

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

SAINT LUCIA

SLUHCRA2022/0004

BETWEEN:

Jonathan Edward

Appellant

and

The King

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor Ward

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Leslie Prospere and Ms. Britney Barnard for the Appellant
Ms. Tanya Alexis-Francis for the Respondent

2022: December 5;
2023: May 12.

Criminal appeal – Appeal against conviction and sentence – Appellant convicted of causing dangerous harm – Application to adduce fresh evidence – Medical notes of virtual complainant – Medical notes credible but not fresh – Whether on assessment of the strength of the medical notes there was a risk of a miscarriage of justice if they were excluded – Self-defence – Whether the weight of the evidence of self-defence rendered the conviction unsafe – Prosecution’s duty of disclosure – Section 908 of the Criminal Code – Whether failure by prosecution to disclose the medical notes of the virtual complainant resulted in a miscarriage of justice – Whether judge’s refusal to stand down matter pending disclosure of the medical notes resulted in a miscarriage of justice – Comments made during prosecutor’s closing speech about appellant’s failure to call two witnesses – Whether judge ought to have declared a mistrial owing to the prosecutor’s comments – Judge’s directions to the jury – Whether judge failed to give appropriate directions to the jury to ameliorate alleged harm caused by prosecutor’s comments – Procedural irregularity – Prosecution witnesses giving evidence in each other’s presence at locus in quo – Whether conviction thereby rendered

unsafe – Appellant sentenced to 8 years imprisonment – Whether sentence manifestly excessive and disproportionate

On 1st February 2014, Ricardo Lionel, the virtual complainant, sustained multiple stab wounds during an altercation with the appellant, Jonathan Edward, on the compound of the Sandals Halcyon Beach, Castries, Saint Lucia ("Sandals Halcyon"). The appellant was charged with attempted murder and causing dangerous harm and in the alternative, causing grievous bodily harm. The trial took place before the learned judge and a jury.

The appellant's case was that the virtual complainant was intoxicated and had displayed aggression towards him earlier that evening. Sometime later, the virtual complainant approached him and tugged at his shirt before breaking a bottle and chasing after him. The appellant ran to a retaining wall/sea breaker that abuts the foreshore of Sandals Halcyon, where there was a five-foot drop to the sea. The appellant alleged that he had no choice but to either confront the virtual complainant or jump into the sea. He claimed that the virtual complainant continued to attack him and so he stabbed the virtual complainant in self-defence. The prosecution's case was that the appellant had pounced on the virtual complainant in a sneak attack as the virtual complainant was exiting the venue after an altercation between the two earlier that evening. On 13th April 2022, the jury unanimously convicted the appellant of the offence of causing dangerous harm. On 23rd June 2022, the appellant was sentenced to eight years imprisonment.

Being dissatisfied with his conviction and sentence, the appellant appealed. The appellant also sought leave to adduce, as fresh evidence, the medical notes of the virtual complainant for the period 1st to 5th February 2014, when he was a patient at the Victoria Hospital. The Court chose to treat with the application to adduce fresh evidence at the hearing of the substantive appeal.

In support of his application, the appellant contended that: (i) the medical notes were credible as they were generated by medical personnel at the Victoria Hospital who had attended to the virtual complainant; (ii) they were exculpatory of the appellant; (iii) they would have been admissible at the trial; and (iv) there was a reasonable explanation for the appellant's failure to adduce them at the trial.

In support of his appeal, the appellant lodged 11 grounds of appeal. Under grounds 1 – 4 the appellant contended that: (i) the prosecution failed in its duty of disclosure by not disclosing the medical records before the evidence closed; (ii) the judge erred when he refused to stand down the trial pending disclosure of the medical notes; and (iii) these failings resulted in a miscarriage of justice since the appellant was deprived of the opportunity to conduct inquiries of the authors of the medical notes and to deploy them in his defence. Under grounds 5 – 7 it was argued that: (i) the prosecutor's comments during his closing address were highly prejudicial to the appellant; and (ii) the judge erred when he failed to discharge the jury following the prosecutor's comments and furthererred when he did not give the jury appropriate directions to ameliorate the prejudicial harm caused by the prosecutor's comments. Ground 8 asserted that the judge erred when he allowed two witnesses for the prosecution and the appellant's witness to point out two critical areas at the *locus in quo* in the presence of one another. Ground 9 stated that the verdict was

perverse owing to the overwhelming evidence of self-defence. Lastly, grounds 10 and 11 contended that the sentence was excessive and disproportionate.

Held: dismissing the application to adduce fresh evidence and the appeal against conviction and sentence, that:

1. Where the evidence to be adduced in a criminal appeal is not credible, that is the end of the matter. However, where the evidence is both credible and fresh it should be admitted unless the court is satisfied that it would not affect the safety of the conviction. Where the evidence is credible but not fresh, the court must make an assessment of its strength and the possible impact on the safety of the conviction. If, on assessment, the court considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted even if it is not fresh.

Lundy v The Queen [2013] UKPC 28 applied; **Lescene Edwards v The Queen** [2022] UKPC 11 applied.

2. On the facts, the medical notes were credible as they had been made by doctors who had attended to the virtual complainant whilst he was hospitalized. However, the notes cannot be described as fresh since they were in existence since 2014 and could have been obtained for the trial with reasonable diligence. On assessment whereas the notes recorded the virtual complainant as combative on admission at the hospital, this did not mean that he was the aggressor at the time he was stabbed. Further, whilst it was recorded in the notes that the ambulance personnel reported having found the virtual complainant by the beach, this was hearsay and shed no light on the real issue of the case, which was whether the appellant acted in self-defence. Lastly, the absence of the notes did not impair the appellant's ability to properly examine the medical witnesses. The notes therefore would have been of tenuous strength and would not have impacted on the safety of the conviction. The application to admit the medical notes of the virtual complainant as fresh evidence was consequently refused.
3. Under section 908 of the Criminal Code, the prosecution has a duty to disclose prosecution material in their possession. Even so, a failure in this duty itself does not automatically lead to the conclusion that a trial is unfair. Rather, the significance and consequences of the non-disclosure must be assessed. The test to be applied is whether, taking all of the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict. On the facts, even if the prosecution can be said to have breached their disclosure obligations in relation to the medical notes, this has not produced a material irregularity that renders the conviction unsafe. Considering the entirety of the evidence before the jury and the relative weakness of the medical notes as evidence to support the appellant's case, there is no real possibility that the jury would have arrived at a different verdict had the notes been deployed at trial.

Section 908 of the **Criminal Code** Cap. 3:01 of the Revised Laws of Saint Lucia, 2020 applied; **Winston Solomon v The State** (1999) 57 WIR 432 distinguished;

Maureen Peters v The Queen BVIHCRA2009/005 (delivered 1st October 2010, unreported) followed; **McInnes v Her Majesty's Advocate** [2010] UKSC 7 applied.

4. A judge's foremost duty is to ensure that a defendant has a fair trial. In pursuit of that objective, the judge has a discretion whether to reopen the case for the prosecution or the defence to receive further evidence after closing addresses but prior to summation. Two established situations where a judge may permit this are (i) where the evidence arises *ex improviso* or (ii) in order to adduce evidence which is a mere formality. Although the judge's discretion is wider and not confined to these two well established exceptions, it is only on the rarest of occasions that a judge should exercise this discretion outside of these established situations.

R v Francis [1991] 1 All ER 225 applied.

5. On the facts, the record of appeal showed that counsel for the appellant requested that the matter be stood down and told the trial judge of the reason for requesting the medical notes. At the time of the request, neither counsel nor the judge had sight of the medical notes. Before deciding whether to proceed, the judge heard representations from both the prosecution and the appellant, considered the stage at which the trial had reached, the purpose for which the medical notes were requested, the relevance of that purpose to the core issue and the burden of proof. Even if it can be said the judge erred by not standing down the trial until he had reviewed the notes himself, this error did not result in the trial being unfair. Having regard to the negligible evidential value of the notes themselves, the judge's decision not to stand down the matter did not result in a miscarriage of justice.
6. The duty of prosecuting counsel is to act as a minister of justice. However, strong criticism and a direct challenge to a defendant's and/or his witness' evidence does not breach that duty once the criticism is based on the evidence or the absence thereof. The prosecutor's comments in his closing merely suggested that the appellant and his witness had fabricated evidence. This was perfectly permissible and amounted to no more than a strong challenge to the appellant's evidence. Properly construed, this did not place a burden on the appellant to call witnesses in support of his case or to establish self-defence. The comments were within proper bounds and the judge was not required to declare a mistrial. Further, the judge gave a careful direction to the jury that they should decide the case solely on the evidence they had heard and not speculate on what evidence there might have been. These directions were more than sufficient to mitigate any perceived harm or prejudice resulting from the prosecutor's comments.

Maureen Peters v The Queen BVIHCRA2009/005 (delivered 1st October 2010, unreported) followed; **Randall v R** [2002] UKPC 19 applied; **Angus Warrington v The State** Criminal Appeal No. 6 of 2006 (delivered 17th September 2007, unreported) followed.

7. A procedural irregularity occurring during the trial does not, without more, render a conviction unsafe. The effect of that irregularity on the fairness of the proceedings

and whether it caused any unfairness to the defendant must be assessed. On the facts, a procedural irregularity did occur during the visit to the *locus*. However, the irregularity did not result in any advantage to the prosecution or prejudice to the defence. Notwithstanding that the prosecution witnesses were in each other's presence, they each identified a different location where the stabbing was said to have occurred. This evidence at the *locus* merely served to highlight the discrepancy between the prosecution witnesses on this point and did not in any way injure the appellant's case; if anything, it assisted his case. In the circumstances, while there was merit to the appellant's argument, the irregularity did not affect the safety of the conviction.

8. An appellate Court will not overturn the factual findings of a jury unless it can be shown that the finding is so against the weight of the evidence as to be obviously and palpably wrong. The burden is on the appellant to satisfy this Court that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the verdict that they did. On the facts, it was the jury's task to assess the credibility of the witnesses on the issue of self-defence. Having regard to the totality of the evidence before the jury, it was entirely open to them to arrive at the verdict they did. There is no basis for saying that no reasonable jury who had applied their minds properly to the facts in the case, could not have arrived at the verdict they did. The verdict was therefore not perverse.

Wendell Anthony et al v The Commissioner of Police BVIMCRAP2014/0016 (delivered 23rd November 2016, unreported) followed.

9. A judge is expected to adhere to the Sentencing Guidelines of the Eastern Caribbean Supreme Court. He may only depart from the guidelines where exceptional circumstances exist that justify such departure, and he must clearly articulate his reasons for so doing. At the sentence hearing the judge repeatedly pressed counsel for the appellant to identify the exceptional circumstances that warranted such a departure. Counsel was unable to do so then and failed to do so before the Court of Appeal. Whilst the appellant's argument was that the judge should have departed from the sentencing guidelines there was no argument criticizing the judge's actual application of the guidelines. The judge applied the guidelines and arrived at a sentence that was proportionate and just in the circumstances of the case.

JUDGMENT

- [1] **WARD JA:** On 1st February 2014, Ricardo Lionel, the virtual complainant, sustained two stab wounds to the back, one to the abdomen and another to the arm during an altercation with the appellant, Jonathan Edward, on the compound of the Sandals Halcyon Beach, Castries, Saint Lucia ("Sandals Halcyon"). The appellant was

charged with attempted murder and causing dangerous harm and, in the alternative, causing grievous bodily harm. The appellant's case was that he had acted in self-defence. The prosecution's case was that he had pounced on the virtual complainant in a sneak attack as the virtual complainant was exiting the venue after an altercation with the appellant earlier that evening. The trial took place before Thompson J and a jury. On 13th April 2022, the jury unanimously convicted the appellant of the offence of causing dangerous harm. On 23rd June 2022, he was sentenced to eight years imprisonment. The appellant gave notice of his appeal against conviction and sentence by amended Notice of Appeal filed on 28th June 2022. By amended notice of application filed on 11th November 2022, the appellant sought leave to adduce, as fresh evidence, the medical notes of the virtual complainant for the period 1st to 5th February 2014, when he was a patient at the Victoria Hospital. The Court adjourned the hearing of this application to the substantive hearing of the appeal.

The prosecution's case

- [2] The prosecution's case is that on 31st January 2013, at about 7:30pm, the virtual complainant and friends arrived at a staff social event held at the car park of the Sandals Halcyon. Several hours into the event, while dancing, the virtual complainant placed his arms around the waist of the appellant's girlfriend, Karina Barthelmy. The appellant approached the virtual complainant and asked him why he was placing his hands around his "woman's waist". The virtual complainant's friend, Kelvin Jonas ("Mr. Jonas"), who knew the appellant, spoke to him and his girlfriend with a view to de-escalating the situation. The virtual complainant accepted that he was a bit tipsy since he had about fifteen alcoholic drinks at the time. Sometime later, the virtual complainant decided to leave. As he was making his way to a bus stop some distance from the car park, he felt a sharp object to his back, then another. When he turned around, he felt a third object in his hand. He grabbed the appellant, and they both fell to the ground. He felt another sharp object, this time to his abdomen. He was wrestling with the appellant but felt too weak. He could only remember seeing the appellant walking in the direction of Castries and hearing

people around him speaking. The virtual complainant thereafter became unconscious and was subsequently transported to the Victoria Hospital.

The appellant's case

[3] The appellant gave evidence and called his girlfriend and one Dr. Syls Wilson ("Dr. Wilson") as witnesses in his defence. His case was that on the day in question he was performing volunteer work as an electrician at the event. The virtual complainant was intoxicated and had displayed aggression towards the appellant earlier that evening, following an incident with his common-law wife, Karina Barthelmy. Sometime later, as the appellant was disassembling some lights at the car park, the virtual complainant approached him and tugged at his shirt before breaking a bottle and chasing after him. The appellant ran to a retaining wall/sea breaker that abuts the foreshore of the property, where there was a five-foot drop to the sea. This area was poorly lit. The appellant's case is that he had no choice but to either confront the virtual complainant or jump into the sea. He attempted to disarm the virtual complainant and was cut by the broken bottle which the virtual complainant was brandishing. The virtual complainant continued attacking the appellant. The appellant became afraid and stabbed the virtual complainant in his abdomen to stop his attack. The virtual complainant continued his attack, and they both fell to the ground. The appellant fell on his back, and during the struggle, the virtual complainant crawled onto his lap and bit the appellant in his hip region. The appellant stabbed the virtual complainant twice in his back to stop him biting but the virtual complainant refused to loosen his bite. The two were subsequently separated by several persons. The virtual complainant, however, tried to free himself from their grip. The appellant led evidence from Dr. Wilson that he had sustained a 1cm cut to his little finger and a human bite to his right hip.

[4] As is evident from the foregoing summary, there is no dispute that the appellant and the virtual complainant were involved in a physical altercation during which the appellant stabbed the virtual complainant. The issue for the jury was whether he was acting in lawful self-defence when he did so. A factual issue in the case, which

was hotly contested, was the exact area where the stabbing occurred. The appellant claims that it occurred along a retaining/sea breaker wall situated on the foreshore of the beach where the event was being hosted. His case was that he was forced to either jump into the sea below or repel the virtual complainant's attack. The virtual complainant's evidence was that the stab wounds were inflicted near an auto dealer along the Castries/Gros Islet Highway. His witness, Mr. Jonas, placed the stabbing in the hotel's car park. The jury visited the scene of the incident during the trial. A further issue that the appellant highlights is whether the virtual complainant was rendered unconscious immediately after being stabbed. The appellant contends that these facts were material to the issue of self-defence.

Grounds of appeal

- [5] In written submissions, the appellant sets out 11 grounds of appeal. Grounds 1 to 4 concern the medical notes of the virtual complainant from the Victoria Hospital. The appellant complains that the prosecution failed in its duty of disclosure by not disclosing these records timeously and in any event, before the evidence closed. The judge also erred in law when he wrongly refused to stand down the trial until the medical records were disclosed. Together, these failings by the prosecutor and the judge resulted in a miscarriage of justice as the appellant was deprived of the opportunity to conduct inquiries of the various authors of these medical notes and to deploy them in his defence.
- [6] Grounds 5 to 7 relate to comments made by the prosecutor during his closing address. The appellant contends that the prosecutor's reference in his closing address to the appellant's failure to call two witnesses mentioned in his evidence to support his case, was seriously prejudicial to the appellant as it conveyed to the jury that the appellant and the one witness he did call fabricated their evidence and failed to disclose to the investigators the existence of these two witnesses who could have assisted his case. The comments also gave the jury the impression that the appellant had failed to discharge his evidential burden of self-defence. Further, the judge erred when he failed to discharge the jury following the prosecutor's highly

prejudicial comments, and further erred when he failed to give the jury appropriate directions to ameliorate the prejudicial harm caused by the prosecutor's comments.

- [7] Ground 8 complains that the judge erred when he permitted two witnesses for the prosecution and the appellant's witness to point out two critical areas at the *locus in quo* in the presence of one another.
- [8] Ground 9 alleges that the verdict is perverse having regard to the overwhelming evidence of self-defence.
- [9] Grounds 10 and 11 challenge the sentence as being manifestly excessive and disproportionate.

The application to adduce fresh evidence

- [10] At the appeal, the appellant sought leave to adduce, as fresh evidence, the medical notes of the virtual complainant. The grounds of the application state that the medical notes were credible as they were generated by medical personnel at the Victoria Hospital who had attended to the virtual complainant; were exculpatory of the appellant; would have been admissible at the trial; and there was a reasonable explanation for the appellant's failure to adduce them at the trial. This issue is closely linked with, and feeds into grounds 1 to 4.

The law

- [11] Section 40 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**¹ ("**Supreme Court Act**"), provides the statutory footing on which this Court may admit fresh evidence. It provides, so far as material:

"40. Duty to admit fresh evidence

Without prejudice to the generality of the preceding section (supplementary powers), where evidence is tendered to the Court of Appeal under that section, the Court of Appeal shall, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its powers under that section of receiving it if –

¹ Cap. 2.01 of the Revised Laws of Saint Lucia, 2020.

- (a) it appears to it that the evidence is likely to be creditable and would have been admissible at the trial on an issue which is the subject of the appeal; and
- (b) it is satisfied that it was not adduced at the trial but that there is a reasonable explanation for the failure to adduce it.”

[12] **Lundy v The Queen**² is one of the leading cases on the admission of fresh evidence on appeal. The overriding test is that the new evidence should be admitted if the interests of justice require it. Lord Kerr, at paragraph 120 of the judgment, explained the necessary steps a court must take in deciding whether to admit fresh evidence in the following way:

“The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

[13] The case also held at paragraph 122 that in cases involving scientific evidence the requirement that evidence be fresh assumes less critical importance and the court ‘should not be astute to exclude the new material solely because it might have been obtained before the trial.’

[14] I understand the case to establish the following propositions: (1) where the evidence is not credible, that is the end of the matter; (2) where it is both credible and fresh it should be admitted unless the court is at that stage satisfied that it would not affect the safety of the conviction; (3) where it is credible but not fresh, the court must make an assessment of its strength and possible impact on the safety of the conviction. If, on assessment, the court considers that there is a risk of a miscarriage

² [2013] UKPC 28.

of justice if the evidence is excluded, it should be admitted even if it is not fresh; see also **Lescene Edwards v The Queen**.³ These principles have also been adopted and applied by this Court in several decisions, including **Nardis Maynard v The Queen**.⁴

[15] Applying the staged process, there is no dispute the evidence is credible. It comprises notes made by Dr. Bernadette Joseph-Labadie (“Dr. Joseph-Labadie”), Dr. Kabiye and Dr. Cenac, who attended the virtual complainant while he was hospitalized.

[16] The next step is to consider whether the evidence is fresh. Based on the transcripts of the trial, it would appear that the existence of the medical notes first came within the contemplation of the appellant during the cross-examination of Dr. Joseph-Labadie on 7th April 2022. She was asked whether she had any recorded information of the virtual complainant’s condition when he presented. She replied:

“A: It would be on, on the actual notes, which I don’t have in my possession right now, so, I don’t know.

Q: Are these notes available Doctor?

A: Well, they should be at Medical Records, Hospital’s Medical Records.”⁵

[17] At the close of evidence that day, counsel for the appellant, Mr. Leslie Prospere, made a request for the medical notes in the following terms:

“Yes, my Lord, there are two housekeeping matters I want to raise for tomorrow. The first is, my Lord, I think I will be doing my client a disservice if I do not request a copy of the medical notes from the Doctor. So, I would, with the Court’s assistance, like to request a copy of the notes, unless, of course, my learned friend can arrange for these notes to be produced for me.”⁶

[18] The court then ordered the prosecution to disclose the medical notes of the virtual complainant for the period 1st to 5th February 2014 when he was a patient at the

³ [2022] UKPC 11.

⁴ SKBHCRA2004/0012 (delivered 10th June 2022, unreported).

⁵ See Record of Appeal pg. 135.

⁶ See Record of Appeal pg. 137.

Victoria Hospital by 10 a.m. the following day. When on that occasion the prosecution failed to produce the notes because the hospital was having difficulty retrieving the notes, counsel for the appellant elucidated the reason he was requesting the notes:

“Yes. My Lord, the, the reason why I, I am requesting the notes is, I wish to make sure I leave no stone unturned as it relates to the condition, the virtual complainant was in when he presented at the hospital, and if the court, if, if I can go further, my Lord, I, I believe that that can assist the defendant in this defence, particularly as it relates to whether or not the defendant, the, the, the victim was conscious at the time, because we received certain information my Lord and these notes will shed some light on that information.”⁷

[19] Mr. Prosperé reiterated this on 11th April when the notes were still unavailable:

“My Lord, may, may I, may I just indicate, my Lord, that the, the purpose for requesting the medical notes is to establish that the patient, at the time of being presented to the hospital, was conscious and I’ll go even further, conscious to the extent that he even provided challenges to the medical staff at the time, in terms of his conduct.”⁸

[20] The appellant asserts that there is a good reason for his failure to adduce the medical notes at his trial, namely the prosecution’s breach of its duty to disclose them, which resulted in a material irregularity.

[21] Learned counsel for the respondent, Ms. Tanya Alexis-Francis, submitted that the prosecution was never in possession of the medical notes. When at trial the judge ordered them to produce the notes by Friday 8th April 2022, there was a good reason why they were unable to do so: the hospital had relocated and this affected their ability to retrieve the medical notes from 2014. Up until the morning when the judge was to embark on his summing up, the prosecution had not obtained the medical notes and was not in a position to disclose them. Nonetheless, the respondent contends that non-disclosure, in itself, does not automatically render the trial unfair.

⁷ See Record of Appeal pg. 154.

⁸ See Record of Appeal pg. 257.

- [22] It is apparent from the cross-examination of Dr. Joseph-Labadie that counsel for the appellant was alive to the relevance of the medical condition of the virtual complainant in the immediate aftermath of the fight, and, particularly upon presentation at the hospital. Yet, there is no indication on the record that the appellant had previously requested any medical notes from the prosecution. This is not said by way of criticism or to suggest that counsel had an obligation to request disclosure from the prosecution; only to point out the fact that the notes were in existence since February 2014 but had never been sought by either side. It did not seem to occur to either the prosecution or the defence that the notes might be potentially relevant. Given the statutory obligations imposed on the prosecution, discussed later in this judgment, this is somewhat surprising since in cases of this nature the medical notes of a virtual complainant are routinely obtained and disclosed by the prosecution and invariably regarded by the defence as relevant, especially where self-defence is in issue. Why it should take a passing comment from Dr. Joseph-Labadie eight years later about the existence of the notes for light to dawn is not entirely clear.
- [23] I consider that the evidence could have been obtained for the trial with reasonable diligence and cannot therefore be described as fresh.
- [24] The finding that the evidence is credible but not fresh necessarily leads to the next step, which is to make an assessment of its strength and possible impact on the safety of the conviction. The appellant contends that the medical notes shed very important light on: (1) the virtual complainant's display of aggression towards the appellant in the aftermath of the incident; (2) the precise location where the incident occurred, which lay at the heart of the defence; and (3) the credibility of the eyewitnesses in the trial. The appellant says further that the absence of the medical notes at trial meant that the appellant lost the opportunity to put pertinent questions to the two medical witnesses about the virtual complainant's condition when he presented to the accident and emergency department. Each assertion will be examined in turn.

Do the notes shed light on the virtual complainant's aggression in the aftermath of the incident?

[25] The appellant relies specifically on the following endorsements in the medical notes:

- (1) An entry made by Dr. Cenac at 1:20 a.m. on 1st February 2014 which states:

“Young male - appears to be confused and combative. Appears to have the odor of alcohol about the body.”

- (2) An entry made by Dr. Kabiye at 1:25 a.m. on 1st February 2014 which states:

“Patient was unable to give a history. Was also noted to be intoxicated...Patient's blood oxygen level...”

- (3) An endorsement made by a nurse stating:

“Attached to cardiac monitor...v/signs done. Patient very combative and confused. Patient restrained.”

[26] Mr. Prospere makes the point that none of these excerpts record the virtual complainant as having presented in an unconscious state. Rather, they show him to be combative after he presented at the accident and emergency department. This, submitted Mr. Prospere, completely undermines the distorted version of events that the jury had received of an unconscious virtual complainant, who was conveyed to the hospital. The notes, together with Dr. Joseph-Labadie's opinion that the virtual complainant would have been able to continue fighting despite his injuries, would have led the jury to draw the reasonable inference that the prosecution's version of events in the aftermath of the incident was untrue.

[27] Ms. Alexis-Francis submitted that being combative at the hospital cannot equate to being the aggressor at the time of the incident.

[28] In my view, the evidential value of these excerpts from the medical notes, individually and cumulatively, is practically nil. The evidence at the trial was that the incident occurred between 12:40 and 12:45 a.m. The notes from the emergency department record that the virtual complainant was admitted to the accident and

emergency department at 12:50 a.m. The excerpts sought to be admitted speak to the virtual complainant's condition some half an hour after his admission and about forty to forty-five minutes after the incident. It cannot be logically extrapolated from this that the virtual complainant was the aggressor at the time he was stabbed, which is the relevant time. While the medical notes record him being combative at the hospital, admission of evidence of that he was combative at 1:20 a.m. "in the aftermath of the incident" could not have had the effect of supporting the appellant's case that the virtual complainant was combative before or at the time he was stabbed or immediately thereafter.

[29] Further, it is difficult to understand why the appellant suggests that the prosecution's case was that the appellant became immediately unconscious after being stabbed. Indeed, counsel for the appellant had elicited from the virtual complainant that he had continued fighting with the appellant after being stabbed in the abdomen. The exchange was as follows:

"BY MR. PROSPERE:

Q. Yes, and despite being stabbed in the abdomen, you still continue struggling with the defendant. In other words, that didn't do anything to you. You still continue, am I not correct?

A. Certainly."⁹

[30] Mr. Jonas' evidence under cross-examination was that the virtual complainant was not conscious when the paramedics arrived. The medical notes are silent on this. Additionally, the jury heard the evidence of Dr. Joseph-Labadie that a person sustaining injuries of the type the virtual complainant had could have continued fighting thereafter. Thus, the jury already had before them evidence from the virtual complainant himself, and from another prosecution witness no less – that would tend to lend some support to the appellant's case that he continued to struggle or fight after being stabbed. These medical notes could take matters no further.

⁹ See Record of Appeal pg. 76.

Would the medical notes have shed light on the precise location where the incident occurred?

- [31] Mr. Prospere submitted that the medical notes ‘shed extremely important light on the crucial and vigorously disputed issue of where the stabbing incident occurred.’ The appellant grounds this submission on an entry by Dr. Kabiye, which states:
- “Pt brought in via ambulance personnel who report that he was found lying by the beach.”

Reliance is also placed on an entry in the emergency department notes stating:

“This patient brought into A/E dept. Ambulance personnel stated that patient was found lying on the beach.”

- [32] Mr. Prospere submitted that this dovetails with the appellant’s case that the incident occurred near the foreshore in the vicinity of the retaining wall.
- [33] Ms. Alexis-Francis submitted that the medical notes would not have assisted the jury by providing independent evidence corroborating the appellant’s case that the incident took place close to the retaining wall, since there is no evidence from the paramedics indicating the location where they found the virtual complainant.
- [34] The first issue is whether this aspect of the evidence is admissible. It records what was purportedly reported by ambulance personnel. This narrative recites what is called the history and does not form part of the actual medical report, per se and does not speak to the virtual complainant’s medical condition. It is therefore hearsay. But even if it were somehow admissible, the notes shed no light on the real issue in the case, which is whether the appellant was acting in self-defence at the moment he inflicted the wounds to the virtual complainant, wherever the incident occurred.
- [35] The appellant’s argument seems to proceed on the assumption that because the jury convicted the appellant, they must have found that the incident occurred where the virtual complainant said it did. This is not necessarily so. The jury was well aware that the location of the stabbing was a hotly disputed issue in the case. They can be taken to have appreciated that this was the reason why they were taken to the scene

so that the virtual complainant and the appellant and their witnesses could point out where they say the incident occurred.

[36] The jury had to assess the credibility of the witnesses on this issue. In considering that evidence, several options were open to the jury. They could accept the virtual complainant's account of where the stabbing occurred; or, they could reject it, considering his drunken state and the fact that his own witness said repeatedly that the stabbing occurred in the car park; or they could accept the appellant's account of where the stabbing occurred, but reject his account of the manner in which it occurred, in light of the medical evidence of the stab wounds to the virtual complainant's back and abdomen. In such an instance, evidence that the virtual complainant was found on the beach could shed no light on how he sustained his injuries, or on whether the appellant was acting in self-defence when he stabbed him. At its highest, that evidence might possibly have tended to support the appellant's account of where the stabbing occurred but not how the stabbing occurred, which was the central and critical issue for the jury.

[37] It is therefore difficult to conceive that the bare assertion in the medical notes that the virtual complainant was found on or by the beach would have impacted the safety of the conviction in circumstances where the jury heard and assessed the evidence of eyewitnesses, who pointed out the location of the incident. I am of the view it would not.

Did the absence of the medical evidence impair the appellant's ability to properly examine the medical witnesses

[38] Mr. Prospere submitted that had the notes been available Dr. Joseph-Labadie could have been cross-examined on (1) the virtual complainant's oxygen blood saturation level recorded as normal up to 1:45 a.m. and its effect upon him to have maintained his aggressive conduct at the accident and emergency department; (2) whether the virtual complainant's 'highly combative conduct' likely commenced upon presenting to the accident and emergency department in light of said oxygen blood saturation

level; (3) the virtual complainant's ability to maintain his aggression for some time after being stabbed; (4) the likelihood of the author of the nursing notes potentially leaving out other pertinent information from her notes 'in the heat of attempting to restrain the combative virtual complainant'; (5) whether the virtual complainant's combative conduct was more likely related to his 'acute alcohol intoxication' rather than acute blood loss or severe bodily injury. Additionally, Mr. Prospere submitted that the appellant could have asked his own witness, Dr. Wilson, questions relating to the virtual complainant's ability to have maintained his aggression for some time after the incident.

[39] Whether the virtual complainant was aggressive while at the A&E, or whether his aggression commenced there and whether it was more likely attributable to his 'acute alcohol intoxication' rather than acute blood loss or severe bodily injury are completely irrelevant to what the jury had to decide. In any event, the jury was well aware that it was the appellant's case that the virtual complainant was highly intoxicated (the virtual complainant admitted he had consumed no less than fifteen alcoholic drinks and his witness said he was intoxicated), and they already had the evidence of Dr. Joseph-Labadie that the virtual complainant could have continued to fight after sustaining his injuries. It was for them to decide whether that logically meant that he was the aggressor at the material time and that the appellant must have been acting in self-defence when he stabbed him.

[40] Further, any invitation to Dr. Joseph-Labadie to speak to the likelihood of the author of the nursing notes potentially leaving out other pertinent information from her notes 'in the heat of attempting to restrain the combative virtual complainant' would be to invite the witness to engage in rank speculation. Had these questions been posed at the trial they were bound to be disallowed as inviting conjecture and speculation. The medical notes could not have been deployed to pursue a clearly impermissible line of questioning.

Conclusion on admissibility of the medical notes

- [41] Having carefully considered the appellant's arguments as to the potential value of the medical notes, for all the reasons outlined above, I am of the view that that evidence would have been of tenuous strength and would not have impacted the safety of the conviction. Accordingly, I would refuse leave to adduce the medical notes as fresh/additional evidence.

Grounds 1 to 4

- [42] These grounds all touch and concern the medical notes. Ground 1 alleges that a grave material irregularity occurred during the course of the trial when the prosecution failed in its duty to disclose the said notes prior to the jury retiring. Ground 2 alleges that the prosecution failed to comply with the order of the judge on 7th and 8th April 2022 that the notes should be disclosed to the defence. Ground 3 complains that the judge wrongly refused the appellant's oral application for the trial to be stood down until the notes were disclosed to his counsel. Ground 4 complains that the failings of the prosecution and the judge, as alleged in grounds 2 and 3 respectively, was manifestly unfair to the appellant who was deprived of the opportunity to conduct his own investigations and inquiries in relation to the notes and potentially use them in his defence.
- [43] In relation to grounds 1 and 2, learned counsel for the respondent, Ms. Alexis-Francis, submitted that the prosecution was never in possession of the medical notes and there was a good reason why they were unable to produce them by the deadlines ordered by the court: the hospital had relocated and this affected their ability to retrieve the medical notes from 2014. Up until the morning when the judge was to commence his summing up, the prosecution had not received the medical notes. Nonetheless, the respondent contended that non-disclosure in itself does not automatically render the trial unfair.

[44] In Saint Lucia, the prosecution's duty of disclosure is codified in section 908 of the **Criminal Code**.¹⁰ It provides:

"908. Disclosure by the prosecutor

(1) Subject to any guidelines as may from time to time be issued by the Director of Public Prosecutions, at the trial of any indictable offence the prosecutor shall—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which, in the opinion of the prosecutor, might undermine the case for the prosecutor against the accused; or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(2) For the purposes of this section prosecution material is material—

(a) which is in the prosecutor's possession, and which came into his or her possession in connection with the case for the prosecution against the accused;

(b) which he or she has inspected in connection with the case for the prosecution against the accused.

.....

...

(8) The prosecutor shall make a disclosure as soon as is reasonably practicable after the accused is committed for trial or as soon as is practicable after the accused gives a defence statement or, where the Court makes an order under section 910, within such time as the Court may specify in that order."

[45] The terms of section 908 presuppose that the material is in the possession of the prosecution since they can only inspect it and form an opinion about its likely impact on the prosecution's case if they know what the material is.

[46] Section 910 of the **Criminal Code**, however, provides that if the accused has at any time reasonable cause to believe that there is prosecution material which might be reasonably expected to assist the accused's defence and that the material has not been disclosed to the accused, the accused may apply to the court for an order requiring the prosecutor to disclose such material to the accused in accordance with section 913.

¹⁰ Cap. 3:01 of the Revised Laws of Saint Lucia, 2020.

- [47] An issue in this case is whether the medical notes constituted prosecution material as defined by the **Criminal Code**. There is no dispute that up to the time of trial the medical notes had never come into the prosecution's possession in connection with the case for the prosecution against the appellant. It is equally clear that the prosecution could not have inspected them in order to form an opinion on whether it might undermine the case for the prosecutor against the accused.
- [48] At common law, with specific reference to medical records, the Court of Appeal of Trinidad and Tobago in **Winston Solomon v The State**¹¹ held that the prosecution had a duty to disclose the medical records of the appellant that were in the hands of the police and prison authorities, who knew of the pendency of the prosecution and who had arranged for the appellant to be examined by a psychiatrist, but had failed to make available to the prosecution the psychiatrist's report that was contained in a letter addressed to the prison medical officer and copied to the Commissioner of Prisons.
- [49] In the case at bar, it is doubtful whether the medical personnel of the Victoria Hospital can be regarded as agents of the prosecution in the same way as police and prison officers. That said, it required little effort for the prosecution to have obtained these records had it addressed its mind to it. The virtual complainant's medical record was obviously relevant. In any event, the appellant made a specific request for disclosure of the medical notes after Dr. Joseph-Labadie was cross-examined. The judge ordered that they be disclosed by specific dates. The prosecution was unable to comply because they never received the medical notes.
- [50] It is settled that non-disclosure by itself does not automatically lead to the conclusion that a trial is unfair. In **Maureen Peters v The Queen**,¹² Baptiste JA, cited approvingly and adopted the following statement by the Supreme Court of the

¹¹ (1999) 57 WIR 432.

¹² BVIHCRA2009/005 (delivered 1st October 2010, unreported).

United Kingdom **McInnes v Her Majesty's Advocate**¹³ at paragraph 20 of the judgment:

“The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair ... as a consequence there was no miscarriage of justice ... The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict.”

- [51] Applying this test, even if the prosecution can be said to have breached their disclosure obligations in relation to the medical notes, this has not produced a material irregularity that renders the conviction unsafe. Taking into account the entirety of the evidence that was placed before the jury, and the previous discussion in this judgment on the likely impact the notes might have had, there is no real possibility that the jury would have arrived at a different verdict had the medical notes been deployed at the trial. Grounds 1 and 2 therefore fail.

Grounds 3 and 4

- [52] In relation to ground 3, the complaint is that the trial judge wrongly refused the appellant's oral application for the trial to be stood down pending disclosure of the medical notes to his counsel. Ground 4 complains that this refusal was manifestly unfair to the appellant who was deprived of the opportunity to conduct his own investigations and inquiries in relation to the notes and potentially use them in his defence. On the morning when the judge was due to commence his summing up, counsel for the appellant advised the court that the legal officer at the hospital had just received the virtual complainant's medical file but he could not say if it would be disclosed to the prosecution or himself. Counsel for the appellant invited the judge to stand down the trial pending receipt of the medical notes, with the possibility of witnesses being recalled for cross-examination. The application was resisted by the prosecution. The judge refused the application.

¹³ [2010] UKSC 7.

[53] A judge's foremost duty is to ensure that a defendant has a fair trial. In the pursuit of that objective, the trial judge has a discretion whether to reopen the case for the prosecution or the defence to receive further evidence after closing addresses but prior to summation. The two well-established situations where a judge may permit this are where the evidence arises *ex improviso*, or in order to adduce evidence which is a mere formality. However, **R v Francis**¹⁴ makes it clear that the judge's discretion is wider and not confined to these two well established exceptions. While safeguarding the flexibility of the discretion by not attempting to define its limits, the court was clear that the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions. **R v Hussain (Ashiq) & Ors**¹⁵ cites two examples where the trial judge, in the interest of justice, exercised his discretion to permit a defendant to re-open his case before the jury retired to consider its verdict, for the purpose of adducing further evidence. The case reports that in the decision of **R v Morrison**,¹⁶ the defence was permitted to adduce further evidence which had only just come to light following counsel's closing speech. In **R v Sanderson**,¹⁷ the defendant was permitted to call a witness at the close of the summing up. The Court of Appeal will not interfere with the exercise of that discretion unless it appears that an injustice has thereby resulted: **R v Sullivan**.¹⁸

[54] In the instant case, the record of appeal shows that counsel for the appellant represented to the judge that the purpose for requesting the medical notes was to establish that the virtual complainant was conscious when he presented at the hospital. The judge asked if it was to show belligerence. Counsel confirmed that was so. The judge then entertained representations from counsel for the prosecution and the appellant. In deciding whether to proceed with the case, the judge considered the stage at which the trial had reached; the purpose for which the medical notes were to be deployed, namely to shed light on the virtual complainant's condition

¹⁴ [1991] 1 All ER 225.

¹⁵ [2010] EWCA Crim 1327 at para. 25.

¹⁶ [1911] 6 Cr App Rep 159.

¹⁷ [1953] 1 WLR 392.

¹⁸ (1922) 16 Cr. App. R 121.

when he presented at the hospital; the relevance of that to the core issue in the case; and the burden of proof. Having weighed all of these matters the judge concluded that there was no reason to delay the trial. In all of this, it must be borne in mind that neither the judge nor counsel had seen the notes up to that point. It could not be said with any certainty whether they could assist one way or the other. The judge was being asked to determine the application on a speculative basis.

[55] It might be said with justification that the judge should have at least stood down the matter until he had obtained the notes and perused them. He would then have been in a much better position to have assessed their value to the appellant's case. The question for this Court is whether that failing resulted in an unfair trial and renders the conviction unsafe. That assessment can only be made by means of an evaluation of the evidential value of the notes. As it turns out, the judge was spot on in his appreciation of the value being ascribed to the medical notes by the appellant and in his assessment of their likely impact or relevance to the issues in the case. The extensive discussion and exchanges between the judge and counsel for the appellant on this issue virtually mirror the submissions before this Court.

[56] Having regard to my previous assessment of the value of the medical notes and my conclusion that they would not have impacted the safety of the conviction, I can see no reason to fault the judge's exercise of his discretion in these circumstances. But even if he erred in not standing down the trial until he had at least reviewed the medical notes himself, that error did not result in the trial being unfair and does not render the conviction unsafe.

[57] In my view, the trial judge did not err in refusing to stand down the trial until the medical records were disclosed. Nor can it be maintained that any failings by the prosecutor and the judge resulted in a miscarriage of justice. Accordingly, grounds 3 and 4 fail.

Grounds 5 to 7

[58] These grounds are related. Ground 5 complains that during his closing address, the prosecutor wrongly and/or improperly made reference to the appellant's failure to call two witnesses in his defence. Ground 6 alleges that the judge erred fundamentally when he failed to declare a mistrial and discharge the jury following the prosecutor's comments. Ground 7 asserts that the judge erred fundamentally when he failed adequately or at all to direct the jury in such a way as to "ameliorate" the effects of the prosecutor's adverse comments.

[59] The impugned part of the prosecutor's address is as follows:

"Members of the jury, you remember, and it's important. You will remember that the defendant told you that there was a colleague of his who was close by, close by the tent, close to the tent when Ricardo first attacked him. There was a colleague of his and he said that colleague did nothing. Okay, that's believable the colleague did nothing. Someone is armed with a weapon. He may not want to get involved, injure himself. So the colleague does nothing but what is mind boggling about that, members of the jury, he said, the defendant is subsequently charged of a very serious offense or his liberty is at stake, and even if his colleague did nothing, his colleague did see Ricardo attacking him.

His colleague could assist his defense. He saw he was there, when Ricardo attacked him, but he does not tell the police or that colleague. He does not ask that colleague to go to the police and say what happened. Eight years on, still no mention of that colleague. During these proceedings, he was at the liberty to call any witness to give evidence that would support his defence. No mention no appearance of that colleague. Now, remember he is not someone who is unknown to him, that you have trouble in finding them, in tracking them down. No, he told you it was a colleague. Someone he knows and he knows where to find. In spite having that at his disposal, he does not use it.

He does not act in his best interest. Members of the jury. You know why, because that never happened. That is why he could not get that colleague to come and testify in his defense, and he also spoke about another individual named Zahra, and I believe it was Ms. Barthelmy who told you that, Zahra also worked at the hotel and that it was this Zahra person who, who pulled Ricardo off him. Whilst Ricardo is on him attacking him, Zahra comes and pulls Ricardo off him. Here is has another colleague to support his defence, who could say that I had to pull Ricardo off Jonathan, but again does not tell the police about Zahra. He does not ask Zahra to go to the

police. Zahra never showed up to give evidence on his, on his behalf. Zahra is someone that is known. He has that at his disposal.

That is two persons members of the jury, two persons that he could locate, he could bring to testify in his defence. One, who saw when he was initially attacked. The other, pull Ricardo off him. No mention of either of them. Make that make sense for me, members of the jury, make it make sense to me please. This is a lie; I ask you to reject it.”¹⁹

[60] The appellant contends that these comments were seriously prejudicial as they gave the jury the impression that he and his witness had fabricated their evidence; had failed to disclose the existence of material witnesses; and “failed to discharge his evidential burden of self-defence”. Mr. Prospere submitted further that the prosecutor’s comments were in breach of section 912 of the **Criminal Code** since the prosecutor had not obtained the judge’s leave to make such comments and in any event, the appellant had not committed any of the breaches stipulated in subsection (1). Section 912 provides:

“912. Faults of disclosure by accused

(1) Where the defence—

- (a) fails to give a defence under section 908;
- (b) gives a defence after undue delay following the disclosure by the prosecution;
- (c) sets out inconsistent defences in a defence statement given under section 909;
- (d) at his or her trial puts forward a defence which is different from any defence set out in a defence statement given under section 909;
- (e) at his or her trial, adduces evidence in support of a special defence without having given particulars of the defence in a statement given under section 909;
- (f) at his or her trial, calls a witness in support of a special defence without having complied with section 909(3),

the Court or, with the leave of the Court, any other party, may make such comment as appears appropriate or the

¹⁹ See Record of Appeal pgs. 414-415.

Court or jury may draw such inferences as appear proper in deciding whether the accused committed the offence concerned.

(2) A person shall not be convicted of an offence solely on an inference drawn under subsection (1).”

[61] For the respondent, Ms. Alexis-Francis argued that section 912 was not in play and that the prosecutor did not require leave to comment on evidence given by the appellant. The prosecutor’s comments were fair and accurately reflected the evidence at the trial since the appellant had admitted under cross-examination that he had not given the police the name of the person who had pulled Ricardo off him.

[62] In **Maureen Peters**, this Court distilled the principles relevant to prosecutorial conduct and fairness as derived from **Randall v R**²⁰ in the following terms:

“[40] In *Randall v R* [2002] UKPC 19 at paragraph 10, the Privy Council addressed the issues of prosecutorial misconduct and the fairness of a trial. The Board pointed out that throughout any trial an overriding requirement is to ensure that the defendant is fairly tried. To that end a number of rules were developed to ensure that the proceedings were conducted in an orderly and fair manner. These rules speak to the duty of the prosecuting counsel and also recognize the central role of the jury in a criminal trial. The duty of a prosecuting counsel is not to obtain a conviction at all costs, but to act as a minister of justice. The Board recognized that the central task of the jury was to decide whether the guilt of the defendant was established to the requisite standard and that the jury’s attention must never be distracted from that central task.

[41] The Board deprecated bullying, intimidation, personal vilification, insult or the exchange of insults between counsel. There can never be any justification for such conduct. The Board recognized that counsel’s duty may require a strong and direct challenge to a witness’ evidence and strong criticism may properly be made of a witness or a defendant as long as that criticism is based on the evidence or the absence of evidence before the court. Further, reference should never be made to matters which may be prejudicial to a defendant but which are not before the court. At paragraph 28 the Board observed that it is not every departure from good practice which renders a trial unfair, but the right of a criminal defendant to a fair trial is absolute. At what point would departure from good practice compel a conclusion that the trial was unfair and lead to a quashing of a conviction?

²⁰ [2002] UKPC 19.

The Board stated that if the departure from good practice is so gross or so persistent, or so prejudicial or so irremediable, an appellate court will have no choice but to hold that the trial was unfair and quash the conviction.”

[63] In summary, the duty of a prosecuting counsel is to act as a minister of justice. However, strong criticism and direct challenge to a defendant’s and /or his witness’ evidence, does not breach that duty, provided that the criticism is based on the evidence or the absence of evidence.

[64] It should be said at the outset that the appellant’s reliance on section 912 of the **Criminal Code** is misconceived. This was not a case where the prosecutor was seeking to avail himself of one or more of the defence disclosure failures identified in section 912(1) in order to comment adversely or to invite the jury to draw an adverse inference therefrom. This was simply a robust challenge to the credibility of the appellant on a particular aspect of his evidence.

[65] The prosecutor’s comments must be read as a whole and in context. Properly construed, the prosecutor was not placing a burden on the appellant to call witnesses in support of its case; the appellant had chosen to give evidence and to call a witness. The prosecutor’s real point was that the two persons about whom the appellant had testified, were not present during the incident and that the appellant and his witness were lying when they said they were. The prosecutor had put to the appellant in cross-examination that he had made up his evidence about Zahra “on the spot.” That is what the prosecutor was inviting the jury to find when he ended his remarks by saying, “This is a lie; I ask you to reject it.”

[66] Mr. Prospere submitted that this gave the jury the impression that the appellant and his witness had fabricated evidence. There is nothing to this point. It is perfectly permissible for a prosecutor to suggest that an appellant or his witness has fabricated evidence. In my view, the prosecutor’s comments amounted to no more than a strong challenge and criticism of the appellant’s evidence in relation to two persons, said by the appellant and his witness to have witnessed the incident and

to have restrained the virtual complainant after the incident. The prosecutor's comments invited the jury to find that that evidence had been fabricated. To do so, imports no suggestion that the appellant had any burden to establish self-defence. Such criticism, robust as it was, does not compel a conclusion that the trial was unfair. See **Angus Warrington v The State**.²¹

[67] For these reasons I would dismiss ground 5.

Ground 6

[68] Ground 6 must likewise fail in light of my conclusion that the prosecutor's comments were within proper bounds. Nothing about the prosecutor's comments could possibly require the judge to declare a mistrial.

Ground 7

[69] It follows also that ground 7 is unsustainable. The judge directed the jury quite properly on the burden and standard of proof. He told the jury:

"Now, the Prosecution are the ones who have to negative or block or rebuff self defence, and by this I mean, the defendant does not have to prove that he was acting in self defence when he inflicted these injuries. The Prosecution are the ones who have to make you sure that he was not acting in self defence and if they have not negative self defence, then the defendant is entitled to be acquitted since the injuries would have been sustained in lawful self defence and as such there would be no issue of harm, dangerous or grievous or wounding for you to consider if you find that the defendant was acting in self defence."²²

[70] Later in the summing up, the judge reminded the jury to approach the assessment of the reliability of all witnesses, "...bearing in mind always that the burden is on the Crown to make you sure. The defendant and his witnesses have nothing to prove to you."²³ No complaint has been made about these directions.

²¹ Criminal Appeal No. 6 of 2006 (delivered 17th September 2007, unreported).

²² See Record of Appeal pg. 464.

²³ See Record of Appeal pg. 468.

[71] Further, the judge gave a careful direction to the jury that they should decide the case solely on the evidence they had heard and not speculate on what evidence there might have been:

“Now, you have to draw a sensible conclusion from the evidence you heard, what you do not and you must not guess or speculate about anything that was not covered by the evidence. You are to decide the case on the evidence that you have heard. You are not to speculate, for example, or guess about what other persons who were at Sandals on that night and into the morning of February 1st might have said as they were not called as witnesses. So you ought not to wonder about, for example, what Charms Emmanuel might have said or what any co-workers might have said or what anyone else who was at the place might have said. Your task is to decide the case on the evidence before you.”²⁴

[72] These directions were more than sufficient to mitigate any perceived harm or prejudice that may have resulted from the prosecutor’s comments. I would therefore dismiss ground 7.

Ground 8

A grave material irregularity occurred during the *locus in quo* visit when the learned trial judge permitted each of the Crown’s two eyewitnesses, in each other’s presence and in the presence of a defence witness, to identify to the jurors two crucial areas of the crime scene

[73] The respondent accepts that this irregularity occurred on the visit to the *locus*. This was a procedural irregularity in that the prosecution witnesses practically gave evidence in the presence of each other. However, a procedural irregularity occurring during the trial does not, without more, render a conviction unsafe. The effect of that irregularity on the fairness of the proceedings and whether it caused any unfairness to the defendant must be assessed.

[74] In this case, the irregularity did not result in any advantage to the prosecution or prejudice to the defence. Notwithstanding that the prosecution witnesses were in each other’s presence, they each identified a different location where the stabbing was said to have occurred. This discrepancy had already manifested itself in their

²⁴ Ibid.

previous testimony in court as both had described different locations of the stabbing. The virtual complainant placed the stabbing along the roadway; his witness Mr. Jonas said it occurred in the car park. This evidence at the *locus* merely served to highlight the discrepancy between the prosecution witnesses on this point and did not in any way injure the appellant's case; if anything, it assisted his case.

- [75] In these circumstances, while there is merit to ground 8, it has not affected the safety of the conviction.

Ground 9

The verdict is perverse having regard to (sic) the overwhelming evidence of self-defence that the appellant adduced in the trial

- [76] Mr. Prospere submitted that the appellant had adduced overwhelming evidence that he had stabbed the virtual complainant in reasonable and proportionate self-defence, most of which the Crown was incapable of refuting.
- [77] The appellant points to the following features of the evidence which he says demonstrates the unreasonableness of the verdict: (1) the virtual complainant's height and size comparison with the appellant; (2) the virtual complainant's state of intoxication; (3) the virtual complainant's stab wounds and the medical evidence that it was possible that he could continue to fight after being stabbed, together with the appellant's evidence that he had to be restrained by several persons after the stabbing; (4) the appellant's personal injuries and the medical evidence supporting his account of the injuries he had sustained; (5) the poor lighting conditions at the scene of the stabbing; (6) the virtual complainant's aggression towards the appellant during the incident; (7) the appellant's explanation to an off duty police officer that he had stabbed the virtual complainant because he had attacked him and (8) the Crown's version of the attack.
- [78] An appellate Court will not overturn the factual findings of a jury unless it can be shown that the finding is so against the weight of the evidence as to be obviously

and palpably wrong: **Wendell Anthony et al v Commissioner of Police**.²⁵ The burden is on the appellant to satisfy this Court that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the verdict that they did.

[79] Clearly, the jury had competing eyewitness accounts of how the stabbing occurred. They also had medical evidence detailing the injuries to both the virtual complainant and the appellant. They would have been aware that the medical evidence established that the injuries to the virtual complainant's back could possibly have been inflicted by the appellant while the virtual complainant was lying across his lap. All of these matters raised by the appellant were well within the contemplation of the jury. They received adequate directions from the trial judge as to how they should approach the task of assessing the witnesses and determining who was credible and reliable and who was not. Those directions have not been faulted.

[80] It was the jury's task to assess the credibility of the witnesses on the issue of self-defence. Having regard to the evidence before the jury, it was entirely open to them to arrive at the verdict they did. There is no basis for saying that no reasonable jury who had applied their minds properly to the facts in the case could not have arrived at the verdict they did.

[81] This ground of appeal is simply an invitation to this Court to substitute its views of the facts for those of the jury. The appellant has failed to discharge the burden of showing that the jury's verdict is so against the weight of the evidence as to be obviously and palpably wrong. There is therefore no merit to ground 9.

Grounds 10 and 11

[82] These grounds complain that the sentence is manifestly excessive and disproportionate to the circumstances under which the offence occurred. The nub of the appellant's complaint, as set out in his written submissions, is that the judge

²⁵ BVIMCRAP2014/0016 (delivered 23rd November 2016, unreported).

rigidly adhered to the sentencing guidelines, resulting in a sentence that was manifestly excessive and disproportionate. Mr. Prospere submitted that this was a case that warranted a departure from the sentencing guidelines, while still meeting the ends of justice. It was submitted that none of the classic aims of sentencing applied to the appellant, having regard to the contents of the pre-sentence report and the circumstances under which the appellant stabbed the virtual complainant.

[83] In relation to the aim of prevention, Mr. Prospere highlighted that the pre-sentence report noted that the appellant was regarded by the community as law-abiding and productive. The incident was totally out of character, and it was felt that the appellant posed no threat to the community. In terms of the principle of deterrence, Mr. Prospere argued that given the appellant's previous good character, it cannot logically be argued that he would offend again. In relation to the aim of rehabilitation, Mr. Prospere argued that the pre-sentence report suggests that the appellant is a well-rounded young man, who is not in need of rehabilitation. In relation to retribution or punishment, Mr. Prospere submitted that this was a case where rehabilitation and restorative justice would have more adequately met the ends of justice, rather than a long custodial sentence. He contended that not enough emphasis was placed on the aims of restorative justice in circumstances where the virtual complainant expressed a preference for payment of compensation for his injuries and the indication in the pre-sentence report that the offence had little effect upon the community, which continues to hold the appellant in high esteem. Mr. Prospere submitted that a compensation order with time served on remand would have met the justice of the case.

[84] On behalf of the respondent, Ms. Alexis-Francis submitted that the judge did not err in principle in arriving at an appropriate sentence and there was no proper basis on which he could have departed from the relevant sentencing guidelines.

[85] The function of an appellate Court in reviewing a sentence imposed by a trial judge is succinctly summarised by George-Creque JA (as she then was) in **Tyrone Kadan et al v The State**²⁶ at paragraph 25 where its proper function was said to be to:

“[R]eview the sentence and to consider, based on what was before the trial judge, whether in the exercise of his discretion in sentencing he committed some error of law or principle or gave too much weight to some factor or failed to take into account some factor or whether it can be said that he exercised his discretion in a manner that was manifestly wrong.”

[86] The Eastern Caribbean Supreme Court has issued a Compendium Sentencing Guideline on Violence Offences. In speaking to the applicability of the guideline, the guideline states:

“In sentencing for these offences, the Chief Justice has issued guidelines and the court must apply the relevant guidelines and sentence accordingly, unless to do so would not be in the interests of justice. It is only permissible to depart from the guidelines in exceptional circumstances, where such departure can be justified. Clear reasons for not applying the guideline must be given when passing sentence.”

[87] Thus, a judge is expected to adhere to the guidelines. He may only depart from the guidelines where exceptional circumstances exist that justify such departure, and he must clearly articulate his reasons for so doing.

[88] At the sentence hearing the judge repeatedly pressed counsel for the appellant to identify the exceptional circumstances that warranted such a departure. Counsel was unable to do so then and has not fared any better before this Court. The appellant has not been able to identify any feature which makes this case exceptional, such that departure from the sentencing guidelines is justified. None of the factors identified by the appellant, even cumulatively, yield exceptional circumstances. The judge was plainly right to reject the invitation to depart from the guidelines.

²⁶ DOMHCRA2007/002 (delivered 17th May 2010, unreported).

[89] While the appellant's contention is that the judge should have disapplied the sentencing guidelines, there is no alternative argument criticizing the judge's actual application of the relevant sentencing guidelines; and rightly so. The judge applied the sentencing guidelines and arrived at a sentence that was proportionate and just in the circumstances of the case.

[90] The evidence which the jury must be taken to have accepted is that this was a revenge sneak attack from behind on a vulnerable and intoxicated victim, who was dealt potentially life-threatening injuries. On any view, this was a brutal and senseless attack at a time when the appellant had sufficient time for sober reflection since the first altercation which was the catalyst for the eventual assault on the virtual complainant. It is an ambitious submission that a compensation order and time served would meet the justice of the case. The appellant has failed to demonstrate that the trial judge failed to apply the correct principles in arriving at the appropriate sentence.

[91] I would therefore dismiss the appeal against conviction and sentence.

Disposition

[92] The appeal against conviction and sentence is dismissed.

I concur.
Mario Michel
Justice of Appeal

I concur.
Vicki-Ann Ellis
Justice of Appeal

By the Court



Deputy Chef Registrar