EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRAP 2009/0006

BETWEEN:

YOURRICK FURLONGE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise E. Blenman — Justice of Appeal

Appearances:

Mr. Dane Hamilton, QC, with him, Mr. Dane Raimon Hamilton Jr. for the Appellant
Mr. Anthony Armstrong, Director of Public Prosecutions, with him, Ms. Shannon Jones for the Respondent

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2013: February 26;
2014: January 27.

Criminal appeal against conviction and sentence – Murder – Identification evidence – Recognition – Unsworn statement given from dock by appellant – Summing-up – Whether directions on identification/recognition given to jury by learned trial judge adequate – Whether good character direction given to jury by learned trial judge adequate – Whether conviction unsafe and unsatisfactory – Whether sentence excessive

The deceased was stabbed on the morning of 6th August 2007 while he was with a group of friends during J'Ouvert, a part of the Carnival celebrations in Antigua. He later died while at hospital, as a result of his injuries. Two of the prosecution witnesses who had an unobscured view of the incident recognised the person who stabbed the deceased as the appellant; one of the witnesses had known him (the appellant) for not more than a year, and the other, for around a month. The witnesses were also able to give a description of the clothing that the attacker was wearing, which matched up with the clothing that the appellant confirmed he had

been wearing at the time of the incident. The identification/recognition evidence of these two witnesses was central to the prosecution's case.

On 2nd April 2009, the appellant was convicted of murder. In his sentencing judgment, the trial judge found that there were no mitigating factors but that the aggravating factors were that the offence was a serious one, that the appellant was not acting in self-defence, he had not been provoked, he was not remorseful, and he had, throughout the trial and after the conviction, maintained his innocence. On 13th May 2009, the trial judge sentenced the appellant to life imprisonment.

Held: dismissing the appeal against conviction, and allowing the appeal against sentence to the extent that the sentence is reduced to 20 years imprisonment with 2 years to be deducted for the time spent on remand, that:

1. A trial judge is not required to slavishly use the words set out in the case of R v Turnbull[1] in directing a jury on identification/recognition evidence. All that is required is for the judge to use words which assist the jury in their approach to the assessment of the evidence; it will suffice if the judge's directions comply with the sense and spirit of the Turnbull guidelines. Merely paying lip-service to the guidelines will not be enough nor will it suffice to give a general warning without detailed references to any particular circumstances that may have affected the accuracy of the witness's observation. The trial judge's directions ought to underscore the strengths and weaknesses of the prosecution's case to the jurors. In the present case, the trial judge's directions in relation to this issue were adequate.

   Mills and Others v R (1995) 46 WIR 240 applied; Leroy Langford and Another v The State [2005] UKPC 20 followed.

2. While it may have been prudent for the trial judge to address the jury on the allegations that were put to the appellant in the Question and Answer interview about his purchasing a ticket to leave the country, his not doing so did not result in any prejudice to the appellant, bearing in mind the strong recognition evidence in the case.

3. The learned trial judge's directions on good character were proper and there was nothing in the Question and Answer interview which could have undermined or taken away from these directions. In this regard, there was no miscarriage of justice.

   Teeluck v State of Trinidad and Tobago [2005] UKPC 14 applied.

[1] [1977] QB 224.

4. The learned trial judge adequately summed up the evidence led by the defence. The appellant's defence of alibi had been highlighted to the jury during the summing-up on numerous occasions and was therefore properly put to the jury by the learned judge.

5. The trial judge erred in failing to take into account any of the mitigating factors which were present in this case, in sentencing the appellant. At the time of the incident, the appellant was 26 years old, had no previous convictions or run-ins with the law, was gainfully employed, was qualified, and had a good work ethic. These mitigating factors, when weighed up against the aggravating factors, were substantial enough to warrant a reduction in the sentence from life imprisonment.

JUDGMENT

[1] BLENMAN JA: This is an appeal against conviction and sentence. Mr. Yourrick Furlonge, the appellant, was convicted on 2nd April 2009 and sentenced to life imprisonment on 13th May 2009 for the murder of Jason Pryce, the deceased.

Background

[2] On the morning of 6th August 2007, during Carnival celebrations in Antigua, more specifically, at 'J'Ouvert', the deceased and some other friends were at an area known as Independence Drive in the vicinity of High Street. Whilst there, he sustained two stab wounds to his back.

[3] Central to the prosecution's case was the recognition of the appellant as the person who inflicted the stab wounds. Three witnesses testified on behalf of the prosecution in relation to the incident; however two witnesses, namely Vandoss Yannick Leonard Daawuud and Andrew Dabrio, gave direct evidence in relation to the incident. Each of their testimony placed the appellant at the scene of the crime and as the individual who committed the murder. In particular, Daawuud testified that he knew the appellant 'not for more than a year'. On the morning of the incident, he was 'jamming' in a carnival band with a group of boys, which group included the deceased and Dabrio. The J'Ouvert finished on Independence Drive. The group came to a standstill on the corner of Independence Drive. This was

about 12:00 p.m. There was a truck passing as they stood there. At one point, he saw the appellant run from behind the passing truck into the group of boys and stab the deceased in his back, below his neck, with a long silver blade knife. The deceased and the appellant then ran in separate directions. The entire incident lasted 'not more than 20 seconds'.

[4] Daawuud testified that he was a couple of feet away from both the deceased and the appellant when he saw the appellant stab the deceased. He saw the appellant's 'whole body from his face downwards'; he saw that the appellant was dressed in a white shirt and long blue jeans pants; there was nothing blocking him from seeing the appellant. Prior to that morning he could not recall the last time he saw the appellant. At the time of the stabbing the deceased's back was facing the appellant; the deceased was unarmed and the appellant was unprovoked. Under cross-examination, Daawuud testified that when the band in which he was 'jamming' with stopped on Independence Drive he was standing alone and the deceased was a couple of feet away from him. He said that the area where he was standing did not have 'any crowd of people other than me and the group of boys' and that no one in the group was drinking anything. Daawuud maintained that he was not mistaken in his recognition of the appellant.

[5] Dabrio gave evidence that he knew the appellant for 'maybe a month'. He testified that he saw the appellant twice that morning. The first time was before the incident; at that time, Daawuud, the deceased and Dabrio were standing on High Street talking to some girls. At one point, he noticed the appellant, dressed in a white T-shirt which was painted up by the band and a blue bandana around his neck, passing going downtown. He (the appellant) turned and looked at the group and smiled and clapped 'as if he was happy to see us'. Dabrio said that there was nothing blocking him from seeing the appellant. The second time he saw the appellant was when the group of boys were walking on their way home after J'Ouvert; this was about 12:00 p.m. Dabrio testified that he saw the appellant stab the deceased in his upper back with a wooden handle knife. He saw the appellant's back, his head, and the side of his face. At that point he was standing

about 15 feet away from both the deceased and the appellant. Similar to Daawuud, there was nothing blocking him from seeing the appellant stabbing the deceased. Dabrio testified that, 'I don't know exactly where he [Daawuud] was, but he was maybe either behind of [sic] me or beside of [sic] me'. His testimony also supported Daawuud's testimony, in that neither the deceased nor any of the boys attacked the appellant and that the appellant was unprovoked at the time of the stabbing.

[6] Under cross-examination Dabrio said that, at the time of the stabbing, there were about 10 other people apart from their group in the vicinity. In addition, Dabrio stated that he had one beer to drink and the other members of the group drank beers as well. Dabrio further testified that, 'when he [the appellant] stab [sic] Jason, he looked at Jason and then he ran. That took about five seconds'.

[7] The appellant presented an alibi defence at trial. He gave an unsworn statement from the dock stating that he did not stab the deceased even though he was at the J'Ouvert 'jamming' with some friends that morning. He called two witnesses, Kirk Richards and Sirmarley Martin, who testified on his behalf. Richards gave evidence to the extent that the appellant was with him and his friends, which included Martin, throughout the entire J'Ouvert and that after the J'Ouvert festivities they, including the appellant, went to Richards's home. It was about 10:00 a.m. when they got to Richards's home. Richards further testified that they were at his home until about 3:00 p.m. Martin's evidence supported Richards's evidence in that the appellant was with them during and after the J'Ouvert.

[8] The evidence of Daawuud and Dabrio provided strong eyewitness testimony to the murder. By the jury's verdict they believed the prosecution's case and returned a verdict of guilty.

The appeal

[9] The appellant has filed several grounds of appeal against his conviction and sentence which essentially complain that:

1. the conviction is unsafe and unsatisfactory as no jury properly directed on the law and the evidence would return a verdict of guilty.

2. that there were material misdirections and non-directions on the law and on the evidence which rendered the verdict of the jury unsafe and unsatisfactory:
    (i.) the directions given on identification were inadequate;

    (ii.) the trial judge failed to exclude the evidence of Kimsha Isaac or alternatively to properly direct the jury as to its probative value or its treatment;

    (iii.) the trial judge failed to direct the jury in any adequate or satisfactory manner or at all as to how to treat the alleged finding of blood spots on the shoes and shirt of the appellant; and

    (iv.) the directions on good character of the appellant were inadequate and unsatisfactory.
3. his defence was inadequately put to the jury.

4. the sentence is too excessive.

Ground 1 – Conviction is unsafe and unsatisfactory

[10] The gravamen of Mr. Hamilton, QC's complaint was that the conviction was unsafe and unsatisfactory and this permeated throughout all the grounds of appeal. I do not propose to deal with ground 1 as a stand-alone ground at this juncture, but will deal with it as I address the other grounds of appeal raised by the appellant.

Ground 2 – Misdirections on the identification evidence

[11] Learned Queen's Counsel, Mr. Hamilton, asserts that the trial judge's directions to the jury were inadequate given the factual background of the evidence led in the

case. He argues that Dabrio's claim that he saw the appellant before the incident required special caution. This is so because seeing someone passing earlier on a crowded street may well result in an association or unconscious transference whereby he confuses a face with one previously recognised. He submits that it must be borne in mind that Dabrio hardly knew the appellant and saw only the assailant's back, head and side of face for seconds.

[12] The main thrust of Queen's Counsel's submissions is that as a consequence of the non-directions and misdirections on the part of the learned trial judge, there was a miscarriage of justice and therefore the conviction should be quashed. The appellant further contends that the learned trial judge failed to instruct the jury on matters which they should bear in mind when they came to assess the evidence of visual identification. Moreover, the learned trial judge merely paid lip-service to the matters pertinent to identification evidence; no assistance was given by the trial judge in carefully identifying, applying and assessing the evidence adduced. There was a need for the trial judge to properly stress and warn the jury that visual identification is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eyewitness may be there is always the possibility that they might nevertheless be mistaken in their identifications. The appellant relies on a number of cases including R v Turnbull and Another,[2] and Winston Fuller v The State,[3] in support of his submissions.

[13] On the other hand, the learned Director of Public Prosecutions, Mr. Armstrong, on behalf of the respondent, submits that the learned trial judge accurately and fairly addressed the issues relating to visual identification and more importantly the recognition of the appellant and did more than just comply with the sense and spirit of the Turnbull guidelines. The learned trial judge reminded the jurors of the relevant evidence in the case while keeping in mind the relevant guidelines under the Turnbull case. In particular the learned trial judge highlighted the weaknesses of the recognition evidence, such as they were, while drawing their attention to the

[2] [1977] QB 224.
[3] (1995) 52 WIR 424.

strengths. This assisted the jurors in the proper approach in their assessment of the evidence. Mr. Armstrong posits that the aim of any direction to a jury must be to provide a realistic, comprehensible and common sense guideline to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the accused.

[14] Mr. Armstrong refers this Court to Dabrio's evidence which included a description of the clothing he saw the appellant wearing the morning at the time of the incident. The pieces of clothing accorded with the clothing belonging to the appellant which was later recovered by the police after the killing. Counsel submits further that the area of the body of the deceased where the witnesses observed the appellant stabbing the deceased is in line with the location of the injuries as found by the pathologist. The Director of Public Prosecutions submits that the evidence given by the two witnesses of the recognition of the appellant as the person who committed the offence was very strong and the learned trial judge properly directed the jury on this evidence and the relevant principles and their applicability to the facts, and as a consequence there was no miscarriage of justice. Alternatively, Mr. Armstrong argues that even if the court were to conclude that there were misdirections, the court should accept that they were minor and therefore apply the proviso since the fairness of the trial was not undermined. Mr. Armstrong relies on numerous authorities in support of his submissions including Mills and Others v R.[4]

Analysis

[15] The frailties of eyewitness evidence are of primary concern to any reliable prosecution and to any judicial system. Therefore, it is critical for the trial judge to ensure that adequate and proper directions are given to the jury. This is even more so where the evidence on which the prosecution relies is that of identification/recognition. In addition, a trial judge is required to highlight the

[4] (1995) 46 WIR 240.

strengths and weaknesses of the prosecution's case in relation to the identification/recognition evidence.

[16] I have no doubt that this appeal raises the question of the correct recognition as distinct from identification of the appellant as the person who committed the offence. The prosecution's case was premised primarily on the recognition of the appellant. Recognition is an aspect of identification and the legal principles that are applicable to identification are also applicable to recognition. Recognition occurs where the persons knew each other before such as the case at bar while identification can be where the persons may not have known each other before.

[17] The prosecution led evidence by both Daawuud and Dabrio who testified that they both saw the appellant stab the deceased with a knife. Daawuud's evidence was that the length of time he saw the appellant ran from behind the truck into the group of boys, stab the deceased and ran away was not more than 20 seconds. Dabrio's evidence was that he saw when the appellant stabbed the deceased, looked at him and ran. That lasted for about 5 seconds. What is clearly discernible from the evidence elicited at trial is that this was not a fleeting glance. Moreover, Daawuud and Dabrio both knew the appellant.

[18] Turnbull contains the classical principles and guidelines in relation to identification evidence for a trial judge on certain directions to be given to the jury. It is useful to repeat some of the enunciations in the judgment of Lord Widgery CJ:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
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> "Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At

> what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally, he [the judge] should remind the jury of any specific weaknesses which had appeared in the identification evidence.
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> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
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> "All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger." (My emphasis).[5]

Lord Widgery also went on to say that the judge should not only identify the evidence capable of supporting the identification but should relate each of the factors material to the particular case to the evidence at the trial.

[19] I am not of the view that the trial judge should slavishly use the above quoted words; however, the words used should assist the jury in their approach to the assessment of the evidence. Principally, what is required is for the trial judge to squarely put before the jury the applicable principles using words which convey to the jury the dangers that are associated with the issue of identification/recognition. This principle received judicial acknowledgement in **Mills**[6] where the Board determined that the **Turnbull** principles do not impose a fixed formula for adoption in every case, and it will suffice if the judge's directions comply with the sense and spirit of the guidelines. It is important to note that merely paying lip-service to the guidelines will not be enough nor will it suffice to give a general warning without detailed references to any particular circumstances that may have affected the

[5] At p. 228C.
[6] At p. 246.

accuracy of the witness's observation.[7] The trial judge's directions ought to underscore the strengths and weaknesses of the prosecution's case to the jurors. In all of this the learned trial judge is required to implore the jury to take caution since a mistaken witness can be a very convincing one.[8]

[20] Further, in Leroy Langford and Another v The State[9] Lord Carswell delivering the opinion of the Board said at paragraph 16:

> "It was accordingly incumbent upon the trial judge to give a careful direction to the jury in his summing-up, and it was desirable that he should tailor it so that the strengths and weaknesses of the identification could be clearly appreciated and weighed up in reaching a verdict. The need for a very careful summing-up on identification on recognition was the greater because there was no scientific evidence linking either appellant with the crime, neither made even a partial admission at any time and [the second eyewitness] Ms. Bridet was unable to make any identification." (My emphasis).

[21] The Board in that case commended the sound advice given by Ibrahim JA in the Court of Appeal of Trinidad and Tobago in Winston Fuller v The State:[10]

> "We are concerned about the repeated failures of trial judges to instruct juries properly on the *Turnbull* principles when they deal with the issue of identification. Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in *Turnbull's* case and at a later time to read to them the evidence of the witnesses. That is not a proper summing-up. The jury have heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination." (My emphasis).

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[7] Reid v The Queen [1990] 1 AC 363.

[8] In Mills and Others v R, it was held that it was not necessary in every case for the judge to tell the jury that a mistaken witness could be a convincing one. However, this approach is commended.

[9] [2005] UKPC 20.

[10] (1995) 52 WIR 424 at 433.

[22] In Fuller, the appellant was convicted of murder. The murder had taken place during a bank robbery. The identification evidence was given by the bank manager, who had not previously known the appellant, but who had picked him out on an identification parade some four months after the commission of the crime and who testified that 'the person I saw in the bank is not for five seconds. I had a view of the man for a few seconds'[11]. The appellant pleaded an alibi, and his evidence in this respect was supported by his mother. The trial judge advised the jury that they must examine the identification evidence carefully, but he failed to direct the jury unambiguously as to the onus of proof of an alibi and failed to refer at all to the evidence of the appellant's mother. The Court of Appeal held that the trial judge's use of the phrase 'are required to examine carefully' falls far short of what was required of the jury in their assessment of such evidence. They concluded that whilst the trial judge had the Turnbull principles in mind, he failed to instruct the jury properly on the matters that they should bear in mind when they had to assess the evidence of visual identification, especially where such evidence may be uncorroborated.

[23] As stated earlier, the case at bar raises the issue of the correct recognition of the appellant. It is the law that the Turnbull guidelines should also be given by the trial judge in recognition cases. Support for this can be found in Blackstone's Criminal Practice 2012[12] where it is stated that the general rule is that an appropriate Turnbull warning should be given even in cases of alleged recognition and that '[a]s the guidelines themselves explain, recognition evidence will often be more reliable than identification of a stranger, but may still be erroneous'. Even where the parties had known each other for many years, it was advisable to warn the jury of the possibility of honest mistake and the reasons why that possibility existed.[13] Lord Lane CJ elaborated in R v Bentley:[14]

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[11] See p. 430 of Winston Fuller v The State. It was not known whether a few seconds meant more than five seconds or less than five seconds.
[12] (22nd edn., Oxford University Press 2011) p. 2695 at para. F18.2 and p. 2699 at para. F18.7.
[13] R v Bentley [1991] Crim LR 620.
[14] [1991] Crim LR 620.

> "Many people have experienced seeing someone in the street whom they knew, only to discover that they were wrong. The expression, 'I could have sworn it was you' indicated the sort of warning which a judge should give, because that was exactly what a testifying witness did – he swore that it was the person he thought it was. But he may have been mistaken …"[15]

[24] An appellate court is required to carefully review the trial judge's summation in order to ensure that there was no error, the effect of which would render the conviction unsafe and result in a miscarriage of justice. Against this background, I now propose to examine the trial judge's directions to the jury regarding the identification evidence. He had this to say:

> "To avoid any risk of injustice, I must therefore warn you of the specially [sic] precaution before convicting the defendant in reliance of [sic] the evidence of identification.
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> "A witness who is convinced [in] his or her own mind may be as a result be convincing -- be a convincing witness but may nevertheless be mistaken. Mistakes ... can be made in the recognition of someone who is known to a witness even a close friend or a relative. You should therefore examine carefully the circumstances in which the identification by each witness was made.
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> "So these are some of the matters which you have to consider. For how long did the witness -- now there are two witnesses, eh, have the person said to be the defendant under observation. At what distance, in what light. Obviously light is important. But let me say right away it was high day time without a hint of rain. There is no evidence of any rain. It is morning time."[16] (My emphasis)

The learned judge went on:

> "Now, -- in the case of [Daawuud], he say he knew him for more than a year but [in] the case of Andrew Dabrio, he say he only knew him for about a month. But you see them in a bar and they hail from Potters.
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> "But on the question of the observation, did the witness see the person he observed before? And if so, how often? If occasionally and any special reason for remembering him?[17]

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[15] See Blackstone's Criminal Practice 2012 (22nd edn., Oxford University Press 2011) p. 2699, para. F18.7.
[16] See Transcript of Trial Proceedings Volume II, p. 156, lines 10-25 and p. 157, lines 1-4.
[17] 20-25 and p. 158, lines 1-2.

The learned judge then repeated the evidence given by Dabrio during his examination in chief where Dabrio described the clothes the appellant was wearing and that there was nothing barring him from seeing the appellant.

[25] As established in the mentioned cases, the summing-up in identification/recognition cases must not only contain a warning about the special need for caution but must also expose to the jury the weaknesses and dangers of the identification/recognition evidence both in general and in the circumstances of the particular case. The judge should not only identify the evidence capable of supporting the identification but should relate each of the factors material to the particular case to the evidence given at the trial.[18]

[26] In examining the principles enunciated in the cases and applying them to this present case, I have no doubt that the learned judge fully complied with the sense and spirit of the Turnbull guidelines in his summation to the jury. The learned trial judge referred to the evidence in the case thus creating the necessary nexus to the particular situation.

[27] Dabrio and Daawuud were no strangers to the appellant. Daawuud knew him for less than one year and Dabrio knew him for about a month. The murder took place during the mid-morning, around 12:00 p.m. At the time of the incident, it was not raining. It was bright. Further, the two eyewitnesses had nothing barring them from seeing the appellant with whom they were familiar. Dabrio gave evidence that he had seen the appellant earlier before the incident smiling and clapping his hands when the appellant saw them – "them" being the deceased and his friends. He testified that at the time of the stabbing he saw the back, head and side of face of the appellant; he observed the appellant wearing a white T-shirt which was painted up and a blue bandana around his neck. Daawuud's evidence was that he had seen the appellant's whole body from his face downwards and that the appellant was wearing a white T-shirt with long blue jeans. It is noteworthy that

[18] Carlton Bedminster et al v The Queen, Antigua and Barbuda High Court Criminal Appeal ANUHCRAP2008/0002; ANUHCRAP2008/0003 (delivered 15th December 2010, unreported).

the appellant himself said that on the J'Ouvert morning he was wearing a white T-shirt, blue long pants and that he had a bandana but it was not on his head. These articles of clothing were handed to the police by the appellant, which pieces of clothing were later tendered into evidence for the purpose of supporting the recognition evidence with regards to what the appellant was wearing at the time of the incident.

[28] I move on to examine whether or not the learned trial judge highlighted to the jury the weaknesses and dangers of the identification/recognition evidence both in general and in the circumstances of the particular case keeping in mind that there was no scientific evidence linking the appellant with the crime nor did he make a partial admission. Daawuud gave evidence that he was a couple of feet away from the appellant; while Dabrio testified that he was 15 feet away from the appellant and that Daawuud was standing beside him or behind him. In addition, Daawuud testified that there was a passing truck at the time. Dabrio also testified that there were about 10 other people there besides the group of boys and that they all had beers to drink. However, there was no evidence that any of the boys were drunk.

[29] The trial judge, at the end of his summing up, after being prompted by counsel for the appellant, said:

> "You see, Mr. Foreman, discrepancy is an evidence of facts of life. Witnesses are not there with measuring tape and time keeping. So you will get discrepancies. It is for you. If somebody said couple and somebody 15 feet. …
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> "One saying 15, one saying couple. Ordinarily, the dictionary meaning of couple is two. But is that what is meant? So I am just going to deal with it in a general way and tell you that whether the discrepancy arise [sic], because one person spoke of five seconds in one context and not less than -- not less than 20 includes five. But these are matters entirely, if the discrepancy is major, if you decide to accept or reject the evidence. If it's meant minor, you decide to overlook it. Not treat it as being serious. That is the classical way you deal with those things. A minor discrepancy you can often ignore."[19]

[19] See Transcript of Trial Proceedings Volume II, p. 181, lines 18-22 and p. 182, lines 2-13.

[30] This, in my opinion, was not the way in which the trial judge should have dealt with the discrepancy regarding the distance. Care should have been taken with this particular piece of evidence. Moreover, the trial judge did not highlight to the jurors Daawuud's evidence of a truck passing at the time of the incident. The learned trial judge ought to have dissected each witness's evidence for the jurors, as particular care must be taken when dealing with identification/recognition cases. The trial judge should have assisted the jury in focusing on the evidence of Daawuud that he clearly recognised the appellant as the person who committed the offence.

[31] However, in my view, the weaknesses of the prosecution's case were very negligible. The learned trial judge's failure therefore is not fatal but rather de minimis. The cumulative effect of the two eyewitnesses' evidence presented a very cogent and compelling case against the appellant. The learned trial judge did remind the jury of their role when he said:

> "Now I am giving you this warning because you need to consider the question of identification very carefully because it would be … unjust … to convict a person who is wrongfully identified. But I… give you this warning: Examine the question, evidence, the identification very carefully."[20]

[32] I do not hold the view that there was a need for a special warning to be given. Dabrio knew the appellant; he described the appellant's clothing; he saw the appellant's back, head and side of face; it was not a fleeting glance. Notwithstanding it was J'Ouvert celebrations, the evidence presented at trial and which was accepted by the jurors was that it was not crowded at the time; further, there was nothing barring Dabrio from seeing the appellant. In addition, there was great consistency in the material aspects of the recognition evidence given by both Dabrio and Daawuud. I have no doubt that even with a special warning from the trial judge directed at Dabrio's evidence coupled with the strong recognition given by Daawuud, the jury would have inevitably reached the same conclusion.

[20] See Transcript of Trial Proceedings Volume II, p. 158, lines 13-19.

[33] In any event, the learned trial judge said, 'I must therefore warn you of the specially [sic] precaution before convicting the defendant in reliance of [sic] the evidence of identification' and he went on to say that mistakes can be made in the recognition of someone; he instructed the jury properly on the matters that they should bear in mind when they had to assess the evidence of visual identification. Moreover, he reminded the jury of the appellant's alibi evidence and as to the onus of proof of an alibi. In sharp contradistinction to Fuller, the witnesses in the case at bar knew the appellant. In my mind, the learned trial judge properly warned the jury with regard to the recognition evidence. Mr. Armstrong, with regard to Fuller, submits that the commendation made by their Lordships in Leroy Langford would in essence be specifying a very restrictive and directive standard. He submits further that if a judge is required to apply rigid rules, there will inevitably be occasions when the directions will be inappropriate to the facts. He highlighted a number of Trinidadian cases which post-dated Fuller and to which the Court of Appeal judges made passing reference to but however followed Turnbull. I accept and agree with the submissions posited by Mr. Armstrong, for it cannot be intended that the guidelines or rules ought to be administered in any mechanical manner. The recognition evidence in this case was not complex. In any case the trial judge's treatment of the evidence in the round was in accordance with the spirit of the Fuller judgment. What is critical is that the fairness of the trial should not have been undermined neither should there have been any miscarriage of justice. In accordance with Turnbull, I reiterate that there need not be a particular form of words and accept the submission of Mr. Armstrong that indeed there was no miscarriage of justice in this case based on the directions the trial judge gave on recognition.

[34] The crux of the appellant's defence was alibi. I propose now to address this defence paying particular regard to recognition cases. It is the law that great care must be taken by the trial judge in his treatment of an alibi defence in cases on which the prosecution relies on identification/recognition of the appellant in seeking to prove that he was the perpetrator of the crime. Indeed, Lord Widgery in Turnbull recognised that care should be taken by the judge when directing the

jury about the support for an identification which may be derived from the fact that they have rejected an alibi. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was. Further, in Fuller, the Court of Appeal held that the learned trial judge must make the jury know that when a defendant raises the issue of alibi there is no onus or burden on him to prove that he was where he said he was. The onus is on the State to disprove it and not for the appellant to establish it.

[35] The Board in Mills and Others v R held that where a defendant did not give evidence but raised an alibi defence in an unsworn statement from the dock, the judge in his summing up only had to give directions to the jury on the evidential value of the unsworn statement and he was not required to direct them that rejection of the alibi did not by itself support the identification evidence. As a matter of fact, no such directions can or should be given. In that case, appellant's counsel argued that logically there was no reason why the Lord Chief Justice's observation (in Turnbull) about the impact of a rejection by the jury of an alibi defence raised by oral evidence should not be equally applicable to such a defence put forward in an unsworn statement. Their Lordships considered that argument and said that it must be appreciated that the pursuit of logical symmetry is not the ultimate goal of the law.

[36] Their Lordships stated that:

> "There is nothing in the passage quoted from *Turnbull* to indicate that Lord Widgery CJ had in mind an alibi put forward in an unsworn statement. On the contrary, the references to evidence and witnesses tend to suggest that the Lord Chief Justice did not have in mind an alibi defence in an unsworn statement."[21]

[37] Their Lordships made the point that even before Turnbull was decided, the Privy Council elucidated the evidential status of an unsworn statement in terms which qualitatively treated it as significantly inferior to oral evidence and permitted trial

[21] At p. 248.

judges to direct juries to explain the inferior quality of an unsworn statement in explicit terms. Their Lordships deemed it relevant to take into account the guidance given by the Privy Council in 1974 at the request of the Court of Appeal of Jamaica in Director of Public Prosecutions v Leary Walker[22] where Lord Salmon observed (at page 411):

> "… the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness-box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."[23]

[38] In the case at bar, the appellant gave an unsworn statement from the dock. Therefore, as laid down in Mills and Others v R the learned trial judge only had to give directions on the evidential value of the unsworn statement. The learned trial judge, in that regard, had this to say, 'the [unsworn] statement … is a statement. … That is why you … have to decide how you treat it given that objective reality'[24]. However, it must be remembered that two witnesses testified on behalf of the appellant, both of whom attested to the appellant's alibi evidence. In that instance a trial judge would need to pay due regard to the guidelines as set down in Turnbull.

[39] I propose now to examine the learned trial judge's treatment of the appellant's alibi defence. The learned trial judge said to the jurors:

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[22] (1974) 21 WIR 406.
[23] See pp. 248-249 of Mills v Others v R (1995) 46 WIR 240.
[24] See Transcript of Trial Proceedings Volume II, p. 147, lines 1-4.

"Now Mr. Foreman, as the Prosecution has to prove his guilt so it can be sure of it, he does not have to prove anything. Proving that he was elsewhere at the time. On the contrary, the Prosecution must disprove the alibi or negative it.

"Even if you conclude that the alibi is false, that of itself does not entitle you to convict the defendant. It is a matter for you to take into account, but you should bear in mind that an alibi is sometime[s] invented to boast [sic] a genuine defence.

"So the question is: With respect to the defendant's -- defence alibi, has the Prosecution negative [sic] that alibi? That is for you. …

"Did the accused in fact lie? If you are not sure, you can ignore the matter. But if you are sure that he lied, you consider the matter further by asking the second question, which is, why did the accused lie? The mere fact that the accused told a lie is not itself evidence of guilt. A defendant may lie for different reasons and as such lies may possibly be innocent in the sense that they may not be known guilt. …

"If you think that there is or may be innocent explanation for his lies, then you should take no notes of that. It is only if you are sure that the accused did not lie for an innocent reason, it was deliberate and relate [sic] to a material issue that you can consider that the lies can support or strengthen the case against the accused."[25] (My emphasis).

[40] The above quoted reference shows that the learned trial judge properly reminded the jury that (1) proving the appellant told lies about where he was at the material time does not by itself prove that he committed the offence (2) that the onus was on the prosecution to negative the appellant's defence of alibi.

[41] I reiterate that the evidence that the prosecution produced was cogent and reliable. Indeed the prosecution's case was a strong one; it was premised on compelling eyewitness testimony given by persons who during mid-morning saw the appellant, for more than a fleeting glance, and recognised him as the person who stabbed the deceased. What matters is the quality of the identification evidence rather than its volume.[26] It must be remembered that there was nothing

[25] See Transcript of Trial Proceedings Volume II, p. 165, lines 10-22, p. 166, lines 1-8 and lines 12-18.
[26] R v Martin Anthony Breslin (1985) 80 Cr App R 226.

blocking both witnesses from seeing the appellant. The quality of the evidence was good and remained good at the close of the appellant's case, this lessened the danger of a mistaken identification.

[42] Taking into account the totality of the circumstances and applying the very sound principles enunciated in Mills and Others v R where the Board determined inter alia that (1) the Turnbull principles do not impose a fixed formula for adoption in every case; (2) the learned trial judge has a wide discretion to express himself in his own way; and (3) it will suffice if the judge's directions comply with the sense and spirit of the guidelines, I do find that the trial judge's directions overwhelmingly did all this. I have no doubt that the trial judge adequately dealt with the issues of recognition and alibi. Therefore, there is no basis for the complaint that the trial was unfair and for these reasons this ground of appeal must accordingly fail.

Ground 2(ii) – Failure to exclude evidence of Kimsha Isaac

[43] Mr. Hamilton, QC submits that the trial judge failed to properly direct the jury on how to deal with the evidence in the Question and Answer interview conducted by Corporal Morgan in which there was an allegation made by the police that shortly after the stabbing the appellant booked a flight out of Antigua and Barbuda. He also failed to properly direct them on the evidence given by Kimsha Isaac that, in 2007, she was a ticketing agent working for LIAT. Queen's Counsel contends that there was no direction from the learned trial judge as to how the jury should assess and treat those pieces of evidence. Mr. Hamilton, QC proffers that unproven allegations made by the police should never be admitted into evidence where its prejudicial value far surpasses the probative value. Queen's Counsel submits that in this case there was no probative value. There was a danger that the jury may attach undue weight to such evidence and regard it as probative of the crime with which the appellant was charged.

[44] Mr. Armstrong submits in response that Kimsha's name was on the back of the indictment and taking into account the general rule that prosecuting counsel should call all witnesses whose names appear on the back of the indictment, she

was called to take the stand. Counsel contends that Kimsha's evidence made no reference to the Question and Answer interview and in any event the appellant flatly denied any attempt or knowledge to flee the jurisdiction.

Analysis

[45] I accept that as a matter of practice, prosecuting counsel should call, or read into evidence the statements of, all witnesses whose statements have been served, or to use the traditional phrase 'witnesses whose names are on the back of the indictment'.[27] As an alternative to calling a witness and examining him in the normal way, it is open to prosecuting counsel to tender a witness for cross-examination. Counsel merely calls the witness, establishes his name and address, and then invites the defence to ask any questions they wish.[28]

[46] In the present case, that is exactly what happened. It was quite proper for the prosecution to tender Kimsha to be cross-examined without leading any evidence from her. Prosecuting counsel established the name, address and where the witness worked in 2007; that was the extent of her evidence. There was no cross-examination of the witness either.

[47] It may have been prudent for the trial judge to address the jury on the allegations that were put to the appellant in the Question and Answer interview about his purchasing a ticket to leave the country even though he resoundingly rejected those allegations. I have no doubt that it was within the discretion of the trial judge not to do so. I am not satisfied that his omission to do so has resulted in any prejudice to the appellant bearing in mind the strong recognition evidence in this case. I see no basis for this contention.

[48] In my mind, Kimsha's evidence could not have advanced the prosecution's case in any way and neither could it have undermined the defendant's case. In that regard I agree with appellant's counsel that it had no probative value. Still, the

[27] Blackstone's Criminal Practice 2012 (22nd edn., Oxford University Press 2011) p. 1756 at para. D16.17.
[28] Blackstone's Criminal Practice 2012 (22nd edn., Oxford University Press 2011) p. 1758 at para. D16.24.

evidence which the jury had from Kimsha was that she worked at LIAT in 2007, nothing more, nothing less; there was simply nothing which was prejudicial in Kimsha's evidence. The evidence in the Question and Answer interview to the question posed by Corporal Morgan about a ticket having been purchased by the appellant after the incident, showed that the appellant never purchased or had any knowledge of the purchase of any tickets to leave Antigua and Barbuda. This ground of appeal is also dismissed.

Ground 2(iii) – Treatment of the evidence of blood spots

[49] Mr. Hamilton, QC complains about the learned trial judge's treatment of the blood spots on the appellant's clothes. He contends that the fact that the appellant's shoes along with the shirt he wore to J'Ouvert was admitted into evidence, albeit to prove collateral matters, created a danger that the jury may attach undue weight to such evidence and regard it as probative of the crime with which the appellant was charged. The appellant's shoes had blood spots and on his shirt had what appeared to be blood spots. It was put to the appellant in the Question and Answer interview that the shirt indeed had blood spots on it. Queen's Counsel also submits that the learned trial judge's reference to that piece of evidence was unadorned and sparse and that the jury ought to have been given assistance on the value and cogency (if any) of the evidence. The jury was left to draw whatever inference they wished, argues counsel.

[50] Mr. Armstrong submits that the prosecution did not rely on the blood spots to prove its case. In fact, the only probative value of the clothes was to support the identification evidence as to what the witnesses said they saw the appellant wearing at the time of the killing. Mr. Armstrong contends that the learned trial judge gave the jury adequate and correct direction on inferences and as such the jury would have drawn the inference which would have been favourable to the appellant.

Analysis

[51] I reiterate that the prosecution's case was primarily based on recognition evidence. There was no attempt by the prosecution to rely on any forensic evidence since in any event there was none provided in the case. Witnesses called on behalf of the prosecution gave testimony to the effect that no forensic testing was carried out on the clothing and that the real objective of seeing the clothing was based on information received regarding what the appellant was wearing at the time of the murder. It was highlighted to the jury that the appellant was very cooperative during that examination; he even offered to give a sample of his blood. The trial judge pointed out the Question and Answer interview to the jurors where the appellant gave responses in relation to the clothes he was wearing that J'Ouvert morning. The trial judge ought to have gone further and stressed to the jurors that there was no forensic evidence linking the appellant to the crime and therefore their consideration of the pieces of clothing would only be with regard to what the appellant was wearing at the J'Ouvert. Did his failure to do so undermine the fairness of the trial? The answer to that question would be in the negative. Even without the clothing being tendered into evidence the strong recognition evidence of the appellant would have inevitably resulted in a guilty verdict. Accordingly this ground of appeal must fail.

Ground 2(iv) – Good character direction

[52] Mr. Hamilton, QC complains that the learned trial judge failed to give a proper and adequate good character direction where the circumstances clearly required a full and proper good character direction. Evidence of good character is evidence of probative significance and that the trial judge should give adequate directions on it, submits Mr. Hamilton, QC. The appellant further submits that the duty is not discharged by merely giving a perfunctory direction without addressing the evidence which tends to support it in any meaningful way. Mr. Hamilton, QC's complaint is based primarily on the learned trial judge's reference to the Question and Answer interview when giving the good character direction.

[53] Mr. Armstrong disagreed and advocated that the trial judge disposed of his duty to give the good character direction effectively and accurately in accordance with the dictates of the law.

Analysis

[54] There is no dispute that the appellant had no previous convictions and was of good character. A defendant who is of good character is entitled to the benefit of a good character direction from the judge when summing up to the jury. This direction is essential in every case in which it is appropriate for such a direction to be given. Where an appellant's good character is established by evidence including (an admission by the prosecution) or cross-examination it is incumbent on a trial judge to direct the jury as to the significance in relation to both credibility and (un)likelihood of the defendant having committed the offence charged.[29] The witness Mr. Kim Burdon, who worked at LIAT and who had worked closely with the appellant, spoke very highly about the appellant's character, his good work ethic and his good discipline. It was therefore incumbent on the trial judge to give, as he did, a good character direction.[30]

[55] In Teeluck v State of Trinidad and Tobago,[31] the Board said:

> "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 a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: Thompson v The Queen [1998] AC 811, following R v Aziz [1996] AC 41 and R v Vye [1993] 1 WLR 471.

[29] See the case of R v Vye [1993] 1 WLR 471.
[30] See the case of Terrence Barrow v The State (1998) 52 WIR 493.
[31] [2005] UKPC 14.

(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 R 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 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 The Queen [1992] 2 AC 364, 381; Barrow v The State [1998] AC 846, 850; Sealey v The State (2002) 61 WIR 491, para 34."[32]

[56] In relation to a good character direction, the trial judge said:

"This requires me to give you character directions. It has two lengths: Credibility and propensity. The rule is that a person is more likely to be truthful than one of bad character.

"The rule is that a person is more likely to be truthful if he is a person of good character as opposed to one of bad character. This goes to the question of credibility. And a person of good character is less likely to commit a crime, especially one of which he is charged. That goes, [to] propensity.

"But these are mere directions to guide you and it is for you to make the determination. You cannot go on what Mr. Kim Burdon said alone. You have to look at what the accused said in the statement to the police and in the Question and Answer."[33]

[57] It is quite clear that a proper good character direction was given. In the Question and Answer interview it can be gleaned that the appellant enjoyed his job and was never arrested or charged prior to this incident.

[58] An examination of the Question and Answer interview shows that the learned judge's reference to it could not have in any way undermined his earlier directions; rather, it buttressed the appellant's good character. From the Question and

[32] At para. 33.
[33] See Transcript of Trial Proceedings Volume II, p. 167, lines 3-17.

Answer interview the jurors would have learnt that the appellant attended school and had a stable job as a mechanic and that he enjoyed this job. In my view, there was nothing in that interview that could have taken away from the learned judge's earlier proper directions on good character. I agree with Mr. Armstrong that it was a very proper good character direction and that there was no miscarriage of justice.

Ground 3 - Defence inadequately put to the jury

[59] Mr. Hamilton, QC maintained that the appellant's defence was not put properly to the jury by the trial judge. Mr. Armstrong submits the contrary and adds that the learned trial judge did so in a fair manner. I will now give this careful consideration.

Analysis

[60] In looking at Mr. Hamilton, QC's complaint, I am of the opinion that it is clearly unfounded. The trial judge, on numerous occasions, highlighted to the jurors the appellant's defence of alibi. The trial judge adequately summed up the evidence led on behalf of the defence, specifically the evidence of the appellant's witnesses who gave testimony in support of the alibi defence; the judge addressed the appellant's unsworn statement also. The learned trial judge at one point said to the jurors:

> "Defence case is that the accused is saying he didn't commit the murder. And further, he was not even at the scene of the alleged crime. In other words, Mr. Foreman and Members of the Jury, alibi. I was not there."[34]

At another juncture, the learned trial judge said:

> "The two witnesses saw to support the accused'[s] alibi by saying that they were with him on the morning of J'Ouvert up to about ten a.m., and after which they all went to Kirk's house. That is something that you have to consider. …

[34] See Transcript of Trial Proceedings, Volume II, p. 120, lines 12-16.

> "You have to consider in addition there are some directions which I must give you in the circumstance. These are: … law relating to defences, in particular, alibi."[35]

[61] The jurors would have been more than alert as to what the appellant's defence was. This ground of appeal must accordingly fail.

[62] For all the reasons advanced above, the ground of appeal asserting that the conviction is unsafe and unsatisfactory must fail. I find the enunciation of Lord Carswell in delivering the opinion of the Board in Daniel Dick Trimmingham v The Queen[36] quite instructive in reference to this ground of appeal:

> "There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict."[37]

Conclusion on appeal against conviction

[63] This case was one which concerned very strong recognition evidence. Both eyewitnesses were cross-examined and were not shaken under cross-examination. The recognition evidence remained good at the close of the case. This lessened the danger of a mistaken identification. The jury, from their verdict, believed the prosecution's case; as such they were entitled to deliver a verdict of

[35] See Transcript of Trial Proceedings, Volume II, p. 163 lines 16-20 and p. 164, lines 1-4.
[36] [2009] UKPC 25.
[37] At para. 12.

guilty, which they did. Accordingly, the appeal against conviction is dismissed and the conviction is affirmed.

Ground 5 – Sentence is excessive

[64] Mr. Hamilton, QC submits that the sentence was too excessive in all the circumstances of this case. Mr. Hamilton, QC reminds the Court that the appellant had no previous convictions and an impeccable character. Mr. Armstrong for his part urges the Court to accept that the sentence imposed by the trial judge was just and appropriate in all of the circumstances of the case.

Analysis on sentencing

[65] The jurisprudence arising out of Desmond Baptiste v The Queen[38] provides that in every case of a conviction for a murder, a person must be afforded the opportunity to raise mitigating factors in relation to the circumstances of the murder and the convicted murderer. Rawlins JA, in Harry Wilson v The Queen[39] had this to say:

> "[16] … At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.
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> "[17] It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of

[38] Saint Vincent and the Grenadines High Court Criminal Appeal SVGHCRAP2003/0008 (delivered 6th December 2004, unreported).
[39] Saint Vincent and the Grenadines High Court Criminal Appeal SVGHCRAP2004/0030 (delivered 28th November 2005, unreported).

> the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors."

[66] Further, in Callachand & Anor v State of Mauritius (Mauritius)[40] the Board stated:

> "It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."[41]

[67] In Romeo Da Costa Hall v The Queen[42] the Caribbean Court of Justice recognised a residual discretion in a sentencing judge not to apply the primary rule. Examples given were: (1) where the defendant has deliberately contrived to enlarge the amount of time spent on remand, (2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced, (3) where the period of pre-sentence custody is less than a day or the post-conviction sentence is less than 2 or 3 days, (4) where the defendant was serving a term of imprisonment during the whole or part of the period spent on remand and (5) generally where the same period of remand in custody would be credited to more than one offence. None of these factors are relevant to this appeal.

[68] In his sentencing judgment the trial judge found that there were no mitigating factors. Additionally, the learned trial judge found that the aggravating factors in the case were that the appellant was not acting in self-defence, neither was he provoked; he was not remorseful and had throughout the trial and after his conviction maintained his innocence; the tender age of the deceased; and the seriousness of the offence.

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[40] [2008] UKPC 49.
[41] At para. 9.
[42] [2011] CCJ 6.

[69] I fail to see how the learned trial judge could have held that there were no mitigating factors. The appellant at the time of the incident was 26 years of age. He had no previous convictions or any run-ins with the law; was gainfully employed; was qualified; and had a good work ethic which was supported by Mr. Burdon. In his Social Inquiry Report it was said that the appellant presented himself as a methodical, highly confident, but troubled young man, yet no emotion was observed.

[70] The aggravating factors in this case would be the use of a weapon. In addition, the deceased was unarmed. The court is also mindful that the appellant took the life of a young man; the deceased was 19 years at the time of death. However, I do not consider this type of murder to be an exceptionally heinous murder.

[71] Lord Phillips in R v Neil Jones and Others[43] said that full regard must be had to the features of the individual case so that the sentence truly reflects the seriousness of the particular offence. In Keith Mitchell v The Queen[44] the accused was convicted and sentenced for murder. The deceased in that case was chopped severely about his body. On appeal, the conviction and sentence of 12 years with hard labour was confirmed.

[72] In this case, the mitigating factors and the aggravating factors balance out each other. On that basis and bearing in mind the circumstances of the offence and the characteristics of the offender, while keeping those of the victim in focus, a sentence of 20 years is appropriate and just. I will therefore allow the appeal against sentence and impose a term of 20 years imprisonment. It must be borne in mind that the appellant spent 2 years on remand. Applying the principles enunciated in Callachand & Anor, the sentence of 20 years is to take effect from the date upon which he was in custody.

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[43] [2005] EWCA Crim 3115.

[44] Grenada High Court Criminal Appeal GDAHCRAP2005/0011 (delivered 18th September 2006, unreported).

Conclusion

[73] I would dismiss the appeal against conviction. I would allow the appeal against sentence to the extent that the sentence is reduced to 20 years imprisonment with 2 years to be deducted for the time spent on remand.

[74] I gratefully acknowledge the assistance of learned counsel.

Louise E. Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal