

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 2007

BETWEEN:

DWIGHT DOOKIE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

The Hon. Ms. Ola Mae Edwards

Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Mondesir, with him Mr. Lorne Theophilus, for the Appellant

Mrs. Victoria Charles-Clarke, Director of Public Prosecutions, for the Respondent

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2007: October 29;  
November 26.  
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Criminal Appeal – Rape – Section 238 of the 1992 Criminal Code – Appeal against Conviction - whether unsafe or unsatisfactory –Good Character Direction – when required - whether failure to give good character direction is fatal to conviction – Appeal against Sentence – Section 1098(4) of the 2004 Criminal Code – Pre-sentence Report – whether required

The appellant was convicted of rape and sentenced to 15 years imprisonment. He appealed against his conviction on the ground that it was unsafe and unsatisfactory having regard to the failure of the trial Judge to give a good character direction. He appealed against sentence on the ground that it was too severe in all the circumstances, particularly insofar as he was of previous good character. The appellant contended further that the trial Judge should have had regard to a pre-sentence report before taking a decision on sentence. The prosecution's case was that the appellant, a friend of the virtual complainant, abused a position of trust when he had sexual intercourse with her without her consent at his residence on 8<sup>th</sup> April, 2003. The appellant denied raping the virtual

complainant, indicating that he got angry and ceased his advances towards her when he realized that she was a virgin.

Held, dismissing the appeal; affirming the conviction and ordering the preparation of a pre-sentence report:

- (1) The entitlement to a good character direction will only be triggered after the defence raises the point “distinctly”. Where the issue is not raised, the accused will be entitled to a good character direction in rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused. Good character is not raised only by evidence of no previous conviction, but by eliciting or presenting evidence of facts that show good character. In the circumstances of this case, the appellant was not entitled to the benefit of a good character direction because his good character was not distinctly raised at the trial.

**Troy Simon v The Queen** Grenada Criminal Appeal No 16 of 2003 and **Johnson Thomas v The Queen** St Lucia Criminal Appeal No 7 of 2006 distinguished.

- (2) The failure of a trial judge to obtain a pre-sentence report before imposing a custodial sentence on the convicted person does not invalidate the sentence by virtue of the provisions of section 1098(4). Section 1098(4)(a) and (b) however mandates this court to obtain and consider a pre-sentence report before passing sentence.

**Mervin Edwards aka “Shark” v The Queen** St Lucia Criminal Appeal No 1 of 2006 followed.

## JUDGMENT

- [1] **RAWLINS, J.A.:** The appellant, Dwight Dookie, was charged for the rape of a Secondary schoolgirl, by having sexual intercourse with her without her consent

on 8<sup>th</sup> April 2003, contrary to section 238 of the Criminal Code of St Lucia 1992. He was arrested and charged for the offence on 14<sup>th</sup> May 2004. He was convicted on 7<sup>th</sup> February 2007 and sentenced on that date to 15 years imprisonment. He appealed against the conviction on the ground that the learned trial judge erred in that he did not give a good character direction to the jury in the course of the summation. He appealed against the sentence on the ground that the sentence was too severe in the circumstances of the case. The appellant indicates, in relation to his appeal against sentence, that this court should, pursuant to section 1098(4) of the Criminal Code 2004, order the preparation of a probation report before considering sentence in the event that he does not prevail in his appeal against conviction.

[2] I think that it is necessary to set out the evidence given at the trial in detail since an appeal on the grounds raised in this case will depend on that evidence. In this regard, it is noteworthy that in **Troy Simon v The Queen**,<sup>1</sup> I noted<sup>2</sup> that in **Harry Wilson v The Queen**<sup>3</sup> and in **Sealey and Headley v The State**,<sup>4</sup> in particular, Saunders, JA, as he then was, stated<sup>5</sup> that the critical question in determining whether the failure to give a good character direction is fatal depends upon whether, on an assessment of the facts, it could be said that the jury would necessarily have reached the same verdict if the direction was given. This is borne out in judgments of the Privy Council, including **Balson v The State**<sup>6</sup> and in **Singh v The State**.<sup>7</sup>

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<sup>1</sup> Grenada Criminal Appeal No. 16 of 2003, (22<sup>nd</sup> May 2006).

<sup>2</sup> At paragraph 5 of the judgment.

<sup>3</sup> St. Vincent and the Grenadines Criminal Appeal No. 15 of 2002 (22<sup>nd</sup> September 2003).

<sup>4</sup> [2002] UKPC 52.

<sup>5</sup> At paragraph 19 of the judgment.

<sup>6</sup> [2005] UKPC 6.

<sup>7</sup> [2005] UKPC 35.

## The Evidence

- [3] The prosecution's case was presented through the evidence of the complainant, and also through the evidence that was given by her grandmother, her sister and her mother. Dookie gave a statement under caution to the police at the time of his arrest. He also gave evidence at the trial. Dookie rented the quarters in the house of Esther Eledore in which he lived and where the incident allegedly occurred on 8<sup>th</sup> April 2003. Eledore testified at the trial on his behalf. His live-in girlfriend, Shanna Compton, whom he also called, did not assist his case because it was established that she was not at home at the material time on the afternoon of 8<sup>th</sup> April 2003.

### The prosecution's case

- [4] The prosecution's case is that Dwight Dookie and the complainant became very good friends after they met through a cousin of the virtual complainant. They remained friends for some 5 years prior to April 2003. They telephoned each other regularly. She confided in him. Dookie sometimes took her to lunch. They met from time to time in Castries after school or on Saturdays. They spoke with each other about their problems. He encouraged her to go to school.
- [5] On 8<sup>th</sup> April 2003, the virtual complainant was at her home when at about 1pm Dookie telephoned her. He asked her to meet him in Castries. When they met Dookie told her that he needed a shave. She accompanied him to the barber shop and to other places in Castries. He bought her a blouse. They then took the bus to Rodney Bay where they had lunch together. They boarded a bus to return to Castries. She intended to alight from the bus at the bus stand close to her home. However, Dookie stopped the bus close to his home at Mongiraud and invited her to see it. When they arrived at Dookie's home he invited her in. She hesitated outside. He told her not to be afraid to enter. She went into the balcony. Dookie went into the house and returned and asked her to enter. She went into the living

room and stood by a sofa on which a child was sleeping. Dookie went into another room. He then returned and asked her to come into his bedroom because his roommate did not want anyone to interfere with the furniture in the living room.

[6] The complainant further testified that there was a mattress on the floor of his bedroom. There was also a dressing table on which there were personal effects and a stereo system in the bedroom. Dookie asked her to sit on the mattress which she did. They were speaking. He began to kiss her. She was surprised because she did not expect him to do that. She pushed him away. He went to the stereo set and opened the volume quite loudly. He then returned and asked her to remove her shoes. She refused to do so. He sat beside her. He lifted up her feet, placed it on his hip and removed her shoes. He then pulled her body to his, pushed up her T-shirt and bra and began to suck her breast. This took her by surprise. She was pushing him away and asking him to stop. He stopped after about 2 minutes. For her protection she curled herself up on the mattress. Dookie took off his shirt and jeans pants, uncurled her and lay on top of her. She was crying and asking him to stop. He laid still on top of her for awhile. He then pulled off her pants and underwear, held her hands together and inserted his penis into her vagina as he laid on top of her. He had sexual intercourse with her for about 4 minutes notwithstanding that she screamed, protested, pushed him and pleaded with him to stop. When he stopped he knelt between her legs and asked her why she told him that she was not a virgin. She insisted that she did not give him permission to have sexual intercourse with her.

[7] The complainant testified that Dookie then dressed her and urged her to go home. He said that it was 6 o'clock and her mother would have quarreled with her. She threw the top which he had bought for her behind his bed, ran pass him, left the house and took a bus to Castries. She went to the home of a cousin in Marchand. There she went to the washroom and noticed that she was bleeding. She then went to her home where her grandmother saw her crying. She told her grandmother and her sister, who was also at home at the time that Dookie had

raped her. She did not tell her mother immediately. She was afraid to do so because her mother had always warned her not to go to men's homes. That night Dookie spoke to her by telephone and apologized to her. He said that he would not have had sex with her if he knew that she was a virgin.

[8] The complainant further testified that sometime in May 2003 she confronted Dookie at the home of her stepfather. In his presence she told her mother and stepfather that Dookie raped her on 8<sup>th</sup> April 2003. In response to her mother's suggestion that she might have been pregnant, Dookie asked her mother to take her to be tested. He told her mother then that if she was pregnant he raped her but if she was not pregnant he did not rape her. On 23<sup>rd</sup> May 2003 her mother took her to the CID. She was sent to do a medical test and later went to the Gros Islet Police Station where she gave a statement to the police.

[9] The complainant's grandmother testified that on 8<sup>th</sup> April 2003 she was at her home washing dishes when the complainant came crying and told her that the boy that was always calling her on the telephone raped her. The complainant was trembling and told her (the grandmother) that she did not think that he would have done that to her. The complainant asked her not to tell her mother. The grandmother said that around that time she was attending to her mother who was very ill. She (the grandmother) was crying everyday and night so that when the complainant's mother came to the house she forgot to inform her about the matter. She did not speak to the police either, because of the time and energy that she expended on the care of her mother.

[10] The complainant's sister testified that on 8<sup>th</sup> April 2003 she lived at her grandmother's home. She saw the complainant coming from the bathroom and crying. The complainant told her that she had lunch with Dookie at Gros Islet after which they took a bus to travel to Castries. On the way, Dookie stopped the bus. She got off the bus with him. She followed him to his home. Since there was no furniture in the house she went to his room, sat on his bed and he raped her. She

(the complainant's sister) confirmed the complainant's testimony that she saw Dookie at her stepfather's home in May 2003, in the company of her mother, stepfather and the complainant. She informed Dookie that the complainant told her on 8<sup>th</sup> April 2003 that he had raped her. Dookie just stared at her.

[11] The complainant's mother testified that she did not know Dookie prior to April 2003. During the month of May 2003 she spoke with him at his workplace. She informed him of the details of the complainant's allegation that he raped her. Dookie smiled, denied the allegation and said that the complainant had a lot of problems. Her other daughter also recounted to Dookie the details of the allegation that the complainant had made to her on 8<sup>th</sup> April 2003 that he had raped her. She (the mother of the virtual complainant) said that in response to her statement to Dookie that the complainant could have been pregnant, Dookie suggested that the complainant should have a pregnancy test and if she was pregnant, he did it, but if she was not, he did not do it. She went to the CID with the complainant on the following day. In cross-examination she said that throughout the conversation with Dookie he denied that he raped the complainant. She said that Dookie told her that the complainant had told him that she was not a virgin, but when he started having sex with her he realized that she was a virgin and he stopped. She testified that she always warned her daughters not to go to men's homes or go out with them.

[12] The evidence of Dr. Marius, who examined the virtual complainant on Friday 23<sup>rd</sup> May 2003, was that he found no scratch marks or bruises on her body. Her hymen was no longer intact and the remnant was not bruised or swollen. The introitus and the vagina had been stretched. He said that this could have been caused by sexual intercourse. He concluded that she was no longer a virgin and there was no sign of pregnancy. He did not think that there was recent or frequent penetration.

## Dookie's case

- [13] In his statement under caution, which he gave at the time of his arrest, Dookie said that the virtual complainant told him that she was 17 years old. She also told him that she was not a virgin. He kissed her and she said nothing. He then kissed her for about 2 minutes and she did not respond: she was frozen. He therefore enquired again whether she was a virgin and she said that she was. He asked her why she had lied to him that she was not a virgin when she was. He felt funny and told her that he could not trust her anymore. He left her in the room and he went to the balcony. When he returned to the room about 5 minutes later the virtual complainant was still undressed and on the bed. He told her to get dressed and he went back onto the balcony where he was for about 4 minutes when he saw her coming out. He said nothing to her and she left.
- [14] According to the statement, the complainant called him the following day and asked whether he was okay. He told her that he was upset because of the lies that she told him. He had given his telephone to his girlfriend and the complainant kept sending text messages to the telephone. His girlfriend told the complainant that she was Dookie's girlfriend. About 2 or 3 weeks later the complainant's parents spoke with him at his workplace. They told him that the complainant was not feeling well and asked him what had happened between them. He subsequently visited their home because they told him that they wanted to discuss what was happening. On his last visit to that home the complainant's mother told him that the complainant had put the incident behind her and was interested only in her schoolwork. Sometime after that visit the complainant's cousin asked him whether he knew what was happening and what the complainant was saying about him. He paid no heed to what they said because he had already spoken to the complainant's parents. He denied that he ever had sexual intercourse with the virtual complainant.



- [15] In his evidence at the trial, Dookie confirmed that on 8<sup>th</sup> April 2003 he called the complainant and invited her to go to Castries with him. They met in Castries. First he went for a haircut. He proceeded to purchase items that he needed. The complainant was with him all the time. He went to play video games at Game Hunter. They then went to the bus stand. He told her that he was going home. She said that she had no problem going with him. They stopped to have lunch and then boarded a bus. He said goodbye to her because he was not returning to Castries. She told him that she wanted to see where he lived. He therefore stopped the bus at Mongiraud and she accompanied him home.
- [16] Dookie testified that upon reaching home Esther Eledore's little son was sleeping. He had previously called her and told her that he was bringing a friend home. When he arrived she was in her room, but his girlfriend was not there. He went into a bedroom and changed his clothes. He put on a brown shirt and his favorite blue jeans. He saw the complainant standing outside so he invited her to come into his bedroom because she looked uncomfortable around Eledore's son. There was a mattress on the floor of the bedroom, but there were no furniture or chairs. There was only a small table with his personal effects and a small CD player with small speakers, which did not play loudly. He put it on because Eledore was in the house and he did not want to disturb her or awake her son.
- [17] Dookie further testified that the complainant sat on the mattress and he sat next to her. They chatted for about 4 or 5 minutes. He leaned over slightly to her to try to kiss her, and waited for her response. She tilted her head towards him. They kissed, and at one point his tongue was inside her mouth. He then put her tongue into his mouth. He then kissed her on the neck and asked her to lie on her back. He lifted the barrel top that she was wearing and her bra and started to suck her breast. He paused for awhile and asked her how she felt about it. She said it was okay: kind of nice. He continued to suck her breast again after about 3 minutes. He touched her neck and bot and waited for a response. He did not want to

overstep his bounds because he is a sensitive person who does not like anyone to shout at him. He would only go as far as a person is interested in going.

[18] Dookie testified that when the complainant said nothing and made no gestures or movements he asked her whether she had done this before. She did not answer. He asked 3 times whether she was a virgin. She did not answer. He reminded her that she had said that she was not a virgin so what was up with her. He asked her again whether she was a virgin and she said yes. He got upset and told her off. He went up to the balcony and stayed there for about 5 minutes hoping that she would leave. He went back to the bedroom. She was still lying there without her tops on. He realized that it was getting close to 5 pm when his girlfriend usually left work. He asked the complainant to leave because her mother would be asking for her. He went back into the balcony. She came out from the room, approached him in the balcony and asked him for a comb and mirror. He gave her the comb, pointed her to the bathroom where the mirror was and went back to the balcony. She walked out after she finished. They said nothing to each other.

[19] Dookie further testified that on 9<sup>th</sup> April 2003, the complainant called him and said to him "hi, what's up?" He responded "you and your stories; leave me alone". She asked what he was going to do. He told her that he did not know, but she can do whatever she wanted with herself. Some 3 weeks later when he was at work the security officer indicated that he had visitors. He went outside and saw the complainant's stepfather and mother. They informed him that the complainant alleged that he had sex with her and now he is not speaking to her. That surprised him. He denied that he had sex with her. He arranged to meet them at their home.

[20] Dookie's account of what occurred at that meeting was the complainant's parents asked him what was happening between him and the complainant. He said that they were good friends. They indicated that because of the allegation that he had raped the complainant whether he would marry her if she was pregnant. He was

shocked at the mention of pregnancy when he knew that he did not touch the complainant. When her stepfather then mentioned a pregnancy test again he sarcastically remarked that if the complainant was pregnant, he did it, and if she is not pregnant leave him alone. At this point his girlfriend called him by telephone. He was already upset and so he told the complainant's parents that his real woman was calling him. Subsequently his girlfriend informed him that the complainant was calling and sending text messages to the phone which he had given to her (Shanna).

[21] In cross-examination, Dookie admitted that he had in the past taken girls whom he liked to his home because he needed their company. He insisted that the complainant was not reluctant to go into his house. He said that he did not sit on the balcony or in the living room. He reiterated that while he sat beside the complainant on the bed he kissed her and made advances towards her, by rubbing her back and asked her to lie down.

[22] However, Dookie denied certain allegations made in the evidence against him. He denied that he had intended to become intimate with the complainant. While he admitted that he sucked her breast for awhile and was getting her in a mood, he denied that he did it for the purpose of engaging in sexual intercourse. He also denied that he locked the door once he entered the house. He further denied that he had turned on the stereo loudly so that no one would hear what was happening in the bedroom. He also denied that he told the complainant's mother that he started to have sex with her and stopped. He denied that the complainant was fighting and struggling with him or that he inserted his penis into her vagina. He insisted that he did not betray her trust in him by having sexual intercourse with her without her consent. He insisted that he did not rape the complainant and suggested that she was jealous because she found out that he had a girlfriend.

[23] Esther Eledore testified that Dookie rented quarters at her house. She only knew him to have one girlfriend and that was Shanna. She only accepted him as her

tenant because she knew him to be a quiet and disciplined person. She had made it quite clear to him at the time when he was moving in that she was a single mom and would not therefore accept loud music or “different women” at her home. As far as she was aware he only had a small radio set to which he added 2 tweeters (very small speakers). While she was at home on 8<sup>th</sup> April 2003 she heard no fighting or screaming in her house. In cross-examination, Ms. Eledore testified that between 4:15pm and 5:30pm on 8<sup>th</sup> April 2003 she was in her bedroom which is opposite Dookie’s bedroom. She only heard Dookie speaking with a girl whom he had brought home.

- [24] Shanna Compton testified that she did not know Dookie to be a womanizer or the type of person who forced himself upon a female during their 6 year relationship. She lived with him since her mother died.

#### Good Character Directions

- [25] In **Troy Simon**,<sup>8</sup> I stated<sup>9</sup> that the entitlement to a good character direction will ordinarily be triggered after the defence raises the point “distinctly”, by evidence of the good character of the accused and establishing the absence of any prior criminal record by evidence or cross-examination. In **Troy Simon**, this court further stated that the rationale for a good character direction, in an appropriate case, is that it is relevant to the credibility of an accused person and to the issue of the likelihood or propensity that he would commit the offence in question. This court also noted that the exception to this rule is that even where the issue is not raised the accused will be entitled to a good character direction in rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused. This court further noted<sup>10</sup> that the failure to give a good character direction will not always be fatal to a conviction. It would not be fatal, for example if an appellate tribunal is of the view

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<sup>8</sup> Supra, note 1.

<sup>9</sup> At paragraph 4 of the judgment.

<sup>10</sup> At paragraph 5 of the judgment

that the jury would still have convicted the accused even if the judge gave a good character direction.

[26] Mr. Mondesir, learned counsel for Dookie, submitted that Dookie was entitled to the benefit of a good character direction. This, he said, was because at the trial defence counsel raised the issue of Dookie's good character distinctly. He said that counsel did so when he elicited from Dookie's girlfriend that from her knowledge of Dookie's character and attitude, she did not know him to be a person who would force himself upon a female<sup>11</sup>. Mr. Mondesir further submitted that the issue was also raised when in his evidence in chief; Dookie stated that in circumstances such as those that obtained at the time of the incident on 8<sup>th</sup> April 2003, he would not have gone any further than the interest that the virtual complainant showed.<sup>12</sup> Mr. Mondesir relied on the enunciation of the principles relating to raising good character informally by this court in **Johnson Thomas v The Queen**<sup>13</sup> in which the appeal was allowed on the ground that the trial judge erred by not giving a good character direction when the accused had provided evidence that tended to show that he was of good character.

[27] In **Johnson Thomas**, this court noted that in **Brown v R**<sup>14</sup> Lord Carswell stated that the judge "not only had no duty to raise the issue of good character but would have been ill advised to mention the appellant's character unless he was given information from which he could properly and safely do so." This court stated that the authorities therefore establish that it is the duty of counsel to raise the issue by eliciting the evidence and canvassing the need for a good character direction with the judge. However, we went on to consider cases in which the issue was either not raised or was raised informally. We referred to **Thompson v R**<sup>15</sup> in which Lord Hutton stated that the duty of a judge to give a good character direction is not analogous to the duty to bring to the attention of the jury a possible defence not

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<sup>11</sup> See the exchange at page 97 of the record dated 6<sup>th</sup> February 2007, in the evidence of Shanna Compton

<sup>12</sup> See pages 33-34 of the Record of Appeal dated 6<sup>th</sup> February 2007.

<sup>13</sup> St. Lucia Criminal Appeal No. 7 of 2006 (14<sup>th</sup> May 2007.).

<sup>14</sup> [2005] UKPC 18. See paragraphs 35-38.

<sup>15</sup> [1998] A.C. 811, at 844.

relied on by defence counsel. This, according to Lord Hutton, was because that duty only arises where evidence which gives rise to that defence has been given in the trial and is before the jury. Relying on this last statement, this court observed that it is the evidence that is given that determines whether the judge should direct on an issue. We noted that in **Thompson** good character was not raised and there was no evidence as to character, but that it was raised in **Johnson Thomas** by the appellant himself in his evidence. We further noted that **Gilbert** makes it clear that absence of previous conviction is not synonymous with good character because a person may have no previous conviction and still be a person of bad character.<sup>16</sup> This court concluded that good character is not raised only by evidence of no previous conviction but by eliciting or presenting evidence of facts that show good character.

[28] Mrs. Charles-Clarke accepted that Dookie had no previous convictions. She submitted, however, that he was not entitled to a good character direction because defence counsel did not raise his character distinctly. She submitted, alternatively, that credibility was not at issue in this case, as it was, for example, in **Patrick Lovelace v The Queen**,<sup>17</sup> because the case for the prosecution was consistent, cogent and reliable. I agree that it is. In **Patrick Lovelace**, this court allowed an appeal against a murder conviction, *inter alia*, on the ground of the failure of the trial judge to give a good character direction. Additionally, credibility and propensity were seriously at issue. The evidence of the only eyewitness to the murder, who was the participant in the crime was riddled with serious inconsistencies. She had also given inconsistent statement to the police in which she variously implicated and exonerated the appellant. Mrs. Charles-Clarke also submitted that there was evidence of propensity in that Dookie admitted that he took girls to the bedroom he shared with his girlfriend when she was absent and said that he is a Casanova and has an eye for the ladies. He also told the court that he thought that the complainant wanted him.

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<sup>16</sup> At paragraph 21.

<sup>17</sup> Saint Vincent & The Grenadines Criminal Appeal No. 33 of 2004 (9<sup>th</sup> October 2006).

[29] On the other hand, Mr. Mondesir submitted that the defence had sufficiently raised Dookie's good character from his (Dookie's) evidence that he is not the type of person who would force himself on a woman to have sex with him and on Ms. Eledore's evidence that she knew Dookie to be a quiet person. Mr. Mondesir further submitted that the evidence to which the learned Director referred was not evidence of the type that rebutted the evidence of Dookie and Ms. Eledore so as to override his entitlement to a good character direction.

[30] My view is that the defence faltered at the first hurdle at the trial and Dookie was not entitled to a good character direction. This, in my view, was because the trial judge could reasonably have concluded that the evidence of Dookie and Ms. Eledore, on which Mr. Mondesir relied, provided insufficient ground on which to find that the defence had raised Dookie's character "distinctly". Had it been raised, "distinctly", Dookie's character would have been put in issue and that would have entitled the prosecution to elicit evidence of bad character. There is no evidence that Dookie's character was put in issue in that manner. Significantly, defence counsel did not raise it as an issue in his address to the jury. Additionally, defence counsel failed to invite the trial judge to give the relevant direction when the judge inquired of him, at the end of the summation, whether he (the judge) had omitted any direction. I do not therefore think that the judge could be faulted for not giving the good character direction. In the premises, I would dismiss the appeal against conviction.

### **Appeal against Sentence**

[31] Section 1098 of the Criminal Code 2004, which is under the rubric "procedural requirements for custodial sentences", states:

"1098.-(1) Subject to subsection (2), a Court shall obtain and consider a pre-sentence report before forming any such opinion as is mentioned in subsection (2) of either section 1096 or section 1097.

(2) Where the offence or any other offence associated with it is triable only on indictment, subsection (1) does not apply if, in the

circumstances of the case, the Court is of the opinion that it is unnecessary to obtain a pre-sentence report.

(3) In forming any such opinion as is mentioned in subsection (2) of either section 1096 or section 1097 a Court -

(a) shall take into account all such information about the circumstances of the offence (including any aggravating or mitigation factors) as is available to the Court; and

(b) in the case of any such opinion as is mentioned in paragraph (b) of that subsection, may take into account any information about the offender which is before the Court.

(4) A custodial sentence which is passed in a case to which subsection (1) applies is not invalidated by the failure of the Court passing sentence to comply with that subsection but any Court, on any appeal against such a sentence -

(a) shall obtain a pre-sentence report if none was obtained by the Court passing sentence; and

(b) shall consider any such report obtained by it or by the Court passing sentence.

(5) A "pre-sentence report" in this Sub-Part means a report in writing which is made by a probation officer with a view to assisting the Court in determining the most suitable method of dealing with an offender."

[32] I considered this provision in **Mervin Edwards aka "SHARK" v The Queen**<sup>18</sup> and held that the failure of a trial judge to obtain a pre-sentence report before sentencing a convicted person to a custodial sentence does not invalidate the sentence because of the provisions of Article 1098(4) of the Criminal Code 2004. I noted, however, that section 1098(4)(a) and (b), however, mandates this court to obtain and consider such a report before passing sentence.<sup>19</sup> I therefore propose that directions should be given for the preparation of a report and for counsel for the parties to provide written submissions thereon in order to assist this court to determine the sentence which should be issued in this case.

### Order

[33] Premised on the foregoing, the order that I propose is as follows:

(1) I would dismiss the appeal of Dwight Dookie and affirm his conviction.

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<sup>18</sup> St. Lucia Criminal Appeal No. 1 of 2006 (29<sup>th</sup> January 2007).

<sup>19</sup> See paragraph 31 of the judgment.



- (2) For the purpose of assisting this court to determine the appeal against sentence, the Probation and Parole Services Department of the Ministry of Home Affairs shall prepare a Probation Officer's Pre-sentence Report and forward a copy of the said Report to this Court on or before Monday the 31<sup>st</sup> day of December 2007.
- (3) The Probation and Parole Services Department shall also send a copy of the said Report to the Registrar of the High Court of St. Lucia, as well as to Mr. Leslie Mondesir and Mr. Lorne Theophilus, Counsel for the appellant; to Mrs. Victoria Charles-Clarke, the Director of Public Prosecutions on or before the 31<sup>st</sup> day of December 2007.
- (4) Counsel for the Parties shall file and serve written submissions on or before Monday the 14<sup>th</sup> day of January 2008.

**Hugh A. Rawlins**  
Justice of Appeal

I concur.

**Denys Barrow, SC**  
Justice of Appeal

I concur.

**Ola Mae Edwards**  
Justice of Appeal [Ag.]