EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP 2008/005

BETWEEN:

THERESA ANNE MARIE JUSTIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]

Appearances:

Ms. Wauneen Louis-Harris for the Appellant
Ms. Victoria Charles-Clarke (Director of Public Prosecutions)
for the Respondent

2011: December 15;
2012: June 26.

Criminal appeal against conviction and sentence – Murder – Credibility of appellant – Jury not given good character direction – Evidence of defendant's good character not adduced by defence counsel at trial – Whether failure to do so fatal to fairness of trial or safety of conviction – Inadmissible evidence – Sections 52 and 72 of the Evidence Act, Cap. 4.15 – Whether sentence excessive

The appellant had worked for the deceased for some time, providing him with household and laundry services. She had also developed a sexual relationship with him. On Sunday, 30th January 2005 the deceased was attacked at his home. A friend discovered him in the late afternoon of that same day, lying in a chair with multiple head injuries. He died a few days later.

The Crown's case depended mainly on the evidence of the appellant's nephew, who stated that he had seen the appellant in the balcony of the deceased's house on the day

the deceased was attacked. He said that the appellant came over to him and told him that she had been in an altercation with the deceased and that she had hit him on the head with a radio. The pathologist who conducted the post-mortem examination testified that the deceased's injuries were consistent with blunt force trauma. There were no eyewitnesses to the murder and neither was there any forensic evidence linking the appellant to the crime. During the trial, defence counsel did not adduce evidence of the appellant's good character, and the trial judge did not give the jury a good character direction. The appellant was found guilty of murder and sentenced to 10 years imprisonment.

The appellant appealed against her conviction on the grounds that: the decision was not supported by the evidence; the trial judge erred in allowing inadmissible evidence to be admitted before the jury; the appellant's case was not properly put before the jury; and the verdict was unsafe and unsatisfactory. In relation to sentence, the appellant contended that the sentence of 10 years was excessive.

Held: dismissing the appeal and affirming the appellant's conviction and sentence, that:

1. The omission of a good character direction is not necessarily fatal to the fairness of a trial or the safety of a conviction. Much may turn on the nature of and the issues in the case, and on the other available evidence. In the instant case, the jury would inevitably have convicted the appellant even if a good character direction had been given. It cannot be said that the verdict of the jury was unsafe or unsatisfactory, or unsupported by the evidence.

   Jagdeo Singh v State of Trinidad and Tobago [2006] 1 WLR 146 applied.

2. The prosecution not producing in court a written record of the confrontations conducted by the police would not have precluded the reception of oral evidence of the confrontations or make the oral evidence inadmissible.

   R v Francis (2009) 74 WIR 108 applied.

3. The learned judge adequately conveyed to the jury the fact that there was an absence of forensic evidence in support of the Crown's case. From the summation, the jury would have been left in no doubt that there was no forensic evidence linking the appellant to the crime.

4. The learned judge did not err in principle in sentencing the appellant having taken all matters into consideration including the absence of antecedents and the time she had already spent on remand. There is no proper basis for disturbing the sentence imposed.

JUDGMENT

[1] BAPTISTE JA: On 3rd July 2008 after a trial before Benjamin J and a jury, Theresa Anne Marie Justin ("the appellant") was convicted for the murder of William Andrew ("the deceased") and sentenced to 10 years imprisonment. The appellant appeals against her conviction and sentence.

Background

[2] The deceased lived at Waterworks Road, Castries in 2005. The appellant worked for the deceased for about four years, taking care of his sick and wheelchair-bound wife. He paid her $500.00 dollars a month. The appellant treated the deceased well. At one time he was her sole support, giving her money she relied upon for supporting herself and her children. Upon the expiration of his wife, the appellant and her children moved in with the deceased. The appellant and the deceased had also developed a sexual relationship. Though the appellant later moved out of the house, she continued to provide household and laundry services for the deceased.

[3] At about 5:00 p.m. on Sunday, 30th January 2005, the appellant was found lying on a chair at his home with multiple head injuries. He was taken to the Victoria Hospital and succumbed to his injuries on 7th February 2005. Dr. Stephen James King, a pathologist, conducted a post-mortem examination on the deceased on 10th February 2005 and observed a number of contusions (bruises) mainly to the head and front of the neck. There was a large contusion to the left frontal and temporal areas of the head and associated soft tissue hemorrhage. There was a contusion to the right temporal area with underlying hemorrhage. Dr. King concluded that the cause of death was brain damage with intracranial and intracerebral hemorrhage, that is, bleeding inside the skull and brain tissue. Dr. King opined that the injuries were consistent with blunt force trauma and the most significant force appeared to have been inflicted to the left side of the head. Dr. King stated that an object like the tape recorder shown to him in court could have caused the injuries.

[4] The prosecution's case depended heavily on the evidence of Dave Justin, the appellant's nephew. Justin testified that on 30th January 2005 he visited his sister who lived about 300 yards behind the deceased's house and left at about 11:00 a.m. While walking down the road by the deceased's house, he saw the appellant on the balcony of the house. The appellant asked him where he was coming from, and he replied, by his sister. The appellant walked with him down the road. Justin inquired as to the purpose of the visit to the deceased's home, to which the appellant replied that she came to collect money the deceased had for her. She told Justin that the deceased intended to have her on "maji" (nonsense) for her money. She further told Justin that she had knocked out the deceased with a radio on his head but she does not know whether he died. Justin asked the appellant why she did that and the appellant replied that it was her money that she wanted, so that's why she did that. Justin and the appellant then parted company. In cross-examination, Justin insisted that the appellant told him that she had hit the deceased on the head with a radio. Another prosecution witness, Caesar Maglorie, gave evidence that about 2:30 p.m. that same day, 30th January 2005, he saw the appellant sitting on a chair on the left side of the deceased's house. The appellant called out to him, he responded, and went along his way. He did not see the deceased at the time. Gregory Timal gave evidence that he discovered the deceased lying in a chair when he went to the deceased's home at about 5:30 p.m. that day to play a game of draughts. The deceased's face was swollen and there was blood on his mouth and on the wall and floor. There was also a double tape-deck radio on the floor about seven feet away.

[5] On 24th February 2005, the police conducted a confrontation between the appellant and one Samantha Annius during which Samantha Annius stated that she saw the appellant arrive and leave the house of the deceased between 11:00 a.m. and 12:00 p.m. on Sunday, 30th January 2005. A confrontation was also conducted between the appellant and Justin on 9th March 2005 in which Justin stated that he met the appellant on Waterworks Road "after ten and minutes to eleven" and the appellant told him that she had just come from the deceased's

home to look for money and he said he did not have any so she struck him with a radio on his head. Anne Maria Arthur, the deceased's sister, related an incident involving a verbal confrontation occurring on 3rd May 2005 during which she accused the appellant of killing her brother. The appellant asked her whether she knew that the deceased was making "bomb" and also told her that the deceased gave her (the appellant) a ring and a fridge by making "bomb". Anne Maria understood "bomb" to mean engaging in sex for reward. Anne Maria also stated that the appellant said she hit the deceased on his head with a radio.

[6] The appellant gave evidence on oath basically stating that she went to the home of the deceased at about 11:00 a.m. on Sunday, 30th January 2005 and remained there for about 15 minutes, then left. They spoke about a panty, belonging to the appellant that was missing from the house and a packet of salt-fish which the deceased accused her of taking. She denied striking the deceased with a radio or causing any harm to him. The appellant admitted meeting Justin near the deceased's house but denied telling him that she had struck the deceased with a tape on his head and she did not know whether he had died. The appellant denied telling Justin that she had gone to look for money and that the deceased was giving her "maji" (nonsense) for her money. The appellant also denied telling Anne Maria Arthur that she had struck the deceased with a radio on his head because he did not pay her "bomb" money. The appellant stated that she had no problem with Justin and insisted that she did not hit the deceased or return to his home.

[7] The appellant testified that at the time of his death she was not working for the deceased and that when she went to the deceased he did not owe her any money. The appellant stated that on 30th January 2005, she visited the home of her children's father and he gave her $250.00. It was from there that she went to the deceased's home, arriving there at around 11 o'clock. In cross-examination, the appellant reiterated that she got money from her children's father and denied that she went to the deceased to collect money and stated he did not owe her any

money. The appellant also denied that the conversation with Justin ever took place but could proffer no reason as to why he would have made up that story.

[8] There was no eyewitness account of the murder and no forensic evidence linking the appellant with the crime. It is evident that Justin's evidence was central to the success of the prosecution's case and faced with the sworn evidence of the appellant, the issue of credibility was critical. The learned trial judge was patently conscious of the important role credibility played in the case. The judge told the jury that:

> "It becomes important at this trial to bear in mind that you must feel sure of the guilt of the Accused because at the end of the day, you're being asked to decide whether to believe Dave Justin in preference to the Accused. And so, your deliberations as to the credibility of the witnesses will be of extreme importance in this matter."[1]

In that vein, the learned judge also told the jury that Dave Justin, the appellant's nephew, was the Crown's main witness and it was important for them to determine his credibility – if he is speaking the truth.

[9] The appellant had no previous convictions. Inexplicably, the appellant's then counsel, Mr. Felix, did not bring out that fact during the trial. The appellant did not therefore have the benefit of a good character direction. During the course of the appeal hearing, Ms. Louis-Harris, the appellant's counsel, made an oral application to amend the grounds of appeal to include the absence of a good character direction. Although the application to amend was not granted, the Court decided to consider the issue of the absence of a good character direction under the ground of appeal that "the verdict is unsafe and unsatisfactory".

Grounds of Appeal

[10] The safety of the appellant's conviction is assailed on the grounds that: (1) the decision is not altogether supported by the evidence; (2) the learned trial judge

[1] See p. 32 of the Transcript of Trial Proceedings for 3rd July 2008.

allowed inadmissible evidence to be admitted before the jury; (3) the appellant's case was not properly put before the jury; and (4) the verdict is unsafe and unsatisfactory. With respect to sentence, the appellant contends that the sentence is excessive.

Grounds of unsafety of verdict (good character) and evidence not supporting decision

[11] I will address the grounds of unsafety of conviction and evidence not supporting the decision together. I will begin by considering the issue of good character. In Teeluck and John v The State,[2] the applicable principles were encapsulated in the following 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.
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> (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. [I note here that in *Vijay Bhola v The State* [2006] UKPC 9, Lord Brown of Eaton-under-Heywood pointed out at paragraph 17 that the statement in the last two sentences in proposition (ii) above, needs to be applied with some caution as the cases of *Bally Sheng Balson v The State* [2005] UKPC 2, *Brown (Uriah) v The Queen* [2006] 1 AC 1 show that the cases "where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so 'rare'."]

[2] [2005] UKPC 14 at para. 33.

(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 and Headley v The State* [2002] UKPC 52, para 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself … ."

[12] In Errol Arthurton v The Queen,[3] Dame Sian Elias stated at paragraph 4:

> "Once absence of previous convictions is established, the trial judge is under a duty to direct the jury as to its relevance. The jury must be directed that the accused's good character is relevant in considering whether it is likely that he would have committed the offence; and, where the credibility of the accused is in issue (either because he gives evidence or because he has made an exculpatory statement), the jury must also be directed that his good character is relevant in considering whether he is to be believed: see *Barrow v State* [1998] AC 846, applying *R v Vye* [1993] 1 WLR 471 and *R v Aziz* [1996] AC 41."

[13] In Gerald Muirhead v The Queen,[4] the Board stated at paragraph 34:

> "… it is important that a defendant who is of good character in the legal sense should be given the benefit of the direction which is now standard in the criminal process in England and Wales, and that where the defendant is entitled to such a direction and likely to benefit from it, it is the affirmative duty of his counsel to ensure that the court is made aware of

[3] [2004] UKPC 25.
[4] [2008] UKPC 40.

> his character, through direct evidence given on his behalf or through cross-examination of the prosecution witnesses. The judge's duty to give the direction only arises when such evidence is before the court: *Thompson v The Queen* [1988] A C 811."

The Board noted at paragraph 35 that the two limbs of the good character direction were directed firstly to the credibility of the defendant, and secondly, to his propensity to commit a crime of the nature charged. If the defendant does not give evidence, but merely makes an unsworn statement, the importance of the credibility direction is reduced, but the direction may still be material in respect of propensity. Also, in Peter Stewart v The Queen[5] the Board made the point that the credibility limb of the direction is likely to be less helpful in a case where a defendant chooses to make a statement from the dock (or chooses simply to rely on pre-trial statements) than when he has given sworn evidence.

[14] In delivering the judgment of the Board in Director of Public Prosecutions v Selena Varlack,[6] Lord Carswell stated at paragraph 26 that it is now well established that in any case where the defendant is of good character, in the sense of having no previous convictions, he or she must have the benefit of an appropriate direction, covering both credibility and propensity.

[15] In the present case, the appellant, who had no previous convictions, gave evidence on oath. The appellant's then counsel failed to elicit in evidence the fact of her good character and therefore failed to procure the benefit of a good character direction. The appellant's good character was only ventilated at the sentencing hearing from her antecedent report. No reason has been advanced to explain the failure of defence counsel to adduce evidence of good character at the trial. As the appellant's good character was not raised by the defence at trial, the learned judge could not be faulted for not giving a good character direction. The question which arises, concerns the effect of the absence of a good character direction on the fairness of the trial and the safety of the conviction. Can this Court

[5] [2011] UKPC 11 at para. 15.
[6] [2008] UKPC 56.

be satisfied that the jury would necessarily have reached the same verdict even if they had been directed as to the appellant's good character? The absence of a good character direction is not necessarily fatal and does not automatically lead to the quashing of a conviction. The authorities show that the critical factor is whether it would have made a difference to the result of the case if a good character direction had been given.[7] It is necessary therefore to consider all the facts in the case and the evidence against the appellant to determine what difference, if any, the giving of a good character direction would have made to the verdict.[8] Before doing so, it would be instructive to consider the approach of the Privy Council in cases where good character direction was not given in whole or in part.

[16] In Bally Sheng Balson v The State, Balson first met the deceased about three years before her death. They became friendly and started a relationship. After a while he went to live with the deceased and her three young children at her home. The deceased was killed in her bedroom. Her neck was broken and she was asphyxiated. There were no eyewitnesses to the killing and no scientific evidence linking Balson to the deceased's death. The evidence against him was circumstantial. Despite the fact that Balson had no previous convictions, defence counsel did not lead evidence as to his good character; hence a good character direction was not given. No satisfactory explanation was given for counsel's failure.

[17] The Board opined that a good character direction would have made no difference to the result of the case. The Board stated that the only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder, and observed that all the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or

[7] See Vijay Bhola v The State [2006] UKPC 9 at para. 17 and Director of Public Prosecutions v Selena Varlack [2008] UKPC 56 at para. 27.
[8] See Samuel Robie v The Queen [2011] UKPC 43, at paras. 11 and 20.

that anyone else had a motive for doing so. In these circumstances the Board concluded that the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence.

[18] In Jagdeo Singh v State of Trinidad and Tobago,[9] the appellant, a lawyer, was convicted of two counts of corruption. One of his grounds of appeal to the Board was that his conviction was vitiated by an inadequate good character direction. The complaint was that the direction did not address the credibility limb. The Board noted at paragraph 21 that as a practicing lawyer with no criminal convictions, no recorded blemish on his professional reputation and a commendable record of involvement in community activities, the appellant was entitled to the benefit of a full good character direction. Such a direction should have related to his credibility as a witness and to the lack of any propensity to commit crimes of the kind charged against him.

[19] The Board observed the particular importance of the credibility ingredient since the crucial issue for the jury's decision concerned the conversation between the appellant and one Shelly Ann Basdeo. The issue arose in this way: Basdeo had retained the appellant to represent Rudolph John (her partner) in respect of drug trafficking and marijuana possession charges. In November 1999 there was a meeting at the Magistrates' Court between Basdeo and the appellant (no one else was present). According to Basdeo, the appellant said that John would get bail but she (Basdeo) had to pay the sum of $40,000.00 for him to get it and the money had to be paid to him (the appellant) for him to give to the magistrate and the police prosecutor. She (Basdeo) wanted time to raise the money but the appellant pressed her for an answer, saying that he had to tell the magistrate whether or not she would pay the money. She agreed to pay the money. The appellant denied that any such conversation took place. The appellant said he

[9] [2006] 1 WLR 146.

told Basdeo that he wanted to be paid the balance of his fee of $40,000.00 and would make an application for bail when he had been paid.

[20] The jury had to decide whether they believed Basdeo, a woman of admittedly bad character, or whether the appellant's account might be true. The learned judge at the trial addressed the jury on the propensity limb of good character but not on the credibility limb. The Board stated at paragraph 20 that:

> "It may be that the jury would incline to regard a practising lawyer as a man of probity whose word was prima facie worthy of belief. But the belief of lawyers in their own probity is not universally shared, and there are those who believe them to be capable of almost any chicanery or sharp practice. There can be no doubt that the appellant was entitled to the benefit of a conventional direction on credibility, and such was not given."

At paragraph 25, the Board dealt with the judge's omission of the credibility limb of the good character direction in the following terms:

> "The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated. This was accordingly a case where, depending on the circumstances, the 'proviso' in section 44(1) of the Supreme Court of Judicature Act might have been applicable. In considering whether it was, the Court of Appeal was right to consider whether, properly directed, the jury would 'inevitably' … or 'without doubt' … have convicted."

The Board did not accept that the test was satisfied in the present case and also opined that the Court of Appeal's reasons did not support its conclusion that it was. The Board observed that counsel for the State found himself unable to support the Court of Appeal's reasons and noted that the reasons were open to obvious criticisms. Among the criticisms the Board levied at the Court of Appeal was that it was not satisfactory for that Court to observe that the "only divergence" between the appellant and the prosecution witnesses was that he claimed the money represented fees when this difference was fundamental. The Board concluded at paragraph 26 that it was not a straightforward case and it could not be said that, properly directed on the appellant's credibility, the jury would

inevitably or without doubt have convicted. The appellant's convictions were quashed.

[21] Vidal and Thompson v The Queen[10] presented a situation where the trial judge directed on credibility but wrongly failed to direct the jury on the propensity limb of the good character direction. The Board stated in paragraph 27:

> "It was also made clear in *R v Vye, R v Wise, and R v Stephenson* [1993] 1 WLR 471,477D-G by the Court of Appeal of England and Wales … that the propensity limb of the good character direction should always be given where a defendant is of good character, even in cases where he or she does not give evidence. Where the propensity limb is not given, the court stated at p 482E that, if it is impossible to say that the jury would necessarily have reached the same verdict if they had been given the full character direction, then the conviction should be quashed. On the other hand, in a case where the evidence against the defendant was overwhelming, the appeal would be dismissed despite the irregularity: see p 484B."

The Board noted that the Crown's case depended entirely on the evidence of the eyewitness, Ms. Notice, who gave the clearest evidence that she knew the both appellants very well and had a good view of the incident which led to the death of the deceased. The real defence was that Ms. Notice was lying and had fabricated the whole story. The Board noted that the credibility of Ms. Notice was tested at length during the trial and the jury was able to assess her credibility and to measure it against that of Vidal and Thompson's alibi witnesses. The jury reached their verdict within 62 minutes of retiring. They clearly had no difficulty in being sure that Ms. Notice was a truthful witness and in rejecting the contrary evidence of the alibi witnesses as untrue. In the circumstances the Board was left in no doubt that if the propensity limb of the good character direction had been given, the jury would have reached the same verdicts. The Board agreed that no substantial miscarriage of justice had occurred as a result of the judge's failure to give a full good character direction and it was an appropriate case to apply the proviso.

[10] [2011] UKPC 12.

[22] In Noel Campbell v The Queen (Jamaica),[11] the absence of a good character direction was also addressed by the Board. Campbell was convicted of the murder of a police officer in the Coral Reef Bar. The officer sustained multiple gunshots, four to the head and one to the back of his right shoulder. Mr. Clifford Anglin who was sitting with the officer, was shot in the face but survived. He was the sole witness to the shooting. Anglin stated that he knew the appellant and had seen him that morning in and outside the Coral Reef Bar with another man. At the time that his back was turned to the appellant and the other man, he heard three shots, and he turned around to see the appellant who then shot him in the face. There were two further shots as a result of which the officer fell off his stool.

[23] Campbell's response to Anglin's account was an alibi. Defence counsel failed to adduce evidence of good character; consequently, the learned judge did not direct that the appellant's good character was relevant to the credibility of his evidence and to the propensity or likelihood of his having committed the murder of which he stood charged. The Board concluded that:

> "… on the facts of this case the credibility and reliability of Mr Anglin's identification stood effectively alone against the credibility of the appellant's denial of any involvement. This is a case where the appellant gave sworn evidence. The absence of a good character direction accordingly deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being of greatest potential significance. … The Board does not feel able to treat the absence of a good character direction in this case as irrelevant to the safety of the verdict …"[12]

The case was remitted to the Court of Appeal with a direction to quash the jury's verdict.

[24] In Samuel Robie v The Queen,[13] the appellant (Robie) was convicted of the murder of Roy Bailey. Like Noel Campbell v The Queen (Jamaica), the defence was one of alibi. The sole eyewitness (Simms) gave evidence of seeing the

[11] [2010] UKPC 26.
[12] See para. 45 of the judgment.
[13] [2011] UKPC 43.

appellant and another man attacking Bailey with a meat chopper and a stabbing weapon. Bailey had known the appellant for over thirty years and had seen him regularly. The appellant had no previous conviction and was of good character. As no evidence was given to that effect during the trial, the judge did not give a good character direction. Notwithstanding, the Court of Appeal concluded that the jury would inevitably have convicted the appellant.

[25] In deciding whether the Court of Appeal was entitled to reach that conclusion the Board stated at paragraph 20 that the case against the appellant was strong. It depended on the evidence of Simms. Simms' evidence was tested at length in the course of cross-examination. Moreover, Simms' evidence as to the nature of the attack was corroborated by the doctor's evidence about the injuries. Upon considering all the facts in the case the Board opined that the Court of Appeal was entitled to come to the conclusion that the jury would inevitably have convicted the appellant even if a good character direction had been given. The Board stated that it also would have reached that conclusion. The appeal against conviction was dismissed.

[26] In Stewart v The Queen, the appellant was convicted of murder. The principal witness for the prosecution was Ms. Minnott, who gave evidence identifying the appellant as the killer. The appellant gave an unsworn statement from the dock stating that he did not kill anyone. The appellant's counsel failed to elicit in evidence the fact that the appellant was of good character, thereby depriving him of a full good character direction. The fact of the appellant's good character emerged when his antecedent report was read at the subsequent sentencing hearing. The Board stated that the judge could not be criticized for not giving the good character direction as good character had not been raised by the defence at the trial. There was accordingly no material non-direction and no question now arose as to the application of the proviso. The Board considered that the question was whether it could be satisfied that the jury would necessarily have reached the same verdict even had they been given the full direction as to the appellant's good character.

[27] At paragraph 18, the Board expressed the view that this was a very strong recognition case and no one had ever suggested any reason why Ms. Minnott, should want to identify the appellant as the killer, if in truth it was someone else. The Board stated that the jury had ample opportunity to decide on her credibility and reliability from her lengthy evidence in the witness box and it was hardly surprising that at the end of the day they were convinced by it. The Board stated that the appellant's statement from the dock did little to refute it. The Board opined that it was a very straightforward case and it could safely be said that even had a full character direction been given, the jury would inevitably still have convicted.

[28] In the instant case, like in Balson v The State, there was no eyewitness account of the murder or scientific evidence linking the appellant with the crime and all the circumstantial evidence pointed to the appellant as the murderer. On the evidence presented, the appellant certainly had the opportunity to commit murder. On the issue of motive, if the jury accepted the appellant's uncontroverted evidence that she had visited her children's father and he had given her $250.00 before she visited the deceased that morning, it was open to them to conclude that the appellant had no motive for killing the deceased. It is of course recognised that the Crown need not prove that the appellant had a motive for committing the offence. The question was whether the appellant murdered the deceased or whether he was murdered by someone else. The crucial question before the jury was whether they could accept the evidence of Justin and reject as untrue the evidence of the appellant. The question was one of credibility as between Justin and the appellant.

[29] Earlier in the judgment I referred to the case of Singh v State of Trinidad and Tobago. A few observations can be made about that case: The Board stated that Basdeo (the key witness for the prosecution) was admittedly of bad character; the case was not a straightforward case and the Court of Appeal's reasons did not support the conclusion that if the jury were properly directed it would have inevitably convicted. The Board opined that the Court of Appeal's reasons were open to obvious criticisms. In the present case it could not be said that the critical

witness, Justin, was of bad character. Further, I am of the view that unlike Singh v State of Trinidad and Tobago, the present case is a straightforward case.

[30] The case against the appellant depended upon Justin's evidence that the appellant told him that she struck the deceased with a radio on his head and did not know whether he had died. Justin's evidence is central to the Crown's case and was tested at length in cross-examination.[14] The jury had ample opportunity to decide on Justin's credibility and reliability from his lengthy evidence in the witness box.[15] Justin's credibility was tested at length during the trial and the jury was able to assess his credibility and to assess it against that of the appellant.[16] The jury evidently believed his evidence. It is noted that unlike the situation in Singh v State of Trinidad and Tobago where the key witness (Basdeo) was of admittedly bad character, the same could not be said of Justin.

[31] Unlike Campbell v The Queen (Jamaica), the credibility and reliability of Justin's evidence did not stand effectively alone against the appellant's denial. The evidence of Mr. Timal is that when he entered the deceased's house he found the deceased lying on a chair with his face swollen and he saw a radio about 7 feet from the deceased. One may ask the question, how would Justin have known about a radio if the appellant had not told him so. Further, there is no suggestion that Justin had any animosity towards the appellant, who is his aunt, or there was any bad blood between them. In fact there is no reason as to why Justin would have made up that story about the appellant if in truth she had not told him so. He had no motive for so doing. The appellant, in her evidence could not proffer any reason why Justin would have made that statement. Further, and importantly, as in Robie v The Queen, Justin's evidence as to the nature of the attack as related to him by the appellant was corroborated by Dr. King's evidence about the injuries he observed on the deceased. Clearly, the prosecution presented a very strong case against the appellant.

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[14] See Samuel Robie v The Queen [2011] UKPC 43, at para. 20.
[15] See Peter Stewart v The Queen [2011] UKPC 11 at para. 18.
[16] See Vidal and Thompson v The Queen [2011] UKPC 12.

[32] As stated in Singh v State of Trinidad and Tobago the omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or the safety of the conviction. Much may turn on the nature of the case and the other available evidence. Looking at the trial as a whole and for the reasons stated above, I have no doubt that the jury would inevitably have convicted the appellant even if a good character direction had been given. It could not be said that the verdict of the jury was unsafe or unsatisfactory or that the evidence did not support the verdict of the jury. These grounds of appeal accordingly fail.

Ground relating to inadmissible evidence

[33] Corporal Lamontagne, the investigating officer, arranged a confrontation between the appellant and Samantha Annius on 24th February 2005 at the Criminal Investigation Department. Corporal Lamontagne gave evidence that at the confrontation Samantha Annius said that she saw the appellant enter and leave the deceased's dwelling house and return between 11 a.m. and 12 p.m. on Sunday, 30th January 2005. The appellant denied returning to the house of the deceased after leaving that day. The complaint here is that the evidence of Corporal Lamontagne in relation to the representation made by Samantha Annius and the appellant's response was inadmissible on the ground that it contravenes section 52 of the Evidence Act.[17] Ms. Louis-Harris argues that the prosecution failed to lead evidence to establish that Samantha Annius was not available to give the statement. Further, her statement was against the interest of the appellant and was hearsay evidence which did not fall within the purview of section 52 and should have been disallowed.

[34] Section 52(1) of the Evidence Act applies in criminal proceedings where a person who made a previous representation is not available to give evidence about an asserted fact. Section 52(2) states:

> "The hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise

[17] Cap. 4.15, Revised Laws of Saint Lucia 2008.

perceived the making of the representation, being a representation that was –

(a) made under a duty to make that representation or to make representations of that kind;
(b) made at or shortly after the time when the asserted fact occurred and in circumstances that made it unlikely that the representation is a fabrication;
(c) made in the course of giving sworn evidence in proceedings if the defendant, in those proceedings, cross-examined the person who made the representation, or had a reasonable opportunity to cross-examine that person, about it; or
(d) against the interests of the person who made it at the time when it was made."

[35] The Director of Public Prosecutions submits that sub-sections (1) and (2) of section 52 of the Evidence Act applies where a previous representation made in the absence of the defendant is being given in evidence and is being relied on by the prosecution to prove the truth of the asserted fact. In such a case, if the maker is unavailable, it would offend the hearsay rule and section 52 would apply. The Director of Public Prosecutions argues however, that the previous statement made by Samantha Annius was led for a non-hearsay purpose and was admissible because it was not admitted to prove the truth of an asserted fact. The previous statement was an out of court statement made in the appellant's presence and the other part was the appellant's response. The previous statement was given to establish that certain words were spoken in the appellant's presence and the appellant's reaction to those spoken words. The fact that Samantha Annius was not available to give evidence did not preclude the admissibility of the statement into evidence. The Director of Public Prosecutions submits, and I agree, that the trial judge properly admitted the evidence of Corporal Lamontagne of what was said at the confrontation between the appellant and Samantha Annius. As the Director of Public Prosecutions points out, there was no prejudice to the appellant by the evidence being led because the appellant did not deny that she had gone to the deceased's house on Sunday, 30th January 2005 but denied that she had returned. Further, at the trial, defence counsel informed the court that for tactical reasons he had no objection to the evidence being led. Having admitted the

evidence, the judge would be obliged to give the jury an adequate warning as to how to treat the statement. It was sufficient that the trial judge warned the jury that the appellant's statement was not an admission.

[36] Ms. Louis-Harris contends that Corporal Lamontagne failed to comply with the mandatory requirements of section 72 of the Evidence Act. The trial judge, contrary to section 72(7), failed to warn the jury of the non-compliance with the requirements of the section and failed to give the jury an appropriate warning about the evidence, thereby rendering the verdict unsafe. The Director of Public Prosecutions submits, quite correctly, that section 72 of the Evidence Act does not apply; hence, the requirement for compliance does not arise.

[37] Section 72 of the Evidence Act allows admissions by a defendant in criminal proceedings, subject to the satisfaction of specified conditions. The difficulty the appellant faces is that the appellant's response to Samantha Annius was a denial that she returned to the deceased's house that day. This was not an admission or confession; consequently, section 72 of the Evidence Act could not be engaged.

[38] The appellant also impugns the evidence of Corporal Lamontagne in relation to the confrontation with Justin on the ground that the note of the said confrontation was not produced in evidence before the jury. Ms. Louis-Harris contends that this evidence and the evidence of Justin on the confrontation should have been disallowed by the judge. I do not agree. The fact that a written record of the confrontations was not produced in court does not preclude the reception of oral evidence of the confrontations or make the oral evidence inadmissible.[18] I agree with the Director of Public Prosecutions that there was no need for the trial judge to warn the jury that the record of the appellant's denial that she had returned to the deceased's house that day was not produced. Further, it is noted that the jury had the benefit of hearing the oral testimony of Justin and Corporal Lamontagne of what transpired at the confrontation. Corporal Lamontagne's account was not challenged.

[18] R v Francis (2009) 74 WIR 108.

[39] Corporal Lamontagne gave evidence that he took possession of a white pair of sneakers and a pair of blue three quarter jeans trousers from the appellant's bedroom. These items were not tendered in evidence. The appellant contends that learned judge erred in allowing that evidence as it could not prove a single fact in issue and as such was highly prejudicial. I agree with the Director of Public Prosecutions that nothing suggested that these items were linked to the crime and that even if the evidence was irrelevant, its admission did not create any prejudice to the appellant. The Director of Public Prosecutions inquired of Corporal Lamontagne whether, from his investigations, he was able to ascertain whether the appellant was at the home of the deceased on the 30th January 2005; the response was in the affirmative. The appellant contends that this evidence ought to have been omitted as it was highly prejudicial. I do not agree with that contention. The appellant herself gave evidence that she was at the deceased's home that day but did not return after she left. The appellant also takes exception to the admission of photographs of the crime scene and of the injuries sustained by the deceased on the ground that their prejudicial value far outweighs their probative value. I find no substance in this contention as that type of evidence is properly admissible in law. In the premises there is no merit in the ground of appeal relating to the reception of inadmissible evidence.

Putting the defence

[40] The appellant complains that the learned judge in failing to highlight the effect of the inconsistencies in the Crown's evidence, failed to put her case properly to the jury. Ms. Louis-Harris contends that the appellant was deprived of an opportunity of an acquittal by the failure of the judge to explain to the jury the effect of the inconsistencies in weakening the case for the Crown which was based purely on circumstantial evidence, thereby making the verdict unsafe.

[41] The matters relied on in support of that ground include the inconsistency in the evidence of: (1) Dave Justin; (2) the two police officers and the pathologist in relation to the collection of urine samples from the deceased; (3) the difference in

the evidence of Mr. and Mrs. Timal concerning the location of the knife found at the deceased's home; and (4) the conflict between the evidence of Caesar Maglorie and the evidence of Corporal Lamontagne in relation to Samantha Annius. With respect to the issue of urine sample, two police officers spoke about the doctor collecting urine samples. The learned judge reminded the jury that when the doctor examined the bladder he did not find any urine and he only packaged blood samples. He made no reference to urine samples. In the scheme of things, I do not agree with Ms. Louis-Harris that this was a material inconsistency in the evidence. As the Director of Public Prosecutions rightly pointed out, the issue of urine samples was immaterial to the case. In the same vein, the differences in the evidence of Mr. and Mrs. Timal as to the location of the knife did not amount to a material irregularity and was of no real moment. The trial judge invited the jury to form their own conclusion about that evidence.

[42] Ms. Louis-Harris stated that Caesar Maglorie testified that he saw the appellant at the home of the deceased at about 2:30 to 3:00 p.m., whereas the information from Samantha Annius revealed that she saw the appellant return to the house at 11 in the morning. Ms. Louis-Harris contends that this is a material irregularity as the Crown was unable to establish beyond a reasonable doubt that the appellant was present at the home of the deceased between 2:30 p.m. and 3:00 p.m. on account of the discrepancy. The Director of Public Prosecutions correctly submitted that there was no such discrepancy in the evidence as Samantha Annius did not give a time when she saw the defendant return to the house, nor did Maglorie say that he saw the appellant return to the house. The learned judge pointed out that aspect of the evidence to the jury and warned them to be cautious in how they assessed it.

[43] Justin was the Crown's main witness and the learned judge pointed out that it was important for the jury to determine his credibility. The learned judge pointed out the inconsistencies in his evidence and properly directed the jury as to how to treat the inconsistencies. The learned judge related the inconsistencies in Dave Justin's evidence to the issue of his credibility.

[44] In reviewing the evidence of Dave Justin, the learned judge stated:

> "Now he said that his sister had told him in the morning that Mr. Andrew was at home and you'll recall that the sister Sherika Clercin said in her evidence that she … did not recall telling him that and he later went on to say that she told him that when he went back to his sister's in the evening."[19]

The learned judge also told the jury:

> "… the witness Dave Justin said that the Accused had told him that she had gone to see Mr. Andrew and he denied that what she told him is that she had gone there and that he was not there. Now this suggestion to him runs counter to what the Accused has said. She has said she went there and did in fact meet him and he denied that he had told the police that she had said to him she had gone to Mr. Andrew's home and he was not there and she had to wait for him. However, at some point he was confronted with his own Statement and he agreed that he had said that she told him that she had gone to Mr. Andrew to look for money and he was not there."[20]

[45] The learned judge also told the jury:

> "… when the Officer was cross-examined by Mr. Felix she admitted that when Dave Justin was asked in the confrontation to relate what he had heard from the Accused he was not forthright, in the words of the Officer, he did not relate the evidence to me forthrightly. Initially, he did not reveal the information and the Officer surmised that the reason why he might not have revealed, that he had an idea as to why he might not have revealed the information. And, so he had to ask him further questions to get it out of him. So you must take that into account and decide whether the fact that Dave Justin was not forthright at the confrontation has a bearing on his credibility as to what he said Theresa Justin told him and that becomes important because that is the crux of the case for the Crown."[21]

The learned judge also directed the jury that the accused gave evidence on her on behalf and they must have consideration for every aspect of what she said. The learned judge told the jury that if they believed her testimony, they must acquit her because she is saying she did not commit the act that resulted in the death of William Andrew. Further, if they were not sure about whether to believe the

[19] See pp. 42-43 of the Transcript of Trial Proceedings for 3rd July 2008.
[20] See p. 43 of the Transcript of Trial Proceedings for 3rd July 2008.
[21] See p. 55 of the Transcript of Trial Proceedings for 3rd July 2008.

appellant, they should acquit her. The judge recounted the evidence of the appellant and charged the jury that even if they disbelieved her that does not mean that they should find her guilty. They should go back to the prosecution case and examine the evidence as a whole and see whether the prosecution has satisfied them to the extent that they feel sure that the appellant is guilty of murder. It is only then they could return a verdict of guilty of murder.

[46] Ms. Louis-Harris also complains that the summation failed to emphasise the absence of forensic evidence linking the appellant with the crime. In response, the Director of Public Prosecutions submits that the learned judge's reference to the items taken from the deceased's home and the samples which were sent to Barbados for forensic analysis were adequate. Further, the learned judge referred to the forensic report and told the jury that it was clear from the report that there was no evidence of blood on any of the items.

[47] The learned judge also referred to the partially dismantled tape/radio which was presented in evidence and told the jury that there was no evidence as to how it got in that condition. The judge also pointed to the jury the absence of any fingerprints.

[48] In my judgment, the learned judge adequately brought home to the jury the absence of forensic evidence in support of the Crown's case. From the summation, the jury would have been left in no doubt that there was no forensic evidence linking the appellant to the crime. In conclusion there is no merit in the ground that the trial judge did not adequately put the defence case to the jury.

Lucas direction

[49] The appellant argues that the prosecution sought to rely on the lies of the appellant as evidence to support guilt; accordingly, the judge erred in not giving the three-fold Lucas direction to the jury. Although the learned judge may not have given the Lucas direction in the classical form, the Lucas direction was adequately brought across to the jury.

Sentence

[50] The appellant contends that the sentence imposed was excessive. The learned judge conducted a sentencing hearing and after taking all matters into consideration including the absence of antecedents opined that the offence would attract a term of 15 years imprisonment. The judge then took into account the period spent on remand and imposed a 10 year prison sentence. No error in principle can be discerned and there is no proper basis for disturbing the sentence imposed.

[51] The appeal is dismissed and conviction and sentence are affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal [Ag.]