Doctor Wilson, the sister of the Defendant. Essentially, Doctor Wilson was of the view that her brother was an alcoholic. It was common ground that the Defendant had previously sought treatment for his alcoholism and will continue to require treatment for his condition. Also the report of Doctor Sexius dated October fifteenth, twenty twenty-one confirms that the Defendant suffers from uncontrolled

²⁸ Dillon Saul v The Queen SVHCRA2008/020 (delivered 25th January 2011, unreported).

²⁹ See R v Newsome; R v Browne [1970] 2 QB 711.

diabetes, uncontrolled hypertension, hyper and hypercholesterolemia [sic] for which he was prescribed a course of medication.

This Court accepts that the Defendant's previous good character, genuine remorse and his physical and/ or mental ailment, alcoholism, combined both of these elements, are all mitigating factors of the offender that are to the Defendant's benefit."³⁰

[66] From this passage, it is clear that the judge treated the contents of the pre-sentence report as evidence that the appellant committed the offences when under the influence of alcohol or drugs. That evidence did not emerge at the trial and was clearly not being admitted by the appellant at the sentence hearing. The judge therefore erred in sentencing on a wrong factual basis. In practical terms, however, it does not appear that the appellant suffered any prejudice since the judge regarded it as both a mitigating and aggravating factor cancelling out each other, thereby producing no upward or downward adjustment of the starting point of 12 years.

[67] It is also said that the judge failed to consider that the appellant was not a danger or a threat to society or the virtual complainant. I do not agree. The judge dealt with this matter frontally. It seems that he was influenced by a report by one Dr. Wilson, the appellant's sister, as is evident from the following passage in his sentencing remarks:

"The pre-sentence report referred to a report from a Doctor Wilson, the sister of the Defendant. Essentially, Doctor Wilson was of the view that her brother was an alcoholic. It was common ground that the Defendant had previously sought treatment for his alcoholism and will continue to require treatment for his condition."³¹

...

"This Court accepts that the Defendant does not pose a risk of harm to the victim, but may pose a - - pose harm to the public in view of his alcoholism, and as a footnote I add, Doctor Wilson at page seven of the pre-sentence report says, alcohol triggers a mental state that causes him to behave erratically."³²

[68] In light of those observations by the judge, the submission that he failed to consider that the appellant posed no threat to society or the virtual complainant must fail.

³⁰ See Record of Appeal, pp. 513-514.

³¹ See Record of Appeal, p. 514, lines 15-19.

³² See Record of Appeal, p. 517, lines 9-13.

Delay

- [69] In dealing with delay as a mitigating factor, fulsome guidance was provided by this Court in **Violet Hodge v Commissioner of Police**.³³ Baptiste JA summarised the principles at paragraph thus:

“The principles regarding delay can be summarized as follows. In determining sentence, there is a need to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of *Mills v Her Majesty’s Advocate*. “A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly” per Lady Hallett in *R v Kerrigan* at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in *Attorney General’s Reference No. 79 of 2009*. He emphasised that applications for reductions in sentence would be unusual.”

- [70] It is settled therefore that delay can be a mitigating factor resulting in a reduction of sentence. This is a discretionary matter for the judge and requires the judge to make an assessment of the facts to determine what, if any, discount should be made to the sentence on account of delay. Whether the delay is excessive is a question of fact.

- [71] In so far as the appellant complains that the judge failed to adequately consider the 9-year delay, the judge addressed the matter in this way:

“The fact of the nine year delay between the incident and the Defendant’s trial and conviction is also taken into account in the Defendant’s favour. The reasoning of the Court of Appeal in (inaudible) and the Commissioner of Police, see paragraph 65 to 69 of that case, confirms that prolonged delay between incident and conviction when the delay was not contributed to by the Defendant is a mitigating factor. In this case, while the Defendant had contributed in some “small” measure to the delay between twenty twelve and twenty twenty-one, he was not wholly at fault for that nine-year delay. For reasons that have not been satisfactorily explained, the Defendant’s

³³ BVIMCRAP2015/0005 (delivered 27th February 2018, unreported).

matter went on a hiatus. This delay did not justify a stay of the proceedings, but this Court is minded to deduct one year for the delay from the 11 year starting point.”³⁴

[72] Clearly, the judge formed the view that a delay of 9 years was excessive. The judge’s assessment of whatever evidence was before him was that the appellant contributed to the delay in “some small measure”. In circumstances where the appellant’s contribution to this delay is said to be in “some small measure”, some reason should have been articulated as to why the measure of reduction was 1 year only. In **Violet Hodge**, the Court reduced the appellant’s sentence of 6 years by 1 year on account of a 5-year delay between charge and trial. In **Akim Monah v The Queen**³⁵ there was a delay in excess of 7 years in the prosecution of an appeal caused by the State’s failure to provide the transcript. In that case, the appellant’s sentence was reduced by 2 years by way of redress for the breach of his constitutional right to a fair hearing within a reasonable time.

[73] I am of the view that the judge did not properly take into account the excessive length of delay, his own finding that no satisfactory reason was given to explain why the appellant’s matter went on hiatus, and his further finding that the appellant contributed in “some small measure” only to this period of delay. On this basis, it is my view that this Court would be justified in exercising its discretion to review the sentence imposed by reducing the appellant’s sentences by 2 years, which I consider would meet the justice of compensating the appellant for the inordinate delay in bringing his case to trial. Accordingly, I would allow the appeal against sentence.

Disposition

[74] I would dismiss the appeal against conviction and allow the appeal against sentence by varying the sentences of 5 years and 4 years by reducing them each by 2 years. Accordingly, it is ordered that the appeal against conviction is dismissed. The appeal

³⁴ See Record of Appeal, p. 515.

³⁵ GDAHCRA2021/0015 (delivered 23rd February 2022, unreported).

against sentence is allowed and is varied to the extent that the sentence imposed by the learned judge is substituted with 3 years for intentionally causing dangerous harm and 2 years for using a deadly instrument with intent to cause grievous harm, both sentences to run concurrently.

I concur
Paul Webster
Justice of Appeal [Ag.]

I concur
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar