JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD BISHOP JA
THE HON MS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CRIMINAL APPEAL 41/2016

JOSEPH STANLEY v R

Mrs Carolyn C Reid Cameron QC instructed by Carolyn C Reid and Company for the appellant

Orrett Brown instructed by Director of Public Prosecutions for the Crown

9 December 2020 and 30 July 2021

SIMMONS JA

[1] On 9 December 2020, the court had the benefit of hearing submissions from counsel. At the conclusion of the hearing, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The conviction is quashed, the sentence set aside and a judgment and verdict of acquittal entered."

We promised to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[2] The appellant Joseph Stanley, who was a police officer, was tried in the High Court Division of the Gun Court by Campbell J between 18 April and 4 May 2016, on an indictment containing two counts. The first count was for illegal possession of firearm, contrary to section 20(1)(b) of the Firearms Act, the particulars of which were that on 30

August 2009, in the parish of Kingston, he unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. The second count was for wounding with intent, the particulars of which were that on 30 August 2009, in the parish of Kingston, he wounded the complainant with intent to cause her grievous bodily harm. The prosecution relied on three witnesses.

[3] The defence was self-defence. The appellant gave an unsworn statement from the dock and called three witnesses. He was convicted on both counts and on 4 May 2016 was sentenced to a fine of $100,000.00 or two years' imprisonment and $200,000.00 or two years' imprisonment, respectively. The sentences were ordered to run consecutively in the event that the appellant failed to pay the fines imposed. He was also barred from holding a firearm for three years.

[4] His application for leave to appeal was considered on paper by a single judge of this court, who on 21 November 2019, granted him leave to appeal conviction and sentence.

[3] At the commencement of the hearing of the appeal, the original grounds of appeal were abandoned with leave of the court, and Mrs Carolyn Reid Cameron QC, for the appellant, was granted permission to argue the following supplemental ground of appeal in place thereof:

> "That the learned trial judge erred in law in failing to cognise the appellant's good character, and afford him the benefit of a good character direction. Thus rendering the verdict unsafe and the trial unfair."

The prosecution's case at trial

[4] It was alleged that on 30 August 2009 there was a dispute between the appellant and Kayla Palmer ('the complainant'), at Sophrine Drinking Saloon ('the bar') located at 119 Red Hills Road, Kingston which resulted in the complainant being wounded. There were no eye witnesses to this incident and the complainant was the only prosecution

witness as to fact. The evidence of the three witnesses called on behalf of the Crown is summarized below.

The complainant

[5] The complainant's evidence was that on 30 August 2019, whilst she was working as a bartender at the bar, a dispute arose between her and the appellant, who was a patron at the bar, surrounding his alleged failure to pay his bill of $420.00. The appellant was said to have ordered a Guinness Stout for himself and a Heineken for his friend along with two slices of cheese.

[6] It was her evidence that the appellant would visit the bar about two times each week. She stated that he would always give her a "nice pleasant smile and [say] hello". She also indicated, that in the nine months that she had known him preceding the incident, she never had any problems with him. She stated that on the day in question, when she insisted that he had not paid the bill, the appellant accused her of being a thief and said that he was going to give her six shots. At the time she was standing on the server's side of the bar and the appellant was on the customer's side. The appellant, she said, took up a jug of water and threw the contents in her face. He then took up an ashtray from the bar counter and threw it at her face but it missed its target and hit some bottles on the shelf behind the area where she was standing. The bottles fell and broke. She further stated that he threw the Guinness bottle, from which he was drinking, at her.

[7] The appellant, she said, then came around to the server's side of the bar, removed a firearm from his waist, pointed it at her and shot her in her left side causing a wound. She stated that whilst he was pointing the gun at her, she told the appellant that if he was going to shoot her for $420.00, she would pay the bill. He then reached behind the counter, picked up a cutlass which belonged to the bar and used it to cut his hand. He told her that "this [was] his evidence that [she] chopped him". After being shot, the complainant said that she did not fall to the floor but remained standing until she was escorted to the hospital by the police.

[8] The complainant stated that she did not attack the appellant and did not do anything to defend herself but only tried to avoid being hit. She said that she did not use any physical force against the appellant nor did she use any indecent language as she knew that he was a police officer. She also said that she called her boss whilst the incident was occurring and advised her of what had been taking place.

[9] In cross-examination, she stated that this was the first time that she had gotten into an argument with a customer. She also denied that she had indicated at the preliminary enquiry that it was not the first time that she had gotten into an argument with a customer. She denied having been in an argument with someone named "Buno". However, having been shown her deposition, she agreed that at the preliminary enquiry she had stated that this was not the first time that she had argued with a customer. She, however, denied that she had hit Buno with a stick and that he had been rescued by the appellant.

[10] The complainant maintained that the appellant took the gun from his waist. It was revealed that although she had indicated in her statement to the police that he had pointed the gun at her, there was no indication that he took it from his waist.

[11] When challenged as to whether she told the police that the appellant used the cutlass to cut himself she stated that the "medications drunk [her], put [her] to sleep so [she was] not going to remember everything". She went on to say "…it is nuff things I never remember to tell them…".

[12] The complainant stated that the appellant having cut himself with the cutlass stated that, that was the evidence that she had chopped him. When it was put to her that she gave no statement to that effect, she stated that she "said it to Mr Edwards, but it looks like he didn't write it". It was also revealed that in her statement to the police, she said that the appellant had taken up the cutlass and said that it was evidence that she drew it at him.

[13] The issue of whether the complainant was "drunk" with medication when she gave her statement to the police was explored extensively. During the trial, she asserted that, that was the case but at the preliminary enquiry she said that her mind was "clear".

Constable Jason Jarrett

[14] The witness stated that at the time of the incident, he was stationed at the Area Five Scene of Crime division which covered Portmore, Saint Catherine North and South and Saint Andrew North. The Red Hills Road area was a part of that division.

[15] He stated that on 30 August 2009 at about 4:50 pm, whilst coming from Saint Thomas, he received a telephone call from Police Control. As a result, he along with Detective Sergeant Mayni went to the bar.

[16] Upon entering the bar, he observed a piece of a broken Guinness bottle on the left side of the bar counter. He also saw pieces of broken bottles and liquid on the floor of the bartender's side of the bar. The witness also observed a brown stain resembling blood on the floor and on a refrigerator which were on the bartender's side of the bar. His evidence was that he took several photographs of the crime scene. He also searched the bar for spent casings and bullet fragments based on the report he had received before arriving at the scene. None were found.

[17] In cross-examination, he stated that upon his arrival at the bar he saw several persons on the outside, including Deputy Superintendent Campbell and Detective Corporal Amos. He also saw the appellant who was not known to him before and observed that he had what appeared to be a bruise on his left arm. He stated that he could not say whether the scene had been tampered with before his arrival. In re-examination, he stated that the scene had been cordoned off prior to his arrival.

Corporal Barrington Edwards

[18] The witness stated that he was now a Detective Sergeant of Police and was stationed at the National Police Station College of Jamaica. At the time of the incident, he was stationed at the Bureau of Special Investigations ('the Bureau').

[19] His evidence was that he was assigned to investigate the shooting injury of the complainant. As a result, on the day after the incident he went to the bar and visited the complainant at the Kingston Public Hospital. He observed that she had a white bandage on her left side and judging by her facial expression and the fact that she was holding onto the side where the bandage was situated, appeared to be in pain. He recorded a statement from her.

[20] He recounted that, on 1 September 2009, he made a phone call to the appellant and requested that he report to the Bureau to make a statement. On the following day, the appellant attended the Bureau and submitted a written statement to him. He asked the appellant to show him the wound that he would have received. The appellant showed him his left forearm "in the area of the palm…" and the witness observed "two red spots, like bruises".

[21] The medical certificate for the complainant, the appellant's firearm and the ballistic certificate pertaining to the said firearm were identified by him and admitted into evidence.

[22] In cross-examination, the witness indicated that, at the preliminary enquiry, he had stated that the complainant was in pain but insisted on giving a statement. He said that the statement was read over to her and she indicated that she understood and approved of its contents. He agreed that nowhere in that statement was it recorded that the appellant used the machete or cutlass to cut his hand. He indicated that it would have been an important aspect of the case. He also said that if the complainant had informed him that was the case, he would have recorded it in the statement. The witness indicated

that the appellant had stated that his injuries were from a machete but he could not recall if the appellant said they were inflicted by the complainant.

[23] He also gave evidence that the complainant had stated that after the appellant took the machete from under the counter, he said "this is the evidence that I have that you draw it at me".

No case submission

[24] A no case submission was made on behalf of the appellant after the close of the prosecution's case. The learned trial judge ruled that the appellant had a case to answer.

The defence

[25] The appellant gave an unsworn statement from the dock. As stated previously, three witnesses were called on his behalf. They were Retired Superintendent Altemont Campbell, Assistant Commissioner of Police, Derrick Knight and Dr Eric Williams.

Joseph Stanley- unsworn statement

[26] The appellant stated that he was a constable of police, having joined the force in 2002. He indicated that he had never been arrested and charged for any offence prior to this matter.

[27] He indicated that on the day in question, he was attacked by three "vicious attackers in a very volatile area" and was in fear for his life. In those circumstances, he asserted that he had no other option but to use his firearm to defend himself as there was no back door to the premises. In this regard, he stated that two men, armed with knives, were standing in the bar along with the complainant who was armed with a machete. The complainant cut him on his left forearm and he fired one round. He then called 119, quoted his regulation number and requested that the police take the complainant to the hospital. He proceeded to the Constant Spring Police Station where he handed over his firearm and his hands were swabbed. He made a report to Detective

Corporal Amos and then went to the University Hospital of the West Indies where he was medically examined.

[28] The appellant stated that he never intended to hurt anyone, especially a female. He asserted that he had no choice as he "would have been a dead man if [he didn't have [his] firearm". He said that in fear of his life, he fired one round from his firearm.

Deputy Superintendent Altemont Campbell

[29] The witness stated that at the time of the incident he was in charge of the Crime Unit for Saint Andrew North Police Division. He had previously known the appellant for about three or four years whilst they were both stationed at the Hunt's Bay Police Station.

[30] His evidence was that on 30 August 2009 he visited the bar at about 12:00 pm. At that time, the scene had not yet been cordoned off, but it had been, by the time of his departure. Upon arrival at the scene, he noticed bloodstains on the floor on both the customer side of the bar and the serving side where the bartender would stand. He indicated that he also observed that there were broken bottles on both sides of the bar, along with ashtrays and a bucket in the sink in the bar. The floor of the bar also appeared to be wet with water.

[31] After making these observations, he went to the Constant Spring Police Station where he saw the appellant. He observed that the appellant had an injury between his wrist and his elbow on his left arm. The injury seemed to have been caused by a blunt instrument as the wound was not deep. The wound also appeared to be recent as it had dried blood on it. He gave instructions for the appellant's wound to be photographed.

[32] He described the area in which the bar was situated as "crime – infested".

[33] In cross examination, he stated that when he arrived at the scene, persons were in front and inside the bar. He said they "were all over the bar". These persons were on both the customer and bartender's side of the bar.

[34] He indicated that he did not record a statement and as such, his evidence was based on his recollection of what happened in 2009. He indicated that there was blood on both sides of the bar. However, there was more blood on the bartender's side. He maintained that he had observed broken bottles on both sides of the bar counter and that the floor was wet.

[35] The witness indicated that whilst the appellant was in the Criminal Investigation Branch (CIB Office) at the Constant Spring Police Station, he overheard a conversation in which the appellant stated that he and the complainant had an altercation. He also heard the appellant say that the complainant threw bottles and water at him and used a machete to chop him and that, he in turn, fired a shot. Deputy Superintendent Campbell indicated that he had observed the appellant's injury and gave instructions for it to be photographed.

Assistant Commissioner of Police Derrick Knight

[36] The witness indicated that he had known the appellant from 2006 when he was stationed at the Hunts Bay Police Station. He became his commanding officer in 2007. They would see each other occasionally at social events and engage in casual conversations. He stated that the appellant is "… strong in his belief. I think he is an honest, genuine and committed person, at least to the JCF. Extremely knowledgeable around international affairs".

[37] The witness indicated that on the day in question, whilst out of town, he received a call from the appellant. The appellant advised him that he was at the Constant Spring Police Station in connection with an incident that had occurred at a bar on Red Hills Road. The appellant told him that he got into a discussion with the bartender which led to a dispute that escalated and culminated in two men coming into the bar, one with a knife and a dagger. He also reported that the bartender used a cutlass to chop him on his hand after which he shot the bartender and the two men ran off. The appellant told him that he did not know the men but would try to locate them. In cross-examination, he indicated that he would see the appellant once per week at briefings and that the appellant would

sometimes be a part of the operations team which was led by him. His evidence was that they went together on approximately 30 operations.

Dr Eric Williams

[38] The witness stated that he was a medical consultant at the University Hospital of the West Indies and was assigned to the Accident and Emergency Department. He said that he knew Dr Francois Pencle who had treated the appellant on 30 August 2009 and that he could speak to the medical records of the appellant. Those records included a signed report of Dr Pencle on the appellant dated 30 August 2009.

[39] He indicated that a diagram was included in the report. He stated that based on the diagram, the appellant was observed to have had two injuries, a laceration and an abrasion to the left forearm. A laceration, he explained, was caused by a sharp object where two pieces of skin are separated and an abrasion was caused by a dull object. He described an abrasion as being a scratch. He indicated that, in the notes, it was recorded that the appellant's injuries were caused by a machete. The injuries were described as being superficial. The appellant received a tetanus injection and was discharged with pain medication.

[40] In cross-examination, he stated that the word "laceration" was not used in Dr Pencle's notes to describe the appellant's injury. The notes described the injury as an abrasion. It was also indicated that the triage nurse had noted that the appellant had a small bruise to the left hand.

Judge's summation

[41] The learned trial judge recounted the events as stated in the evidence of the complainant and the statement of the appellant. He correctly identified credibility as being the central issue in the trial. He reminded himself of some of the inconsistences and discrepancies in the Crown's case. He also referred to the appellant's statement that he had never been arrested or charged for any offence prior to this case and that he had acted in self-defence. He examined the evidence of Retired Deputy Superintendent

Altemont Campbell and Assistant Commissioner of Police Derrick Knight who gave evidence on behalf of the appellant. However, despite the fact that the good character of the appellant had been raised in the appellant's statement from the dock and in the sworn testimony of Assistant Commissioner of Police Derrick Knight as well as the complainant, no good character direction was given by the learned trial judge. It is that omission which is the focus of this appeal.

The issues

[42] In examining the sole ground of appeal herein, the following three issues fall to be considered:

(i) Whether a good character direction ought to be given, where, as in this case, the accused made an unsworn statement?

(ii) Whether the failure to give a good character direction was fatal to the conviction?

(iii) Whether an order for a re-trial would be appropriate in the circumstances of the case?

I will discuss each in turn.

Issue (i): Whether a good character direction ought to have been given, where, as in this case, the accused made an unsworn statement?

Appellant's submissions

[43] Queen's Counsel for the appellant submitted that it is a general principle of common law that an accused is entitled to have any available evidence of his good character put before the court in the form of a good character direction. The court was reminded that the direction contains two limbs, the credibility limb and the propensity limb. The former would support the accused's credibility where he gives sworn evidence or relies on exculpatory statements made by him out of court. Whilst the latter would

have the effect of suggesting that he does not have the criminal propensity to commit the offence for which he is charged. Reference was made to **R v Aziz** [1996] AC 41 ('**Aziz**') and **R v Syreena Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 95/2004, judgment delivered 29 July 2005 ('**Syreena Taylor**'), in support of that submission.

[44] It was posited that sufficient evidence was placed before the learned trial judge to ground the requirement for a good character direction. Specific reference was made to the following:

i. The evidence of the complainant that the appellant was a serving member of the Jamaica Constabulary Force and that he was a pleasant man with whom she never had a problem before the incident;

ii. The evidence of Deputy Superintendent Campbell in re-examination who, in stating his opinion of the appellant stated that "He is strong in his belief. I think he is an honest, genuine and committed person, at least to the JCF. Extremely knowledgeable around international affairs";

iii. Evidence adduced by Retired Superintendent Altemont Campbell, Assistant Commissioner of Police, Derrick Knight and Corporal Barrington Edwards pertaining to pre-trial statements made by the appellant concerning the incident being initiated by the complainant, the injuries he received and the need to defend himself; and

iv. The appellant's unsworn statement in which he said "I joined the JCF the 23rd of November 2002. At no time in my entire life prior or subsequent to this matter have I ever been arrested and charged for any offence".

[45] It was submitted that in light of the above, a good character direction covering both the credibility and propensity limbs ought to have been given. Mrs Reid-Cameron argued that the credibility limb of the direction was necessary as the appellant was heavily reliant on the abovementioned pre-trial statements made to officers Campbell and Knight after the incident. In support of this position reliance was placed on **Aziz** and **R v Vye**; **R v Wise; R v Stephenson** [1993] 3 All ER 241 ('**Vye**').

[46] It was further submitted that the learned trial judge had correctly identified the main issue to be one of credibility and a direction on credibility could only have enured to the benefit of the appellant. Mrs Reid-Cameron stated that there is no indication in the summation that the learned trial judge addressed his mind to the appellant's good character and whether he should be given the benefit of a direction under both limbs. It was argued that, at the very least, a direction on propensity should have been given. It was further submitted that in light of the learned trial judge's silence on the issue, it is not known how the statement of the appellant and the evidence of his witnesses were assessed. It was, therefore, unclear whether the appropriate legal principles were applied as "inscrutable silence" is not permitted. Mrs Reid-Cameron stated that there was no indication that the learned trial judge was aware that the appellant's good character was an issue and that he was cognizant of the relevant principles and the effect of their application (see **Andrew Stewart v R** [2015] JMCA Crim 4). Learned Queen's Counsel submitted that, whilst it could be assumed that the learned trial judge was conversant with the legal principles, it was crucial that there be an indication that they were applied as there is no presumption that he did so. The appellant's credibility, she said, was to be examined in respect of the pre-trial statements made to the police. She reiterated that whilst the learned trial judge may have contemplated the appellant's good character, there is nothing in the transcript of his summation that he did so and it was required to be explicitly addressed.

[47] Learned Queen's Counsel submitted that, as a consequence, the conviction should be quashed.

The Crown's submissions

[48] Counsel for the Crown, Mr Orrett Brown, took no issue with learned Queen's Counsel's submissions in respect of the circumstances which give rise to the need for the giving of a good character direction. He stated that, the issue of the appellant's good character had been raised by the appellant in his unsworn statement and through the evidence of the appellant's witness, Assistant Commissioner of Police Derrick Knight.

[49] He submitted that evidence of the pre-trial exculpatory statements made by the appellant regarding the incident would trigger a direction on the credibility limb of the good character direction. However, as the appellant gave an unsworn statement at the trial, the utility of a direction on the credibility limb would be of limited effect. He agreed however, that at the very minimum, the appellant was entitled to a direction on the propensity limb.

Discussion and analysis

[50] It is well-settled that where the good character of an accused is raised at trial, he is entitled to the benefit of a good character direction. This requirement is inextricably linked to an accused's right to a fair trial, which according to Morrison JA (as he then was) in **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009 ('**Michel Reid**'), is "the overriding requirement in any criminal trial".

[51] The direction has two limbs. Where the accused gave evidence or made pre-trial exculpatory answers or statements he will be entitled to a direction as to the relevance of his good character to his credibility (see **Vye**). In **Vye**, at page 245, Lord Taylor of Gosforth CJ, who delivered the judgment of the court stated the principles to be as follows:

> "...it is now an established principle that, where the defendant of good character has given evidence, it is no longer sufficient for the judge to comment in general terms. He is required to direct the jury about the relevance of good character to the

credibility of the defendant. Conventionally this has come to be described as the 'first limb' of a character direction. The passage quoted also stated that the judge was entitled, but not obliged, to refer to the possible relevance of good character to the question whether the defendant was likely to have behaved as alleged by the Crown. That (in effect the *Stannard* direction) is the 'second limb'…

(a) Defendant of good character not giving evidence

There are authorities suggesting there is a discretion whether a 'first limb' direction should be given in relation to answers to the police in interview which are relied upon in support of the defence (eg **R v Ackers** (23 July 1992, unreported)). In **R v Handbridge** (26 November 1992, unreported) it was held that 'good practice' suggested the direction should be given. In **R v Field** (1992) Times, 22 December it was accepted that absence of previous convictions 'may go to the credibility of a defendant who does not go into the witness box but who answers questions from the police'.

In our judgment, when the defendant has not given evidence at trial but relies on exculpatory statements made to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements. He will, of course, be entitled to make observations about the way the jury should approach such exculpatory statements in contrast to evidence given on oath (see ***R v Duncan*** (1981) 73 Cr App R 359), **but when the jury is considering the truthfulness of any such statements, it would be logical for them to take good character into account, just as they would in regard to a defendant's evidence.**

Clearly, if a defendant of good character does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb direction is not required." (Emphasis supplied)

He continued at page 248:

"To summarise, in our judgment the following principles are to be applied. (**1) A direction as to the relevance of his good character to a defendant's credibility is to be**

> **given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements**." (Emphasis supplied)

[52] In **Aziz** their Lordships, in the House of Lords, accepted those principles. Lord Steyn said at page 50:

> "It has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious."

[53] Where an accused did not give sworn evidence or make pre-trial exculpatory statements, but the issue of his good character had been raised, a direction as to the relevance of his good character in relation to the likelihood of him having committed the offence should be given (see **Tino Jackson v R** [2016] JMCA Crim 13 ('**Tino Jackson'**) at para. [24] and **Syreena Taylor**. Such a direction is to be given whether the trial is by judge alone or by a judge and jury.

[54] In this matter, credibility is clearly in issue and the appellant made pre-trial exculpatory statements. Evidence of those statements can be found in the testimony of Deputy Superintendent Altemont Campbell and Assistant Commissioner of Police Derrick Knight. In **Teeluck & Anor v The State** (Trinidad and Tobago) [2005] UKPC 14 ('**Teeluck**'), at para. 33, Lord Carswell who delivered the decision of the Board stated that where credibility is in issue, a good character direction is "always relevant" once the issue of the good character of the defendant is raised. He stated:

> "33. The principles to be applied regarding good character directions have been much more clearly settled by a number of decisions in recent years, and what might have been properly regarded at one time as a question of discretion for the trial judge has crystallised into an obligation as a matter of law. There is already quite a substantial body of case-law on the various aspects of the application of the principles, not

all of which is relevant to the present appeals. Their Lordships consider that the principles which are material to the issues now before them can conveniently be encapsulated in the following series of propositions.

(i) when a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: ***Thompson v R*** (1998) 52 WIR 203, following ***R v Aziz*** [1 996] AC 41 and ***R v Vye*** [1 993] I WLR 471.

(ii) **The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given**: ***R v Fulcher*** [1995] 2 Cr App Rep 251, 260. **If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character' direction could not have affected the outcome of the trial**: ***R v Kamar***, (1999) The Times, 14 May 1999.

(iii) **The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.**

(iv) **Where credibility is in issue, a 'good character' direction is always relevant**: ***Berry v R*** [1992] 2 AC 364, 381; ***Barrow v The State*** [1998] AC 846, 850; ***Sealey v The State*** [2002] UKPC 52, para 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: ***Barrow v The State***... following ***Thompson v R*** [1998] AC 811, 844. lt is a necessary part of counsel's duty to his client to ensure that a 'good character' direction is obtained where the defendant is entitled to it and likely to benefit from it.

> The duty of raising the issue is to be discharged by the defence not by the judge, and, if it is not raised by the defence the judge is under no duty to raise it himself: ***Thompson v R***…" (Emphasis supplied)

[55] These principles were adopted by this court in **Orville Murray v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 176/2000, judgment delivered 8 April 2002, **Michael Reid**, **Horace Kirby v R** [2012] JMCA Crim 10, **Leslie Moodie v R** [2015] JMCA Crim 16 ('**Leslie Moodie**') and **Shernette Virgo Alexander v R** [2020] JMCA Crim 15.

[56] The appellant has however given an unsworn statement, which according to **Syreena Taylor**, relieves the court of the obligation to give directions on the credibility limb. In **Syreena Taylor**, H Harris JA stated at pages 12-13:

> "An accused who exercises the option to give [an] unsworn statement does so at his or her peril. An unsworn statement is not commensurate with sworn testimony. It is open to a jury to attach to it such weight as it deems fit. **The applicant having not given sworn testimony, no issue as to her credibility would have arisen**. **The trial judge was under no obligation to have given directions on her credibility**. **He would only have been under a duty to have done so, had there been in evidence a pre-trial exculpatory statement made by her <u>in respect of her good character</u> on which the applicant had placed reliance**." (Emphasis supplied)

[57] This issue was also discussed in **Leslie Moodie** by Morrison JA (as he then was), who stated at paras. [125], [127], [128] and [129]:

> "[125] It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly, a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or

she is charged. Generally speaking, it is the duty of the defence to ensure that the issue of the defendant's good character is brought before the court and failure to do so in a proper case may render a guilty verdict unsafe. There is no want of authority for these propositions, either from this court or the Privy Council and it suffices to mention, without further discussion, the decisions of the Privy Council in **Teeluck and John v The State of Trinidad and Tobago** [2005] 1 WLR 2421, especially paragraph [33], and of this court **in Michael Reid v R** SCCA No 113/2007, delivered 3 April 2009, especially paras 15-20.

…[127] The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in **R v Vye, R v Wise, R v Stephenson** [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant 'does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required' (per Lord Taylor CJ, at page 245).

[128] **For the obvious reason that the right of a defendant to make an unsworn statement from the dock had long been abolished in England by the time R v Vye was decided, the court did not consider the position of such a defendant at all in that case. Nevertheless, in R v Syreena Taylor** SCCA N0 95/2004, judgment delivered 29 July 2005, at page 12, **this court, basing itself on Vye, did observe that the trial judge was under 'no obligation' to give directions as to the credibility of a defendant who made an unsworn statement.** As far as we are aware, the Privy Council has yet to put the matter as categorically as this and it may well be that, at an appropriate time, this could be a question for further exploration.

[129] But be that as it may, even on the assumption that a defendant who makes an unsworn statement may be entitled to the direction, the Privy Council has on several occasions in appeals from this court expressed strong reservations as to the value of a credibility direction in such circumstances. Thus, in **Muirhead v The Queen** [2008] UKPC 40, Lord

> Hoffmann observed (at para. 26) that, '[a]s the appellant did not give evidence on oath, the value of the [credibility] direction may be doubtful'; and, in their separate concurring opinion, Lords Carswell and Mance added (at para. 35) that, if the defendant 'has not given evidence, but has merely made an unsworn statement, the importance of the [credibility direction] is reduced'. Then, in **Stewart v The Queen** [2011] UKPC 11, para. 15, Lord Brown said that "the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pretrial statements) than when he has given sworn evidence'. Next, in **France and Vassell v The Queen** [2012] UKPC 28, para. 48, Lord Kerr emphasised (at para. 46) that '[w]here, as in this case, a defendant who complains about not having had a good character direction has not given evidence, the force of the argument that the credibility limb of the good character direction rendered the conviction unsafe is greatly diminished'. And, most recently, in **Lawrence v The Queen** [2014] UKPC 2, Lord Hodge reiterated (at para. 23) that, since the appellant did not give evidence on oath, a direction on the relevance of good character to his credibility 'would therefore have been of less significance than if he had'." (Emphasis supplied)

[58] The issue of whether an accused who made an unsworn statement was entitled to the credibility limb of the direction was also discussed by the Caribbean Court of Justice in **Gregory August and Another v The Queen** [2018] CCJ 7 (AJ) ('**Gregory August**'). In that case, the appellant had given an unsworn statement and did not call any witnesses to adduce evidence of his good character. The court in deciding on whether the appellant was entitled to a good character direction at paras. [48] and [49] stated:

> "[48] The question which remains for us is whether a defendant who has given an unsworn statement from the dock should be entitled to the credibility limb of the good character direction. The jurisprudence coming out of Jamaica suggests that where a defendant either did not give sworn evidence or gave unsworn evidence of his character, a good character direction as to credibility would have a 'reduced value', would be 'altogether less helpful' or would be 'qualified'.

> [49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. **Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility.** The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence." (Emphasis supplied)

[59] It is clear from the authorities mentioned above that an accused is only entitled to the credibility limb of the good character direction where he either gave evidence or made pre-trial exculpatory statements (see para. [127] of **Leslie Moodie**). This issue was also addressed in **Joseph Mitchell v R** [2019] JMCA Crim 2 ('**Joseph Mitchell'**) by Brooks JA (as he then was), who at para. [34] stated:

> "[34] … in order to benefit from a direction on the credibility limb of a good character direction, an accused must either have made pre-trial statements or answers or have given sworn testimony in his defence, or both. He must also raise the issue of his good character. The issue may be raised in one or more of the following ways:
>
> a. in evidence of his exculpatory pre-trial statements or answers;
>
> b. by his sworn testimony; or
>
> c. through the testimony of a witness, either for the prosecution or for the defence."

[60] In this matter, the appellant made an unsworn statement from the dock in which he raised his good character. He did, however, make pre-trial exculpatory statements. His good character was also raised in the evidence given by Deputy Superintendent Altemont Campbell and Assistant Commissioner of Police Derrick Knight. Such statements would usually trigger the credibility limb of the good character direction. The utility of such a direction where, as in this case, the appellant made an unsworn statement is however, questionable (see **Leslie Moodie**).

[61] The rationale for the distinction between the treatment of an unsworn statement and sworn testimony is that in the case of the former, the assertions have been tested by cross-examination. As noted by Morrison JA in **Leslie Moodie**, although the Privy Council has expressed reservations as to the value of the credibility direction where the appellant made an unsworn statement, there has been no definitive ruling on this issue.

[62] We were, therefore, confronted with strong authority which suggest that an accused is entitled to the credibility limb of a good character direction where credibility is in issue and he has given sworn evidence or relied on pre-trial exculpatory statements or both (see **Vye**, **Aziz**, **Leslie Moodie** and **Joseph Mitchell**). There is also equally strong authority which posits that the value of the credibility limb of the good character direction is doubtful where the accused has given an unsworn statement and that it may be unhelpful where the accused has given an unsworn statement or made pre-trial exculpatory statements (see **Muirhead v The Queen** [2008] UKPC 40 at para, 26 and **Stewart v The Queen** [2011] UKPC 11 at para. 15 cited in **Leslie Moodie** at para. [128]). In the case at bar, the relevance of the credibility limb of the direction becomes important when the case for the defence is contrasted to that of the prosecution.

[63] In this matter, a number of inconsistencies arose on the Crown's case in the evidence of the complainant who was the only witness as to fact. One of which was her assertion for the first time, at the trial, that the appellant had used the machete to cut himself. Another was her assertion by way of explanation, that she failed to mention certain things in her statement to the police as she was "drunk" on medication. This was

in contrast to her evidence at the preliminary enquiry that she was "clear" at the time when she gave her statement. We have also noted that Corporal Edwards gave evidence that although the complainant appeared to have been in pain she insisted on giving a statement and appeared to have understood and approved its contents when it was read over to her. These matters raise serious issues in relation to her credibility.

[64] The appellant in his pre-trial exculpatory statements and his unsworn statement indicated that he was attacked and was acting in self-defence. He also stated in his unsworn statement that he had never been charged or convicted of a criminal offence. Such statements would entitle him to the benefit of the credibility limb of the good character direction on the authority of such cases as **Vye**, **Syreena Taylor** and **Joseph Mitchell**. Therefore, in the circumstances of this case, where the credibility of the only witness as to fact was in serious issue, it is arguable that the credibility limb of the direction may have been of some utility, even if it turned out to be limited in the light of the unsworn statement (see **Leslie Moodie**).

[65] The giving of the good character direction is as stated by Lord Hutton in **Sealey and Headley v the State** (2002) 61 WIR 491 ('**Sealey**') "an important safeguard to the accused". No direction was given by the learned trial judge.

[66] Based on the authorities referred to above, we found that the appellant ought to have been afforded the benefit of, at least, the propensity limb of the good character direction. We also formed the view that although he had made an unsworn statement from the dock, given the serious contradictions in the evidence of the complainant, coupled with the observations made by the police at the crime scene, which brought into question the veracity of the complainant's account of the event, the learned trial judge should have given consideration to the credibility limb of the good character direction, even if in the end, he found it could not avail the appellant. His consideration of the credibility limb would have been justified on the basis of the evidence of the appellant's pre-trial exculpatory statements and the matters affecting the credibility and reliability of the complainant's evidence.

[67] We concluded that there was merit in the appellant's complaint that the learned trial judge erred in not having regard to evidence of his good character and affording him the benefit of a good character direction on both limbs, or, at least, the propensity limb.

Issue (ii): Whether the failure to give a good character direction was fatal to the conviction.

Appellant's submissions

[68] It was acknowledged by learned Queen's Counsel that the absence of a good character direction does not automatically result in a conviction being quashed. The determining factor is whether its omission impacted on the verdict and the fairness of the trial (see **Mark Williams and Kevin Shirley v R** [2020] JMCA Crim 25 ('**Mark Williams'**)).

[69] Mrs Reid-Cameron submitted that, in the present case, the absence of the good character direction rendered the conviction unsafe, given that the singular issue in the case was one of credibility. She stated, that having regard to the nature of the evidence presented by the Crown and the fact that the appellant's defence was self-defence, it was important for the learned trial judge to have regard to the credibility limb in determining whether the appellant ought to be believed. In this regard, Mrs Reid-Cameron reminded the court that the first time that the complainant made the assertion that the appellant had cut himself with the machete was in the witness box.

[70] It was submitted that there was no analysis of the evidence of the witnesses and no clear indication of the basis on which the learned trial judge rejected the appellant's version of the facts. Mrs Reid-Cameron argued that when this is examined in conjunction with the absence of the good character direction, the trial was unfair and the verdict unsafe.

[71] In conclusion, learned Queen's Counsel submitted that, in these circumstances, the absence of the good character direction was fatal to the conviction and as such the conviction ought to be quashed.

The Crown's submissions

[72] Mr Brown conceded that the contradictions in the evidence of the complainant and her explanations for same were problematic. He stated that, in the case at bar, there were two competing accounts of the incident and, as such, the learned trial judge ought to have demonstrated how they were resolved. He also indicated that the evidence of one of the appellant's witnesses was that there were broken bottles on both sides of the bar counter and that aspect of the evidence supported the appellant's case. Mr Brown further submitted that where credibility is in issue, a good character direction is always relevant. Reference was made to **Teeluck** at para. 33(iv) in support of that submission. Mr Brown stated that the learned trial judge was obligated to demonstrate that he considered the appellant's good character as part of the totality of the evidence before him (see **Tino Jackson** at para. [46]). In this case it was not apparent that he did so. Counsel also stated that this case was not one in which the force of the evidence was such, that a conviction was inevitable, even if the good character direction had been given.

[73] In the circumstances, it was submitted that the Crown could not assert that a good character direction could not have affected the outcome of the trial (see **Teeluck** at para. 33(ii)). The omission to give the good character direction, it was submitted, was therefore fatal to the conviction (see **Tino Jackson** at para. [47]).

Discussion and analysis

[74] It is settled that the failure to give a good character direction does not invariably lead to the conclusion that an accused has been deprived of a fair trial. As was stated by Brooks JA (as he then was) at para. [45] of **Tino Jackson**:

> "[45] The failure to give the good character direction, when it is required, does not automatically amount to a miscarriage of justice.... The question to be decided in such circumstances is whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given."

[75] An appellate court will, therefore, not interfere with a verdict of guilty where it is of the view that a good character direction would have made no difference to the verdict. In **Michael Reid,** Morrison JA (as he then was) at para. [44] stated the principle thus:

> "[44] (v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted (***Whilby v R***, per Cooke JA (Ag) at page 1 2, ***Jagdeo Singh v The State*** (2005) 68 WIR 424, per Lord Bingham at pages 435-436)."

[76] This principle was applied in **Patricia Henry v R** [2011] JMCA Crim 16 in which the court found that the other circumstances of the case outweighed the potential benefit of the good character direction. Morrison JA (as he then was), who delivered the judgment of the court, stated at para. [50]:

> "[50] ... The giving of a good character direction in an appropriate case is, as Lord Steyn observed in ***R v Aziz*** (at pages 50- 51), a case to which we were referred by Mr Senior-Smith, an aspect of the duty of a trial judge to "put the defence case before the jury in a fair and balanced way". **To the extent that evidence of good character can carry probative significance, therefore, a failure to give the direction where it was clearly called for on the evidence in a case can have a direct impact on whether a defendant's right to a fair trial has been observed. But on the other hand, it is equally clear from the authorities that, as Mrs Hay submitted, the approach required of this court in a case in which it considers that such a direction should have been given is to make its own assessment of the evidence to and to consider whether the outcome would have been the same had the trial judge given the proper direction.**

> [51] In all the circumstances of the instant case, taking into account in particular the appellant's confession and the other items of circumstantial evidence referred to by the learned Resident Magistrate in her reasons for judgment…it appears to us that this is a case in which the potential benefit of a good character direction to the appellant was wholly outweighed by the nature and coherence of the evidence which she accepted." (Emphasis supplied)

[77] In **Mark Williams**, at para. [84], V Harris JA (Ag) (as she then was) stated:

> "[84] … it is well established that the absence of a good character direction will not invariably lead to a conviction being quashed. What is important is whether, in all the circumstances of the case, the omission would have had such an impact so that the verdict would have been different. In **Ricardo Wright v R**, Brooks JA at paragraph [43] said this much, relying on the following passage from Morrison JA (as he then was) in the authority of **Chris Brooks v R** [2012] JMCA Crim 5:
>
> > 'The test is therefore whether, having regard to the nature of and the issues in the case and taking account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at [sic] verdict of guilty'."

The court found that the cogency of the evidence was such that any inadequacy in the directions as to good character, given by the learned Parish Court Judge, was "inconsequential".

[78] In **Edmund Gilbert v R** (2006) 68 WIR 323 ('**Edmund Gilbert**') that was referred to in **Mark Williams**, Lord Woolf who delivered the decision of the Board, stated:

> "[14] … We suggest that the starting point must be that it is the task of the judge to give, at least, such directions as are necessary to ensure that the defendant has a fair trial and the jury received the directions necessary to enable them to reach a just result."

The absence of a good character direction was, in **Edmund Gilbert**, found to be of "very limited significance" in light of the strength of the prosecution's case against the appellant. At para. 20 reference was made to **Jagdeo Singh v The State** [2005] UKPC 35, at page 435, para. 25, in which Lord Bingham of Cornhill stated:

> "25. The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a 'good character' direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated."

The Board concluded that, in the circumstances, the absence of the good character direction was neither fatal to the fairness of the trial nor to the safety of a conviction.

[79] The present case is not one in which it could be asserted with much conviction, that had the learned trial judge directed his mind to the good character of the appellant, and the law regarding the benefit of a good character direction, "the sheer force of the evidence was so overwhelming" that the outcome would have been the same. The main issue was one of credibility and the defence was self-defence. The question which needed to be resolved was whether the appellant attacked the complainant or was acting in self-defence when he shot her. There was evidence that broken bottles were seen on both sides of the bar counter. That evidence, as stated by counsel for the Crown, would have supported the appellant's case if it was accepted. Having perused the transcript of the evidence at the trial, it is our view, that there were sufficient material inconsistencies in the complainant's evidence which may have impacted the learned trial judge's view of that evidence, had he carefully considered them in the light of the appellant's good character. As stated by Lord Hutton in **Sealey**:

> "[34] Therefore the crucial question was one of credibility as between Corporal Holder and the two appellants: were the jury satisfied beyond reasonable doubt that Corporal Holder was telling the truth and that the two appellants were not –

> that Corporal Holder was not lying and that the appellants were? This was the very issue on which a direction as to credibility and propensity based on good character might have been of considerable importance. **The importance of credibility may vary depending on the factual issue in dispute between the prosecution witness** and **the accused in a particular case, but where the issue in dispute is fundamental to the question of the guilt or innocence of the accused, then whether it relates to non-participation in the crime charged or to consent or to some other defence, their Lordships consider that the good character direction is an important safeguard to the accused**." (Emphasis supplied)

[80] In **Bhola v The State** [2006] UKPC 9, Lord Brown opined that "[t]he cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so 'rare' ".

[81] Counsel for the Crown's concession on this issue was, therefore, quite appropriate and in accordance with his role as a minister of justice. We commend him for that approach. In the circumstances of this case, we agreed that the failure of the learned trial judge to demonstrate that he was aware that the issue of the appellant's good character had been raised and to direct his mind to the possible impact it may have had on the evidence as a whole was fatal to the conviction. We concluded that the conviction should be set aside.

Issue (iii): Whether an order for a re-trial would be appropriate in the circumstances of the case?

Appellant's submissions

[82] Mrs Reid-Cameron submitted that this case was not an appropriate one for a re-trial. In this regard, she indicated that the incident occurred in 2009, the appellant who was charged in 2010 was not tried until 2016 and the appeal was now being heard four years later. It was further submitted that a re-trial would most likely result in further inconsistencies in the evidence of the complainant due to the passage of time. In addition, two of the officers who gave evidence on behalf of the appellant have now

retired. It was also pointed out that the appellant was still on interdiction. In those circumstances, it was submitted that a re-trial would be unfair to the appellant and serve no useful purpose. Reference was made to **Tino Jackson** in support of that submission.

Crown's submissions

[83] Mr Brown commenced by referring to sections 14(1) and (2) of the Judicature (Appellate Jurisdiction) Act ('the JAJA'), which gives this court the discretion to order a re-trial where it is appropriate in the interests of justice. It was however submitted, that this case was not one in which this court should exercise its discretion and order a re-trial. Mr Brown reminded the court that the incident occurred 11 years ago and the trial was concluded over four years ago. As such a re-trial would only exacerbate the inconsistencies which arose at the trial between the complainant's statement, her deposition and evidence at trial. Consequently, it was submitted that in the interests of justice the conviction ought to be quashed and no re-trial ordered.

Discussion and analysis

[84] Sections 14(1) and (2) of the JAJA empowers this court to order a re-trial if it decides that a conviction should be quashed. They state as follows:

> "14 (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[85] In **Tino Jackson**, Brooks JA examined the principles relevant to the exercise of the court's discretion to order a re-trial. He stated at paras. [48] and [49]:

> "[48] The next issue to be considered is whether there should be a new trial ordered. Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, 'if the interests of justice so require'. The Privy Council in **Dennis Reid v R** (1978) 16 JLR 246, ruled that a 'distinction must be made between cases in which the verdict of the jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder'. (see the headnote).
>
> [49] Their Lordships, in that case provided useful guidelines in assessing whether a new trial should be ordered in cases which fell between the extremes of those in which a conviction on a new trial was almost inevitable and those where acquittal was the most likely result. They said in part, at page 251:
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> > 'In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard

> to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the Accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.'
>
> Their Lordships also made it clear that a new trial should not be ordered if the result would be to allow the prosecution to make good any deficiencies, which were present in its case at the first trial."

[86] In this matter, the conviction is being set aside as a result of the learned trial judge's error. In accordance with the guidelines in **Dennis Reid v R** (1978) 16 JLR 246, it must be considered whether it is in the interests of justice for the case to be re-tried. Both counsel for the appellant and the Crown have submitted that due to the possible effect that the effluxion of time may have on the memory of the complainant, such an order would be unfair to the appellant. The incident occurred approximately 11 years ago. We have also borne in mind the material inconsistencies which arose on the Crown's case. Another relevant consideration is the fact that two of the appellant's witnesses have retired and may be unavailable to give evidence at a re-trial. We have also noted that the appellant has been on interdiction up to the date of the hearing of this appeal, and as such, his career has been on hold for over 10 years. Whilst it is acknowledged that the offences for which he was tried and convicted are serious, in light of the above considerations, we decided that it would not be in the interests of justice to order a re-trial.

[87] It is for the above reasons that we made the orders set out in para. [1] above.