[2013] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 57 and 58/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

RONALD WEBLEY
ROHAN MEIKLE v R

Mrs Melrose Reid for both appellants

Miss Maxine Jackson and Miss Kelly-Ann Boyne for the Crown

23, 25, 26 October, 5 November 2012, and 26 April 2013

BROOKS JA

[1] On 17 June 2011, a jury convicted the appellants, Messrs Ronald Webley and Rohan Meikle, of the offence of wounding with intent to cause grevious bodily harm to Mr Dilroy Wilson. This was in the Circuit Court for the parish of Saint Ann. Mr Webley was sentenced to serve 12 years imprisonment at hard labour while Mr Meikle was sentenced to serve nine years imprisonment at hard labour.

[2] A single judge of this court granted permission to the appellants to appeal against their respective convictions. Mrs Melrose Reid, with the permission of the court,

in her customary comprehensive style, argued nine grounds of appeal on their behalf. The grounds are:

"Ground 1:	The Learned Trial Judge (LTJ) descended into the arena rendering the trial unfair and the verdict unreasonable.
Ground 2:	The LTJ failed to direct the jury on the law of Self Defence rendering the verdict unsafe.
Ground 3:	The LTJ gave a wrong direction on Common Design
Ground 4:	The LTJ prejudiced the good character direction, resulting in an unfair verdict.
Ground 5:	The LTJ was biased in his summation causing the jury to come to a verdict adverse to the Appellants.
Ground 6:	(A) The LTJ erred when he allowed Crown Counsel to lead forensic evidence without disclosure to the Defence, and (a) without the Crown calling a Forensic Analysis [and] (B) The LTJ erred when he allowed Crown Counsel to lead unsupported medical evidence.
Ground 7:	The Verdict is unreasonable having regard to the evidence.
Ground 8:	The prejudicial conduct of the Crown Counsel during the trial render[ed] the trial unfair resulting in an unreasonable verdict.
Ground 9:	Sentencing: That the Sentence for each was manifestly excessive."

An outline of the case for each party shall first be given and, thereafter, each of the grounds will be considered in turn.

The factual background

[3] The essence of the case against the appellants is that an altercation occurred between Mr Wilson and Mr Webley at Clifford Hall, in the parish of Saint Ann, on 11 March 2009. At some stage during the quarrel, Mr Wilson fled into a house occupied by Miss Jennifer Wright. He was, at the time, being chased by Messrs Webley and Meikle. It is said that Mr Webley, who was armed with a cutlass, chopped the door of the house, entered the house and chopped Mr Wilson, almost completely severing his right hand. This took place while Mr Meikle was at the door of the house, hurling abuse and threats at Mr Wilson and encouraging the chopping.

[4] Mr Webley said that he acted in self defence. He said, in an unsworn statement to the court, that Miss Wright and Mr Wilson, who was armed with a cutlass, entered his yard, attacked and chopped him with a cutlass. He said that he, thereafter, ran from them and they chased him, no doubt with intent to do him further harm. During the chase he saw a cutlass, picked it up and "swing it" in defence of his person. He, however, did not know where, on Mr Wilson's body, the cutlass struck. On his account the injury was inflicted in his yard and not in Miss Wright's house.

[5] Mr Meikle, also in an unsworn statement, said that he heard the fracas and saw Mr Wilson and Miss Wright chasing Mr Webley. Mr Meikle said that he was not involved in the incident at all. He merely observed what had occurred.

Ground One: The Learned Trial Judge (LTJ) descended into the arena rendering the trial unfair and the verdict unreasonable.

[6] Mrs Reid argued that the learned trial judge "not only descended into the arena but stayed there" and in doing so "damaged the case". Learned counsel pointed to what, she argued, were several transgressions by the learned trial judge, of the rule that the judge must remain aloof of the fray. She asserted that the learned trial judge overstepped his bounds when he:

a. asked questions of and supplied answers to the witnesses for the prosecution that would have given those witnesses as well as the jury, the impression that he sided with the prosecution;

b. "literally took over the role of the [prosecutor]" by asking so many questions that it "seemed as if [the prosecutor] went on holidays and the [learned trial judge] took over...[he] was not only in the middle of the arena but took over the entire stage"; and

c. interfered with the cross-examination by defence counsel by supplying answers to the witnesses and throwing defence counsel off his line of questioning.

[7] Learned counsel cited six examples of these alleged transgressions. The first was that the learned trial judge asked Mr Wilson, "When you come down by Miss Jennifer [Wright] did you have your cutlass?" Mrs Reid submitted that it was a leading question and was prejudicial to the case, because of the nature of the issue joined.

[8] This complaint is not wholly justified. It is agreed that the learned trial judge sought to elicit evidence which, if given an opportunity, counsel would have secured. It is to be noted however that Mr Wilson, had, in previous answers, albeit to the learned trial judge, said that on the day when the incident occurred he was coming from his farm. He had, just two answers before the impugned question was asked, said in answer to the learned trial judge, that when he goes to his farm he takes along his cutlass. The exchange transpired thus (as recorded at pages 26-27 of the transcript):

> "HIS LORDSHIP: Tell me something man, you go farm, man?
>
> THE WITNESS: Yes.
>
> HIS LORDSHIP: So what you do, take you two long hand and go down to the farm?
>
> THE WITNESS: No, your Honour.
>
> HIS LORDSHIP: What you go 'round there with:
>
> THE WITNESS: Mi cutlass.
>
> HIS LORDSHIP: Anything else?
>
> THE WITNESS: No, sir, not really.
>
> HIS LORDSHIP: When you come down by Miss Jennifer, you did have your cutlass?
>
> THE WITNESS: Yes, I did carry round mi 'lass, but I never tackle him, no 'lass, mi 'lass did in the corner."

[9] The exchange just cited was only part of what occupied almost three pages of the transcript. These pages portrayed uninterrupted questioning by the learned trial

judge. In our view, the questioning did not elicit any evidence which was prejudicial to the defence. In fact, it was part of the case for the defence that Mr Wilson was armed with a cutlass. The questioning could, however, have given the impression that the learned trial judge had taken over the examination-in-chief from the prosecutor, if even temporarily. It was not the only occasion on which the learned trial judge conducted extensive questioning. The frequency, with which it occurred, provided fodder for Mrs Reid's submission that he had taken over "the entire stage".

[10] Mrs Reid also complained that the learned trial judge interfered at a critical point of the evidence and trampled on ground that was hotly contested between the prosecution and defence, that is, the location of the chopping. It would have been noted from the above outline of the respective cases, that that location was in issue. Mr Wilson, at page 49 of the transcript, was giving evidence of being chased by the appellants while he was in Miss Wright's yard, when the following exchange occurred during the examination-in-chief by the learned prosecutor:

> "Q. Where else you ran to?
>
> A. I go back to Miss Jennifer [Wright's] house.
>
> Q. Where was [sic] the two [appellants] when you ran to that first house?
>
> A. Dem was running after mi. I check seh dem would turn back but dem just show off, dem coming same way.
>
> Q. The two men were coming after me, the door close [sic] and then you went to Miss Jennifer what?
>
> A. House.

Q. Where were the two men when you went to Miss Jennifer's house?

A. Dem coming, talking bout...

HIS LORDSHIP: **You ran inside Miss Jennifer's house**?

THE WITNESS: Yes, your Honour. Dem could a just turn back and goh where dem going but dem show off." (Emphasis supplied)

[11] The last example that we shall cite from Mrs Reid's collection, is set out at page 92 of the transcript where, according to learned counsel, the learned trial judge intervened "to assist the Crown and impressed upon the jury the guilt of the Appellants". The exchange was during the cross-examination of Mr Wilson:

"Q. Let me ask you the question again, Mr Wilson?

A. I am not telling you no lie.

Q. You were near to the house on the step and two men a rush you, why you don't run in that house?

A. If them a run mi, mi nuh must 'sight' dem? Run there soh, go there soh.

HIS LORDSHIP: **A stone was thrown**.

Q. A stone was thrown, where were they when they throw the stone after you, did they come over after the stone was thrown?

A. After him ease back when him si him can't mash me up with the 'lass him ease back.

Q. When the stone was thrown at you, the person who threw the stone, did that person come over the fence? All right, or them never come over that is what I am asking?

A. Them throw the stone and come over the fence." (Emphasis supplied)

[12] The law regarding interventions by trial judges has been examined by this court in previous decisions. One of the most recent is that in the case of **Carlton Baddal v R** [2011] JMCA Crim 6. In that case, criticisms, similar to those made by Mrs Reid, were levelled by Mr Baddal at the conduct of the trial by the judge in that case. Panton P, who delivered the judgment of the court, considered several cases concerning interventions by trial judges and, thereafter, gave the following guidance at paragraph [17] of his judgment:

> "Although we do not agree with the slant that [learned counsel for Mr Baddal] would wish us to take as regards the interventions of the learned trial judge in this case, we wish to say emphatically that the interventions were largely unnecessary. **We also take this opportunity to remind trial judges that it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction**. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (**Jones v National Coal Board** [1957] 2 All ER 155 at 159G)." (Emphasis supplied)

Those comments are fully applicable to the instant case.

[13] Despite Mrs Reid's scathing criticisms of the learned trial judge's interventions, we are of the view that, as in **Carlton Baddal v R**, the interventions did not unfairly prejudice the defence. It is agreed that the learned trial judge was wrong in hurrying

the prosecution's case along to introduce the location of chopping as being inside the house. It was, however, inevitable that the prosecution's witnesses would have done so. That was a critical part of the prosecution's case. Miss Wright stated, without any similar intervention by the learned trial judge, that the chopping occurred inside her house. Although Mrs Reid is justified in complaining about that intervention it cannot be said that the intervention resulted in a miscarriage of justice.

[14] Insofar as the intervention concerning the stone is concerned, it would seem, contrary to the view that Mrs Reid holds, that the learned trial judge was reminding defence counsel about a portion of the evidence rather than unfairly interfering with the cross-examination. It is agreed that the intervention could have had the effect of throwing defence counsel off his line of questioning but this was very experienced counsel, who not only would have continued his tack if he thought fit, but could have returned to it if he was of the view that it needed to be revisited.

[15] Those were matters that concerned the credibility of the prosecution's witnesses. It must also be noted that the learned trial judge made it clear that it was for the jury to decide whether the witnesses Wilson and Wright were untruthful. A typical statement along this theme, of which the learned trial judge made several, is set out at page seven of the transcript of the summation:

> "So, if all the witnesses and the person who provide the information during the trial are lying, then the Prosecution has failed. Because, if all are lying, then it means that Mr. Wilson, Miss Wright, and the policeman [sic], liars all. No proof of the charge against the defendants. So the burden of proof then is important and that has fundamental

> implication. So lying defendants don't mean that you convict."

[16] Based on the above reasoning, ground one fails.

Ground Two: The LTJ failed to direct the jury on the law of Self Defence rendering the verdict unsafe.

[17] Mrs Reid, in this ground, complained that the learned trial judge did not explain the meaning of self-defence to the jury. She argued that the learned trial judge was so biased in his summation that he "was more concerned that the jury understood the law on joint enterprise…but had no interest in explaining the law of self defence". The failure, learned counsel submitted, rendered the convictions unsafe. Learned counsel relied on the case of **R v Webley** (1990) 27 JLR 439, in support of her submissions.

[18] In **R v Webley**, this court found that the trial judge failed to make it clear to the jury, that it was the prosecution that had the burden to negative self-defence. Rowe P, who gave the judgment of the court, said at page 445E-F:

> "We propose to allow the appeal on two grounds. Although the learned trial judge said on numerous occasions that there was a duty on the prosecution to negative self-defence, **he used language with regard to the defence which left the distinct impression that the jury had to find that self-defence was proved**. As we have said earlier the true rule is that once the issue of self-defence is raised on a proper evidential basis, unless the prosecution negatives that defence, the accused must be acquitted. See **R v Abraham** (1973) 57 Cr App R 799. The appellant squarely raised the issue of self-defence. He was entitled to have his account placed fairly before the jury. **As the learned trial judge did not relate his general directions on self-defence to the defence offered, there was a material non-direction which vitiated the conviction**." (Emphasis supplied)

[19] It is to be noted, however, that no special words are needed to convey to the jury, the meaning of self-defence. Learned counsel for the Crown, in reminding us of this principle, cited the judgment of the Privy Council in **Sigismund Palmer v The Queen** (1971) 16 WIR 499; [1971] 1 All ER 1077. In that case, their Lordships said, at page 510A:

> "In their Lordship's [sic] view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding."

[20] That principle is supported by the opinion of the English Court of Appeal in **R v Abraham** (1973) 57 Cr App Rep 799; [1973] 3 All ER 694. The court, at page 803, not only made it clear that trial judges should seek to avoid referring to "the defence of self-defence", because it may give the impression that an onus of proof lies on the accused person, but suggested an approach to an acceptable summation on the issue. They said:

> "What accordingly is the drill, if that term may be used, which a trial judge should faithfully follow in dealing with such special pleas as self-defence? Surely it is this: give a clear, positive and unmistakeable general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus and standard of proof applies, and going on to deal in, for example, the present case with the issue of self-defence and to tell the jury something on these lines: 'Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in

> self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of not guilty. Since it is for the Crown to show that the general plea of not guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case.' Having done that, the trial judge can then proceed to deal with the facts. The last thing we seek to do is to lend support to the misconception that any prescribed words have to be used in giving the direction (see **Palmer v Reginam**)."

[21] In our view the learned trial judge's approach in the instant case, although not strictly adhering to the approach set out in **R v Abraham**, which he clearly was not obliged to do, nonetheless properly communicated to the jury, the sense of the principle of self-defence and its application to the case. He first gave, at an early stage (pages 6-9 of the transcript of the summation), correct general directions on the burden and standard of proof. Then, in setting out Mr Webley's case, the learned trial judge said, in part, at pages 14-16:

> "In respect of Mr. Webley, or 'Nan'...He is saying...that he was being chased, and that's the core of the story, and while this chase was going on, there was a machete that was stuck in the ground...and then as he was being chased, he took up this machete and swung it, and he is saying now that...any chop that Mr. Wilson got, he got it while Mr. Wilson and Miss Wright were chasing him, armed with machete, that is Mr. Wilson. And then now, Miss Wright either had a dagger or a broad bill cutlass, which she fling, and what the defence is saying, is that this Miss Wright is no easy woman....you must not be taken in by her...Because if this Miss Wright is who she is, according to [the] defence, 'Nan' is just another man to beat up...."

It is then that the learned trial judge returned to the burden of proof in the context of the defence.

[22] The learned trial judge addressed the issue of self defence substantively at pages 16, 17-18 and 19 of the transcript of the summation. He said, in part, at page 16:

> "So that, that is what Mr. Webley is saying now, that [Miss Wright] was part and parcel of this attack on him. If you believe Mr. Webley, though he has no duty to prove, then it's not guilty. If you are not sure whether to believe him or not, then it's not guilty. You can only convict either of these two gentlemen if you say I don't believe their account, I believe the Prosecution [sic] witnesses, it happened like how the Prosecution say [sic] it happen, and what they did amounted to the charge of wounding with intent."

[23] At pages 17-18, the learned trial judge reinforced the point that the burden of proof was on the prosecution. He said, in part:

> "In respect of Mr Webley, the real issue is, has the Prosecution proved to you that Mr. Webley, notice I say Mr. Webley, was not acting in lawful self-defence. That is the real issue in respect of Mr. Webley. He doesn't have to prove that he was acting in self-defence, it is for the Prosecution to prove that he was not acting in lawful self-defence, and you not acting in lawful self-defence in the context of this case, you don't have any reason to chop the man, and if the man have [sic] a wound and Mr. Webley had the intent and you believe the Prosecution's case, then he would be guilty of the offence charged."

[24] Finally, at page 19, the learned trial judge gave the jury directions as to the relevance of the burden of proof to the instant case. He said:

> "…the Prosecution must prove wound [sic], they must prove the intention, and they must prove that when the wound was inflicted no lawful justification, in this case, in respect of Mr. Webley, he wasn't acting in lawful self-defence, no reason to defend himself, and in respect of Mr. Meikle, was

> he really an active participant in this, as the Prosecution is saying."

[25] He made it clear to the jury that Mr Meikle's defence was, in some degree, dependent on the jury's finding concerning the issue of self-defence. This is because, if it found that Mr Webley was acting in self-defence, then Mr Meikle would also have to be acquitted (pages 37-38).

[26] We, respectfully, disagree with Mrs Reid on this ground. The criticisms made in **R v Webley** cannot be properly applied to the instant case. Although we completely endorse the opinions expressed by Rowe P in **R v Webley**, we find that the learned trial judge in the instant case did not run afoul of the required approach, and, as demonstrated above, he generally followed the approach that was set out in **R v Abraham**.

Ground Three – The LTJ gave a wrong direction on Common Design

[27] In this ground, Mrs Reid criticised a particular passage contained in the summation. She submitted that the learned trial judge misled the jury as to the law relating to common design or joint enterprise. Learned counsel argued that the direction to the jury breached the principle of law that mere presence is insufficient to incriminate anyone. She relied on the cases of **Hayden Jackson and Others v The Queen** PCA No 81/2008 (delivered 7 July 2009) and **Oneil Williams v R** (1997) 34 JLR 727 in support of her submissions. The impugned direction is recorded at page 20 of the transcript of the summation:

> "The law is that where two or more persons carry out a joint criminal enterprise each is responsible for the acts of the other in carrying out that enterprise. The Prosecution must establish the existence of that joint enterprise and the participation in it....The circumstances where two or more people participated in a particular crime may themselves establish an unspoken understanding or arrangement, which amounts to an agreement there to carry out that crime. I will explain, don't worry. **The person committed the agreed crime themselves** [sic] **or simply by being present at the time when the crime is committed**. So, all of that is a mouthful. What does all of that mean?" (Emphasis supplied)

[28] Mrs Reid linked that direction to the learned trial judge's recounting of Mr Meikle's unsworn statement at page 70 of the summation:

> "When the two gentlemen made their unsworn statements Meikle was saying [sic] not involved in anything. He just stand up, see Mr. Webley swung the cutlass, saw Wright and Wilson run down Webley, saw Webley swing."

The combined result of those two directions, Mrs Reid argued, was that the learned trial judge was saying to the jury that "even if [Mr Meikle] was present and saw what he saw, he is part of the action and qualifies him as a participant to the chopping".

[29] It has long been established that mere presence at the time of the commission of an offence does not, by itself, amount to culpability. **The Queen v Coney and Others** (1882) 8 QBD 534 is authority for that proposition. The law on the point is still as Hawkins J stated it to be, at pages 557-558 of the report:

> "It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime."

[30] It appears, however, that Mrs Reid has not given sufficient cognisance to the context of the impugned direction or to other directions given by the learned trial judge in respect of the issue. Firstly, the impugned direction was made in the context of the statement by the learned trial judge that, "where two or more people participated in a particular crime may themselves establish an unspoken understanding or arrangement, which amounts to an agreement there to carry out that crime". The jury could not have missed the context of an agreement being necessary and would not have been misled, in that context, into thinking that, by merely being present, Mr Meikle could be found guilty.

[31] Apart from that context, the learned trial judge had, from very early in the summation, expressly dispelled any notion that mere presence could result in culpability. He said at pages 9-10:

> "In this case what is Mr. Meikle saying? Mr. Meikle is saying I did not chop, chase, run after, run with, I just happened to be up there and the drama unfolded. If you believe Mr Meikle…is talking the truth, then he is not guilty of any offence at all. **Because you can't find him guilty because the man is at him** [sic] **yard watching mayhem**. Just like you standing in the square of Saint Ann, man run through the place and shoot another man, there is no way the police can come and charge you for shooting the man who got shot out there merely because you were there….If you believe Mr. Meikle is not guilty." (Emphasis supplied)

[32] The context of Mr Wilson's evidence against Mr Meikle was an important backdrop to the summation. The evidence was that Mr Meikle:

a. in obedience to Mr Webley's instructions, got a gun, a stone and a machete;

b. was armed with those things while he, along with Mr Webley, chased Mr Wilson;

c. was at the door of Miss Wright's house cursing and demanding that Mr Wilson should come outside so that they could chop him; and

d. said, or was associated with the statement that, should they injure Mr Wilson, he had enough money to pay police and lawyers.

That context, along with the learned trial judge's summation on common design, would have made it clear that this was, on the prosecution's case, not a case of mere presence, or a case that Mr Webley had gone beyond what Mr Meikle had expected.

[33] Mr Meikle's case was in stark contrast to Mr Wilson's evidence. The jury would have been under no misapprehension that Mr Meikle could have been in a joint enterprise with Mr Webley by merely being present. The cases which Mrs Reid has cited correctly state the applicable principles. The application of those principles to the instant case does not, however, find a firm footing. The criticisms levelled against the respective summations in those cases were on completely different points. This ground also fails.

Ground Four – The LTJ prejudiced the good character direction, resulting in an unfair verdict.

[34] On this ground Mrs Reid submitted that in giving a good character direction, what the learned trial judge gave with one hand, he took back with the other. The statement that learned counsel criticised is recorded at pages 67-69 of the transcript of the summation:

> " Another thing that I will tell you about is there, as far as we know, these two young men have no previous convictions. Yes, which means that they are to be regarded as men of good character and what that means in practical terms these are persons of good character are not involved, usually in criminal activity.
>
> **So, person[s] of good character don't go around chopping off people [sic] hand or almost chopping off people [sic] hand and standing at kitchen door lending support to people doing chopping. And persons of good character are likely [sic] to speak the truth than persons without good character**…" (Emphasis supplied)

[35] On learned counsel's submission, the emphasised portion of that aspect of the summation was not aimed at extolling the qualities of a good character but at discrediting the appellants. She argued that the direction destroyed "the very fabric, spirit and intent of the law". She submitted that the misdirection rendered the trial unfair and, taking all things into consideration, the verdict unreasonable.

[36] Mrs Reid quite properly referred to the cases of **R v Vye** [1993] 1 WLR 471 and **R v Aziz** [1996] 1 AC 41 among the cases that she cited in support of her submissions. These cases are among the "foundation" cases in respect of the recent developments in the law concerning the issue of good character, when it is raised, and the manner with

which it should be treated during summation to the jury. These cases establish that there are two possible limbs to a good character summation to which an accused person may be entitled. The first is the credibility aspect and the second is the propensity aspect.

[37] The requirements of a summation by a trial judge in respect of this issue have had much attention in recent times. Morrison JA considered them fully in the cases of **Michael Reid v R** SCCA No 113/2007 (delivered 3 April 2009) and **Golding and Lowe v R** SCCA Nos 4 and 7/2004 (delivered 18 December 2009). Those cases do not, however, treat with the interpretation of the nuances of the character direction given.

[38] In the instant case, as Mrs Reid concedes, the appellants were not entitled to a direction with respect to the credibility aspect of the good character direction. This is because neither gave sworn testimony nor made pre-trial statements concerning that issue. Learned counsel submitted, however, that they sought "indirectly" to put their respective good characters in issue through the cross-examination of the prosecution's witnesses. She argued that they were, therefore, entitled to a direction in respect of the propensity limb. The learned trial judge, nonetheless, purported to give a good character direction on both limbs of the direction. The issue is whether the words and phraseology that he used, did communicate the sense of what the good character direction was intended to convey.

[39] It would be helpful to remember that a summation is not required to conform to any particular format. It should be couched in language that communicates to the jury

the nature of the issues and the approach to resolving those issues. P. Harrison JA (as he then was) concisely stated this concept in **R v Anthony Rose** SCCA No 105/1997 (delivered 31 July 1998). The learned judge stated:

> "A summing-up is not required to conform to any particular format nor to any set formula. What is required is a careful direction of the jury of their functions, the relative law involved, what evidence to look for and how to apply that evidence to the law in order to find facts."

[40] Bearing that admonition in mind, it is to be noted that where a good character direction is required, it is not to be diluted when it is given. If it is diluted, there will be a basis for questioning the validity of the conviction. In **Regina v Moustakim** [2008] EWCA Crim 3096, a complaint was made against the following direction by the trial judge:

> "You know from the officer that the defendant is aged 42 and you know [from] Mrs Lieden and the defendant that she has no convictions in this or any country, she therefore falls to be dealt with by you as a defendant of good character. Now, how does that impact upon her trial?
>
> **Well, a defendant of good character is entitled to say that I am as worthy of belief as anyone, so in the first place it goes to the question of whether or not you believe Mrs Moustakim's account**. Secondly, she is entitled to have it argued on her behalf that she is perhaps less likely than a defendant of bad character to have committed this or any criminal offence. Good character is not a defence to a criminal charge. **We all start life with a good character, some of us lose it on our way through, and it will be for you to decide what weight is proper to put upon this lady's good character when you come to consider the evidence which is your principal focus**." (Emphasis supplied)

[41] Counsel for the Crown in that case, although conceding that the direction was deficient, submitted that it nonetheless conveyed the spirit of the required direction. He said, "When taken in the context of a direction about good character it conveyed a sense, if less clearly than it ought to have done, that the Appellant is as likely to be telling the truth as an ordinary person of good character should be."

[42] The English Court of Appeal found that the language used was objectionable. It stated at paragraph 15 of the judgment:

> "In our judgment, this direction...was inadequate because:
>
> 1. There is no explicit positive direction that the jury should take the appellant's good character into account in her favour.
>
> 2. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
>
> 3. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word 'perhaps' is a significant dilution of the required direction.
>
> 4. In the judge's direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself."

The court ruled that as credibility was the central issue in that case, the flawed direction rendered the conviction unsafe. It, accordingly, set aside the conviction and ordered a new trial.

[43] When the direction given in the instant case is considered, it cannot be said that the presumed good characters of these appellants were not addressed in the summation. In addressing the propensity limb, the learned judge stated:

> "…these two young men have no previous convictions. Yes, which means that they are to be regarded as men of good character and what **that means in practical terms these are persons of good character are not involved, usually in criminal activity**."

[44] In respect of the credibility aspect, the learned trial judge correctly explained the significance of a good character:

> **"**And persons of good character are likely [sic] to speak the truth than persons without good character…"

[45] Bearing in mind those directions, is it wrong, as Mrs Reid submits, for the learned trial judge to have said that people with good character do not commit the acts of violence with which these appellants were charged? The answer, we think, must be in the negative. That concept, although not conveyed in the terms recommended by the Judicial Studies Board Bench Book, is in part, the import of the direction concerning good character. The other part is the reference to the accused before the court and, as mentioned before, the learned trial judge did make specific reference to Messrs Webley and Meikle in this context. Even if the direction did fall below the required standard, we do not view the failure as resulting in a miscarriage of justice. This ground also fails.

Ground Five – The LTJ was biased in his summation causing the jury to come to a verdict adverse to the Appellants.

[46] The comments of the learned trial judge, which were the main subject of Mrs Reid's complaint in this ground, concerned a portion of the unsworn statement by Mr Webley. The learned trial judge said, at page 70 of the transcript of the summation:

> "When Mr Webley was giving his unsworn statement one got the distinct impression, this is a comment I make, he was creating the **impression** he was running away from these two persons, Wilson with machete, Wright with some sharp-edged instrument. In that chase he picks up this machete and simply swings." (Emphasis supplied)

Mrs Reid objects to the use of the word "impression". Learned counsel submitted that the word was disparaging of Mr Webley's account, as it depicted it as a concoction. This criticism is unwarranted. The learned trial judge was presenting a picture for the jury of Mr Webley's account. It was not an unfair depiction of that account. Even if Mrs Reid's negative interpretation of the word is correct, it is to be noted that the learned trial judge did give the jury, very early in his summation, the usual direction that it was not bound by his comments and was entitled to reject the comments and substitute its own interpretation of the evidence.

[47] Mrs Reid also complained about other aspects of the summation being, in her view, biased. She said, among other comments in this vein, in her written submissions:

> "**We refer to some other bias** [sic] **comments in the summation** :- page 14 line 20 when [the learned trial judge] explained to the jury using the sarcastic expression of the defendant is saying that Ms. Wright is '**clearly the undisputed heavyweight champion**' when the [learned trial judge] used words that flairs; the jury can only see but the irony and sided with the judge. On page 25 lines 22-25

> **Webley was going for Wilson's head** (2)-Page 27 lines 6-9 **Webley lies**- He says 'And if you accept the fact, then it means, necessarily, that Mr. Webley was saying is a lie'." (Emphasis as in original)

Mrs Reid relied, in support of her submissions, on **Fraser Marr v R** (1990) 90 Cr App Rep 154. In that case, the English Court of Appeal did not think that Mr Marr's case, "however unattractive it might have been, was given the balanced treatment and consideration which was its due" (page 154). The conviction was consequently quashed. In like manner, Mrs Reid submitted, the learned trial judge did not use "judicial comments" and the result was an unfair summation.

[48] We do not share learned counsel's view that the summation by the learned trial judge was biased. The summation was unorthodox in its terminology, and therefore, a magnet for the criticisms advanced by Mrs Reid. It was not, however, unfair to the appellants. Some of the criticisms leveled by learned counsel are examined below.

a. "**clearly the undisputed heavyweight champion"**

[49] This comment was made about Miss Wright during the learned trial judge's presentation of the defence that Miss Wright and Mr Wilson were both armed and were chasing Mr Webley. The essence of the summation about Miss Wright, at pages 14 -16 of the summation, was that Miss Wright was an aggressive person. The portion of the summation, from which the impugned comment is extracted, reads thus:

> "…And then now, Miss Wright either had a dagger or a broad bill cutlass, which she fling, and what the defence is saying, is that this Miss Wright is no easy woman. She is **clearly the undisputed heavyweight champion** up where she comes from, at least as far as the women are concerned. They say in Jamaica, don't tek nuh check from nobody, bring

> fight to her, she is not going to back down, that is what the defence is saying, that is her personality…
>
> So, what they are saying then, is that this woman, you must not be taken in by her, that because she look [sic] small and well dressed and so on, they say you must picture her up in this hill there, beat off [a neighbour, Miss Gray]…grab her, more licks, till Miss Gray even run out of her shirt…
>
> So, what the defence is saying then that, in the same way that she, Miss Wright, go up to Miss Gray…and then beat her up. Why she wouldn't have done it on the 11th of March, 2009? Because, if this Miss Wright is who she is, according to [sic] defence, 'Nan' is just another man to beat up. So they are saying that is who she is." (Emphasis supplied)

Taken in context, the comment was merely a graphic, albeit unnecessary, embellishment of that aspect of the case for the defence.

b. **Webley was going for Wilson's head**

[50] The next comment that Mrs Reid complains about, is a part of the learned trial judge's explanation of the prosecution's account of the manner in which Mr Wilson sustained the injury to his hand. The learned trial judge said at page 25 of the summation:

> "The Prosecution goes further, they say, well, the door eventually open [sic] now, so he [Mr. Webley, having chopped the door] goes in, Miss Wright is outside, **Mr. Wilson tells you, the machete is coming forward [sic], his head**. So he is putting up the hand and that is how come now he got the chop. Question for you, at this point, is that true?" (Emphasis supplied)

That was a fair portrayal of the prosecution's case and cannot be said to have been unfair to Mr Webley.

c. **Webley lies**

[51] During his summation to the jury, the learned trial judge sought to assist it in determining where the truth lay. He directed the jury that evidence that it believed to be true, thereby became fact. He said at pages 26-27:

> "When [witnesses] come into court and give the evidence, after they are sworn or affirmed, it becomes evidence. When you believe it, it becomes a fact. Same bit of information but it is treated differently, depending on the stage you are at. So if you believe Mr. Wilson, that that is how it happened, that becomes a fact.
>
> **And if you accept that fact, then it means, necessarily, that what Mr. Webley was saying is a lie**. So as it goes, you know, there is no great science to all of this." (Emphasis supplied)

[52] The learned trial judge, on several occasions during his summation, emphasised to the jury that if it believed Mr Meikle, or if it believed Mr Webley, then it was obliged to find them not guilty. His approach was a balanced one, explaining to the jury the consequences of believing one side or the other. The learned trial judge also used the term "liar" with reference to the prosecution's witnesses as well. In one instance, he said at pages 5-6 of the summation:

> "It means then as far as witnesses, you can accept a part of what a witness says and reject parts of a witness' evidence. So, for example, in this case, you had…Mr. Wright saying one thing, Mr. Wilson saying one thing, and Miss Wright saying something else. You can decide whether to believe one or the other, or neither. So you may come to the conclusion that a lying duet, Mr. Wilson, and Mr. [sic] Wright, liars both."

[53] He said at page seven:

> "Because, if all are lying, then it means that Mr. Wilson, Miss Wright, and the policeman, liars all."

And the learned trial judge mentioned at page 11 that, "Once you say Mr. Meikle's case could be true then the Prosecution's case could be a lie. Because they are two very different accounts, very very different." The complaint that he gave a biased summation is without merit. To address Mrs Reid's other complaints in respect of this ground would unnecessarily lengthen an already long judgment, as none has any greater merit than those analysed above.

Ground Six - (A) The LTJ erred when he allowed Crown Counsel to lead forensic evidence without disclosure to the Defence, and (a) without the Crown calling a Forensic Analysis [and] (B) The LTJ erred when he allowed Crown Counsel to lead unsupported medical evidence.

[54] There are two main elements to Mrs Reid's criticisms of the prosecution's approach to the trial, in respect of the forensic evidence. The first is that the prosecution, without having first alerted defence counsel, adduced evidence of a police officer visiting Miss Wright's house and being shown "mark [sic] which appeared to be blood marks on the bed to the left of entering the...structure (page 252 of the transcript)" and what appeared to be blood marks on the left wall of the structure (page 255 of the transcript). The officer, Constable Farouk Reid, also testified to having been shown marks on a door that appeared to be slice marks or chop marks (page 254 of the transcript). There was no forensic evidence to state whether the marks were in fact bloodstains and if so, whose blood it was.

[55] The second indictment of the prosecution's conduct is that it led evidence that Mr Miller had lost his sight as a sequel to his having been chopped. No medical evidence was brought to make any connection between the injury to his hand and the loss of his sight, yet the approach used by the prosecution, Mrs Reid submitted, was clearly intended to prejudice the defence in the minds of the jury. These complaints will be addressed in turn.

[56] One important result of Constable Reid's testimony, concerning his observations in Miss Wright's house, is that it could have had the effect of supporting the prosecution's case that the chopping occurred inside Miss Wright's house. Miss Wright testified that after the chopping occurred, Mr Wilson ran out of the house, "and the blood [from his hand] just a spray all over" (page 179).

[57] Despite the significance of Constable Reid's testimony, there was no prior written statement from him about his visit. There was, therefore, nothing which would have alerted the defence that this evidence was to be adduced by the prosecution. The learned trial judge compounded the impropriety, according to Mrs Reid, by not only allowing the testimony to be adduced, but playing a hand in eliciting it himself. The relevant portions of the exchanges are at pages 247-254 of the transcript. The first extract is from page 247 and shows the learned trial judge leading the way in the uncharted territory:

> "HIS LORDSHIP: So, tell me something, you never go up to the district where this thing happened?

THE WITNESS: Yes, I did so.

HIS LORDSHIP: When?

THE WITNESS: Approximately two weeks after the incident happened.

HIS LORDSHIP: Two weeks?

THE WITNESS: Yes.

HIS LORDSHIP: When you went the two weeks later where you went?

THE WITNESS: I went to where it was said that the, uhm, the complainant received the injury."

The next excerpt, at pages 248-250 reveals the objection by defence counsel. Despite the objection, the learned trial judge, did not halt the process; indeed, he continued the examination of Constable Reid:

"Q When you went up there, did you see anything or speak with anyone?

MR. GORDON: **M'Lord, I am objecting to, first seeing anything because one would have to establish the state of the scene**.

HIS LORDSHIP: Trees, road, cows, that the man was dashing.

MR. GORDON: Okay, m'Lord.

HIS LORDSHIP: When you go up there who you see up there?

THE WITNESS: I saw a Miss Jennifer Wright.

HIS LORDSHIP: You spoke to her?

THE WITNESS: Yes, I did.

HIS LORDSHIP: So, where you see her?

THE WITNESS: I saw her at her house, Clifford District.

Q You say you spoke with her?

A Yes. I did.

Q Did she point anybody, initially, out to you? Don't tell us what she said, if anything, but did she point anything out to you?

A Yes. She did.

MR.GORDON: M'Lord, I am so sorry.

HIS LORDSHIP: Yes, Mr. Gordon.

MR.GORDON: **Again I complain, evidence is being led taking me by complete surprise and I am never able to deal with ambush. I have no statement of any such visit with Miss Wright pointing out things. I don't have it and is a complete surprise to me else I would have asked Miss Wright about the visit.**

HIS LORDSHIP: I think the surprise was diminished, she said in cross-examination is two sets of police come there, she talk about Scene of Crime.

MR. GORDON: Just pointing out, m'Lord.

HIS LORDSHIP: If the people come up there and taking picture I can't imagine they would be on a sight seeing.

MR. GORDON: So, m'Lord, you don't accept surprise and ambiguity. I am adequately protected, my shield is up?

HIS LORDSHIP: There are various solutions, you can get an adjournment, you can recall Miss Wright if you want, the solutions are limitless.

MR. GORDON: Indeed, m'Lord.

HIS LORDSHIP: Yes, sir. She pointed out things to you?

THE WITNESS: Yes, she did.

HIS LORDSHIP: And you saw what she pointed out?

THE WITNESS: Yes." (Emphasis supplied)

The areas said to have been pointed out to the witness are set out at pages 252-255 of the transcript:

"HIS LORDSHIP: Yes.

A. She pointed out a cho-cho area where she had some cho-chos planting.

HIS LORDSHIP: Yes?

THE WITNESS: She pointed to the kitchen area, which she was standing at …

HIS LORDSHIP: Point …

THE WITNESS: Then she carried me to the door and pointed out some things on the door to me.

HIS LORDSHIP: Which door is this?

THE WITNESS: This is the said door at the back of the house, next to the kitchen area.

HIS LORDSHIP: Yes.

THE WITNESS: She brought me inside to a one, ammh, a studio flat structure, that contain two beds and pointed out those beds to me.

She pointed out mark[s] which appeared to be blood marks on the bed to the left of entering, entering the said structure. She pointed out a dresser, and informed me …

HIS LORDSHIP: Just pointed out?

THE WITNESS: And pointed out some things on the said dresser to me.

...

A. The door swings to the left, there were marks to the upper right, several marks to the upper right side of the, on the door.

Q. Yes sir?

HIS LORDSHIP: Just a moment. Yes, on upper right side of what now, sir?

THE WITNESS: Over a white door.

HIS LORDSHIP: Yes

THE WITNESS: They appeared to be slice marks.

...

Q. Can you repeat it because I didn't hear.

A. Yes, I will. I see what appeared to be slice marks in the upper right sides, of a white door.

Q. Slice marks?

A. Yes.

Q. That was the door you also told us about, you said what appeared to be blood marks on the bed, to the left of the said structure, those marks that you

said appeared to be blood marks, did you see them anywhere else in that room?

A. On the wall, on the left wall."

[58] Mrs Reid, in supporting her complaints, relied on the cases of **Linton Berry v The Queen** PCA No 40/1990 (delivered 15 June 1992) and **Stephen Grant v The Queen** PCA No 30/2005 (delivered 16 January 2006), among others. Learned counsel argued that the requirement is that the prosecution should before the trial give disclosure to the defence of all material at its disposal. On Mrs Reid's submission, the fact that the evidence which the prosecutor intended to adduce was not contained in a statement does not make a material difference. According to learned counsel, "This is not evidence that flew out of the police officer's mouth. [Crown Counsel] led evidence that was not disclosed to the Defence, AND the [learned trial judge] treated it with [scant] regard..."

[59] There is no doubt that **Linton Berry v The Queen** initiated a process in this jurisdiction whereby the prosecution, as a matter of course, discloses, and is expected to disclose to the defence, all material in its possession. That process was, no doubt, hastened by the recommendation of their Lordships of the Privy Council in **John Franklyn and Ian Vincent v The Queen** PCA Nos 20 and 21/1992 (delivered 22 March 1993). Their Lordships, at page 11 of the judgment said:

> "Clearly it would be preferable if the need to consider each case in relation to its particular circumstances could be avoided by **a general practice being promulgated which requires the disclosure of statements of witnesses or alternatively giving the defence a**

> **statement of the nature of the evidence, which will be relied upon by the prosecution, before trial (in the absence of special circumstances) to assist the defendant in the preparation of his defence**. In making this suggestion, their Lordships have in mind the judgment delivered by Lord Lowry in the case of **Linton Berry v The Queen**…" (Emphasis supplied)

[60] Despite the general adherence to that practice, it is to be noted that failure to make disclosure in a timely manner to the defence, does not necessarily result in irreversible prejudice to the defence. The method with which the failure is addressed is important to determining whether the trial was conducted with fairness to the defence. A number of decided cases show that where an adjournment was allowed, after the discovery of non-disclosure, to allow the defence to address the issue, the proceedings in that regard were held not to be unfair.

[61] In **R v O'Brian Muir** SCCA No 50/2007 (delivered 2 May 2008), the granting of an adjournment after the discovery of non-disclosure of important material was held to have counterbalanced the result of the non-disclosure. As a result the court held that Mr Muir was not unfairly prejudiced in his defence. The conviction was, however, overturned on other bases.

[62] Similarly, in **Regina v Robert Bidwell** SCCA No 50/1990 (delivered 26 June 1991), the granting of an adjournment after the late disclosure of material by the prosecution was held to have given Mr Bidwell "an opportunity to prepare his defence even after he had heard the major part of the prosecution's case" (page 10).

[63] On the contrary, where no opportunity was given to the defence to address the consequence of non-disclosure, or where the non-disclosure resulted in irremediable prejudice to the defence, the proceedings were held to be unfair and the conviction was overturned on that basis. That was the situation in **Mardio McKoy v R** [2010] JMCA Crim 27 and in **Harry Daley v R** [2013] JMCA Crim 14.

[64] In applying those principles to the instant case, it is not insignificant that this was not a case of the prosecutor concealing an existing statement from the defence. The fact is that Constable Reid had not recorded a statement concerning his visit to the scene. The next important thing to be observed is that the learned trial judge suggested to defence counsel that the court was amenable to granting an adjournment to allow the defence to address the new evidence, advanced by the prosecution without notice. In addition, the learned trial judge suggested that a recall of Miss Wright for further cross examination was also on the cards. The defence made use of neither of those suggestions and was content to cross examine Constable Reid on the matter.

[65] In addition to the above, the learned trial judge brought the fact that there was no previous statement, to the jury's attention. He also alerted them to the possible implications of the omission. He said at page 59 of the transcript:

> "What the defence is saying is you have to be wary what the policeman [sic] telling you about the things that he say because if you going up there to drop in and look then the natural thing, one would say, you write down what you see, he did not write it down and he is coming here to tell you two years later. The defence is suggesting to you, did he really see these things, because if he saw those things why not write them down so that everyone knows from two

> years ago that he really saw these things he is claiming that he saw to compare these things."

In the circumstances, it cannot be said that the non-disclosure, in that context, rendered the trial unfair.

[66] In respect of the second limb of Mrs Reid's complaint on this ground, it is to be noted that Constable Reid's evidence, about his observations at Miss Wright's house, was put in context by the learned trial judge, in his summation to the jury. He set out the defence's view of that evidence, at page 61 of the transcript of the summation:

> "…[The defence is saying that] if there is any blood up there it had to be after he was chopped and maybe he went inside the house. So that is what the defence -- the criticism the defence is making of how the police went about this.
>
> So, essentially all you are left with is Miss Wright's say so and the policeman's say so. Remember the policeman didn't put it in his statement, so until I suppose he was giving evidence…nobody knew that he actually went up there. So, the defence is saying all these things are to make you suspect about the case being put forward by the Prosecution."

[67] With respect to Mr Wilson's alleged loss of sight, the learned trial judge did not mention it in his summation. He only referred to the wound to Mr Wilson's hand. He did, however, quickly cut off the prosecutor's misguided attempt to reinforce Mr Wilson's loss of sight in the minds of the members of the jury. This was done at page 61 of the transcript:

> "Q Let's talk a bit about your sight, you said to us that at the time of the incident you could see good?
>
> A Very, very, very clear, miss.

Q	But, you don't see so well now?
A	No, miss, the doctor…
Q	When did you lose your sight?
A	After mi, mi get the chop and bleed out, mi eye come dark and me tell it to the doctor and the doctor…
HIS LORDSHIP:	Just a minute.
Q	All right, stop right there.
HIS LORDSHIP:	Doctor coming?
MRS. C. HAY:	No, m'Lord.

The prosecutor, having been alerted by the learned trial judge's query about the medical support for that testimony, abandoned the examination concerning Mr Wilson's sight.

[68] In cases of prejudicial evidence being improperly led the trial judge is faced with a decision. He or she may adopt one of several steps, namely:

a. discharge the jury and order a retrial;

b. immediately direct the jury to disregard the impugned evidence;

c. reserve comment on the matter until the summation;

d. make no comment at all on the basis that further comment would cement the evidence in the minds of the jury.

[69] These options were set out and discussed in **Machel Gouldbourne v R** [2010] JMCA Crim 42. In that case Morrison JA cited the leading case on this point and explained the approach that this court takes is assessing the trial judge's decision in such situations. He said at paragraph [22]:

> "The authorities are clear that every case will depend on its own facts and that the decision as to the appropriate course to be adopted in a particular case is primarily a matter for the discretion of the trial judge, based on the facts before him. **Further, an appellate court will not lightly interfere with the manner in which the judge chooses to exercise that discretion** in the face of what is usually a completely unexpected and (hopefully) purely gratuitous eruption from a witness during the course of giving his evidence at the trial. As Sachs LJ put it in the well known case of **R v Weaver** [1967] 1 All ER 277, 280, to which we were referred by [counsel for Mr Gouldbourne], **the correct course "depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted**…" (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in **McClymouth v R** (1995) 51 WIR 178)." (Emphasis supplied)

[70] In the instant case, it is unlikely that the evidence of Mr Wilson's loss of sight, would have swayed the jury considering that the summation, in respect of the injury, dealt only with the severed hand. The learned trial judge's decision not to mention the matter again was not unreasonable especially considering that he had instructed the jury, at page 8 of the summation, that sympathy should play no part in its deliberation and he made it clear to them that the issue was where the truth lay in respect of the chopping. Based on the above, this ground also fails.

Ground Seven – The Verdict is unreasonable having regard to the evidence.

[71] For this ground, Mrs Reid identified three separate inconsistencies in the prosecution's case. Learned counsel submitted that these discrepancies were not explained by the prosecution and were not properly addressed by the learned trial judge. The result, she submitted, was that the jury could not have come to a positive finding on the evidence and whatever finding it did arrive at, would have been erroneous. She relied on the cases of **R v Curtis Irving** (1975) 13 JLR 139, **R v Noel Williams and Joseph Carter** SCCA Nos 51 and 52/1986 (delivered 3 June 1987) and **R v Byron Young and Others** SCCA Nos 65, 66, 67 and 134/1990 (delivered 16 March 1992), in support of her submissions.

[72] The discrepancies to which learned counsel adverted may be summarised as follows:

a. Whether Mr Wilson had a machete in his hand. Whereas Mr Wilson denied having a machete at any material time, Miss Wright testified that he used a machete to slap Mr Webley.
b. Whether the door inside Miss Wright's house was open or closed. Miss Wright testified that Mr Wilson closed the door between the kitchen and a bedroom after he ran into the house. On the other hand, Mr Wilson did not mention closing a door.
c. Whether Mr Meikle was running behind Mr Webley or standing under a cho cho harbour. Mr Wilson testified that

> Mr Meikle was running behind Mr Webley as they both chased him. Miss Wright, however, did not give evidence of Mr Meikle being involved in the chase. She saw him standing under a cho cho harbour and at another point standing on the step to her house.

[73] In assessing this ground, it must be noted that the evidence adduced by the prosecution was not from a sole witness who was discredited, as in the case of **Curtis Irving**. Nor was this a case where a judge was sitting alone, as was the case in **Williams and Carter**. Here, the jury was the arbiter of fact. The verdict of the jury, in respect of its finding of fact, will only be overturned by this court if it "is shown to be obviously and palpably wrong" (**R v William March and Others** SCCA Nos 87, 155, 156 and 157/1976 (delivered 13 May 1977)).

[74] In the instant case, it cannot be said that there was no credible evidence on which the jury could have arrived at the verdict at which it did. In the circumstances, what has to be examined is whether the jury was properly directed in respect of the issue of discrepancies, and whether the major discrepancies were brought to its attention. That is the import of the decision in **R v Byron Young and Others**.

[75] The learned trial judge's directions in this regard cannot be reasonably faulted. He not only gave the jury correct general directions in respect of considering discrepancies but he did bring these specific discrepancies to the attention of the jury.

In his general directions on the issue of discrepancies, the learned trial judge said, in part, at pages 48-50 of the transcript of the summation:

> " Well, the first thing you have to decide is, is this a discrepancy, clearly it is. Is it significant: You may very well conclude that it is. If it is significant you have a number of options open to you, which I will tell you about now. Well, you may decide that one, one witness is more reliable on this point than the other. You may say I prefer Mr. Wilson or I prefer Miss Wright, that is one option, or option two, you may say I am not too sure which one to believe on this particular point. Option three, I believe none of them on this particular point.
>
> Now, if you say you can't believe any of them on this particular point then it is because of the significance of the difference between them you may say this is an early indication of the lying tongues of these witnesses and they come here now to make up story on these two young men; and if you are of the view that these are lying witnesses on this point you may say well, maybe they are lying on everything in the case or, you may be polite persons and may not wish to call them liars, well, say there is faulty recollection as you may realize faulty recollection affects the mighty and the lowly. If [sic] is faulty recollection you may say the witnesses are unreliable on this point or unreliable in general. If you form the view that they are unreliable generally then you can't rely on them to prove the crown's case. How you resolve it is up to you.
>
> This is an example, you are the judges of the facts, you have to assess the evidence in light of the evidence they have given to you and say I prefer Wilson over Wright, Wright over Wilson, both of them are lying or they are just unreliable either on that point or unreliable generally. You may say to yourself that, well, okay, that part of the case is really not all that important and even if they are unreliable I can still believe what they say on other parts of the case because this is something from 2009 and they are coming here to give evidence some two years later, is it that they can't remember that specific thing clearly or is it that they are lying. All those are matters for you to decide."

[76] In respect of directions on the specific discrepancies raised by Mrs Reid, it will be sufficient to address only the first two, as the third really does not amount to a discrepancy.

a. Whether Mr Wilson had a machete in his hand

[77] Mrs Reid argued that the learned trial judge, in his summation, did not adequately deal with the discrepancy concerning whether Mr Wilson had used his machete at Miss Wright's house. On her submission, the learned trial judge set out the prosecution's case without balancing it with the defence's stance. Learned counsel, in that submission, is however seeking to conflate two separate duties imposed on the learned trial judge. One duty is to explain the method of assessing discrepancies while the other is to set out the defence to the count on the indictment.

[78] There is no doubt that the substance of the defence was adequately explained to the jury. That is, however, a separate concept from an examination of the discrepancies and inconsistencies in the prosecution's case. With regard to this discrepancy, the learned trial judge stated the differences in the testimonies before he gave the general directions. He said, at page 46:

> "…Now there is a difference between Miss Wright and Mr. Wilson about the machete, he said he never slap the machete on any steps or step at any time, Miss Wright says that he did. Miss Wright is also saying that the machete was eventually removed to wherever it was placed eventually to some corner, to some corner [sic]."

b. Whether the door inside Miss Wright's house was open or closed

[79] The learned trial judge also addressed the discrepancy concerning the state of the doors to Miss Wright's house at the material time. Mr Wilson, at pages 49-50 of the transcript, testified that the chase ended when he ran inside Miss Wright's house. The doors to the house were all open. He gave the impression that Mr Webley and Mr Meikle then came to an open door of the house and started cursing. The chopping then followed.

[80] Miss Wright, at page 172 of the transcript, said that during the chase Mr Wilson ran into her house. He first ran into the kitchen and then from the kitchen into the bedroom. When he did so, according to her, "[h]im close the middle door to the kitchen and inside the bedroom". It was also her testimony that when that door was closed, Mr Webley then chopped it off and went into the bedroom where Mr Wilson was (page 176 of the transcript).

[81] Undoubtedly, Miss Wright's testimony with regard to the position of the door was more precise than that of Mr Wilson. The learned trial judge did not address the difference in the two accounts. He recounted for the jury what Miss Wright had said about the door, and in dealing with Constable Reid's testimony about the marks on the door and in the room, observed that Constable Reid's testimony seemed to "be consistent with what Miss Wright is saying" (page 63 of the transcript).

[82] The learned trial judge did, however, put the matter of the credibility of this evidence, squarely to the jury. He said at page 61 of the transcript:

> "So essentially all you are left with is Miss Wright's say so and the policeman's say so. Remember the policeman didn't put it in his statement, so until I suppose he was giving evidence…nobody knew that he actually went up there. So the defence is saying all these things are to make you suspect [sic] about the case being put forward by the Prosecution."

[83] In the circumstances, the failure to address the discrepancy about the door was not fatal to the summation. Mrs Reid's complaints, although meriting some consideration, do not allow this ground to succeed.

Ground Eight – The prejudicial conduct of the Crown Counsel during the trial render[ed] the trial unfair resulting in an unreasonable verdict.

[84] Mrs Reid, in this ground, largely complained that the prosecutor behaved improperly because she asked leading questions on a number of occasions, led the prejudicial evidence concerning Mr Wilson's sight and further prejudiced the defence by the non-disclosure of the police officer's visit to the scene. Learned counsel argued that this behaviour resulted in the trial being unfair. She concluded that the conviction was a miscarriage of justice.

[85] As authority for her submissions, Mrs Reid cited, among others, the case of **Benedetto and Labrador v The Queen** PCA Nos 62 and 88/2002 (delivered 7 April 2003). In that case, there were complaints about the behaviour of the prosecutor, which included accusations of inciting xenophobia against the accused and their witness. Their Lordships in the Privy Council concluded that these complaints were appropriately levelled at the prosecutor. They said, at paragraph 57:

> "Issues of credibility lay at the heart of this trial. The prosecutor's failure to deal with them fairly reinforces the decision which their Lordships have already reached that Labrador's conviction was unsafe."

[86] The lapses by the prosecutor in the instant case did not approach the level of misconduct by the prosecutor in **Benedetto and Labrador**. Neither did they cross the line mentioned in their Lordship's judgment in **Randall v The Queen** PCA No 22/2001 (delivered 16 April 2002). At paragraph 28 of that judgment they said:

> "There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.

The complaints made against the prosecutor in the instant case, even where justified, did not result in an unfair trial.

Ground Nine – Sentencing: That the Sentence for each was manifestly excessive.

[87] As was mentioned above, Mr Webley was sentenced to 12 years imprisonment while, for his part in the incident, Mr Meikle was sentenced to nine years imprisonment. Mrs Reid argued against these sentences along several lines:

a. The learned trial judge erred when he applied an English approach to mandatory custodial sentencing whereas the applicable local statute did not require mandatory imprisonment.

b. The learned trial judge erred by largely ignoring the positive aspects and the recommendation for a non-custodial sentence in each of the social enquiry reports produced in respect of Messrs Webley and Meikle.

c. The learned trial judge erred in largely ignoring the evidence of the character witnesses called on behalf of Messrs Webley and Meikle.

d. The sentences are manifestly excessive.

e. The learned trial judge erred by ignoring the option of non-custodial sentences.

[88] The learned trial judge utilised a very structured approach to the task of sentencing. Not only did he request and make reference to a social enquiry report in respect of each man, but he researched and cited a number of cases in determining that a custodial sentence was the appropriate method of punishment and in determining the length of that sentence. It is lamentable that he did not utilise local cases in this commendable effort. Although Mrs Reid did cite a number of English cases in her arguments against the sentences imposed, she also cited a number of Jamaican cases as well. In the end, however, regardless of the origin of the authorities cited, it is the resultant sentence which will have to be assessed to determine whether it was manifestly excessive or not.

[89] Among the cases cited by Mrs Reid was that of **R v Alpha Green** (1969) 11 JLR 283. In that case, this court referred to a principle which guides it in considering appeals against sentence:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. **It is only when a sentence appears to err in principle that this Court will alter it.** If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene." (Emphasis supplied)

[90] In the instant case, we cannot say that the learned trial judge failed in any way to apply the right principles. On the question of whether a custodial sentence was appropriate, it is to be noted that the penalty prescribed by the section of the legislation, under which Messrs Webley and Meikle were charged, is imprisonment for life. Given the manner in which, the jury must have found, these injuries were inflicted and the serious consequence of the injuries for Mr Wilson, it is not surprising at all that a custodial sentence was imposed.

[91] An examination of sentences passed in cases of convictions for similar offences may assist the process of assessing whether the sentences imposed in the instant case were appropriate.

[92] In the case of **R v Gilbert Barnes** (1968) 10 JLR 457, Mr Barnes had used a machete to chop the complainant across his back. The strike severed the complainant's

spinal cord rendering him crippled and confined to a wheelchair. On the question of whether the sentence was manifestly excessive, it is to be noted that, although this court reduced a sentence of eight years to five years for the offence of wounding with intent, the court found that "[t]here was no evidence of any previous malice or ill will by the applicant against the complainant". In addition, the trial judge in that case was of the view that the applicant "did not intend the serious consequences of his act". Neither of these circumstances apply to the instant case. The evidence elicited in the cross-examination of Mr Wilson suggested previous animosity between Messrs Wilson and Webley. It may be noted, however, that as soon as Mr Webley noticed that Mr Wilson had been struck, he discontinued his attack and left the room.

[93] In **R v Linton Miller** (1987) 24 JLR 179 Mr Miller had, after a quarrel between the complainant in that case and himself, used a stone to deliver a blow to the head of the complainant. The blow caused serious injury and "a state of continuing unconsciousness in the complainant". A sentence of six years imprisonment was not disturbed.

[94] In **R v Paul Jones** (1989) 26 JLR 144, Mr Jones was a party to the shooting and serious injury of his former employer during an attempt to steal the employer's property. Mr Jones did not, himself, fire the shot. A sentence of ten years imprisonment at hard labour was only reduced to seven years because of Mr Jones' youth. He was 15 years at the time of the offence.

[95] In **Regina v Marcellous Robinson** (1998) 35 JLR 325, this court set aside a sentence of 15 years for wounding with intent and substituted one of seven years. In that case Mr Robinson was along with a mob. Some of the persons were armed with weapons, including firearms. The mob set upon the complainants, burning their home and when they attempted to put out the fire, two of the men in the mob, fired shots at one of the complainants, injuring his leg. In considering Mr Robinson's appeal against the sentence, this court considered the submissions that:

> "His role in the commission of the offences…was purely that of an aider and abettor. He did not of himself carry a gun nor did he personally fire the shots that wounded [the complainant]. Hitherto, he had no convictions recorded against him. He had been gainfully engaged as a higgler in the Falmouth Market for the past ten years prior to his arrest."

It found that the sentence of 15 years which had been imposed was manifestly excessive in the circumstances.

[96] All the sentencing cases reviewed above, either originally, or on appeal, imposed sentences that were less than those imposed in the instant case. Those cases were, in the main, older cases. The more recent cases coming before this court have resulted in significantly higher sentences for this offence, although the majority have involved the use of a firearm as the offensive weapon.

[97] Only four recent cases, which did not involve firearms, were readily identifiable. They are **Raymond Whyte v R** [2010] JMCA Crim 10, **Raymond Hunter v R** [2011] JMCA Crim 20, **Ernie Williams v R** [2011] JMCA Crim 37 and **Fitzroy Mortgage v R** SCCA No 140/2007 (delivered 26 January 2009).

[98] In **Raymond Whyte**, Mr Whyte used a machete to injure a woman with whom he had previously had an intimate relationship. The nature of the injuries inflicted is somewhat similar, though not as serious, as those in the instant case. The injuries, as well as some of their consequences, are set out at paragraphs [4] and [5] of the judgment:

> "[4]....The chopping resulted in laceration of the base of the left hand of [the complainant], extending from the mid wrist to the outer side of the base of the hand; that is where the little finger is. This injury resulted in a loss of sensation in the fingers and thumb of the left hand as tendons and nerves were all damaged.
>
> [5] Two surgeries were performed on [the complainant's] hand...The left hand is virtually of no use...."

[99] In considering the question of an appropriate sentence, Panton P, in delivering the judgment of the court, said at paragraph [8] thereof:

> "We are of the view that given the nature of the circumstances in this case; a woman asleep, awakened by someone who had at some stage apparently had professed love for her, is chopped and maimed for no good reason. **In the circumstances we cannot say that a sentence of 12 years imprisonment is manifestly excessive**. Indeed we are of the view, that it is quite appropriate. Each case has to be judged on its own facts...In this case these facts merit the sentence of 12 years imprisonment." (Emphasis supplied)

[100] In **Raymond Hunter**, Mr Hunter, while a prisoner at a police lock-up, used a sharp instrument to injure a police officer. The medical evidence was set out, in part, at paragraph [10] of the judgment:

> "[The police officer] had sustained a deep puncture wound to the chest wall that had entered the chest cavity, causing significant bleeding within the chest cavity as a result of damage to a blood vessel to the left lung and necessitating emergency surgery. Dr Peter Glegg, who gave evidence for the Crown, told the court that...his opinion was that these injuries would have been caused by a sharp, pointed instrument used with a great degree of force."

The sentence of 25 years originally imposed for the offence was reduced by this court to 17 years.

[101] In **Ernie Williams**, Mr Williams was convicted of using a knife to stab his brother several times during a domestic dispute. Other than to say that the victim was first stabbed in the back, the judgment did not specify the injuries suffered by the victim nor any resulting disability. In addressing the issue of sentence, Panton P said at paragraph [13] of the judgment:

> "In respect of the sentence in a case of wounding with intent, the maximum sentence is one of imprisonment for life and so there cannot be any serious complaint that a sentence of seven years imprisonment for such an offence is manifestly excessive, given the level of violence in the society and the antecedent [sic] of the applicant. In the circumstances of the case the sentence is quite appropriate."

[102] Mr Mortgage, in **Fitzroy Mortgage**, used a knife to injure the complainant in that case on the chest and leg. As a result of the injuries, the complainant spent four weeks in hospital. No details of any resulting disability are recorded in the judgment of this court, on his appeal against the sentence of 10 years imprisonment that had been imposed on him. That sentence was not found to be manifestly excessive.

[103] Based on this, admittedly lengthy but hopefully useful, review of sentences for wounding with intent in previous cases, it cannot be said that the sentences imposed on either Mr Webley or Mr Meikle are manifestly excessive. The injury resulted from a violent attack on Mr Wilson by Mr Webley, who was spurred on by Mr Meikle. That attack has left Mr Wilson, who was right-handed, with a serious disability. The learned trial judge noted that Mr Wilson, when he was being sworn in court, "could not even hold the Bible in his right hand".

[104] As a result, there is no reason to disturb the sentences imposed by the learned trial judge. He appropriately imposed a lesser sentence on Mr Meikle in light of the fact that Mr Meikle did not personally strike the blow that injured Mr Wilson.

Conclusion

[105] In conclusion, we find that the evidence adduced by the prosecution and the defence were clearly presented to the jury. It had before it two distinct cases, one from each side. The issues turned on the credibility of the witnesses for the prosecution on the one hand and that of the appellants on the other. The jury accepted the testimony of the prosecution's witnesses and there is no basis for overturning the verdict. The convictions must therefore be affirmed.

[106] Bearing in mind the manner in which the injury was inflicted on Mr Wilson, and the nature of the resulting disability, the sentences imposed cannot be said to be manifestly excessive. They too must be affirmed.

[107] On these bases, we find that the appeals against conviction and sentence in both cases should be dismissed and the convictions and sentences affirmed. The sentences in each case shall run from 23 September 2011.