EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0009

BETWEEN:

[1] PATRICK FACEY
[2] MICHAEL FACEY

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for the Appellants
Ms. Tiffany R. Scatliffe, Principal Crown Counsel, and Mr. O'Neil St. A. Simpson, Crown Counsel, for the Respondent

---

2014: January 12
2015: May 18.

Criminal appeal – Appeal against conviction – Wounding with intent contrary to section 163 of the Criminal Code of the Virgin Islands – Whether trial judge ought to have left alternative verdict of unlawful wounding to the jury – Whether trial judge ought to have given a good character direction in relation to appellant who exercised the right to remain silent at trial – Whether remarks by trial judge to the jury on majority verdict inappropriate – Appeal against sentence of 10 years' imprisonment – Whether sentences imposed by trial judge excessive

The appellants, Patrick Facey and Michael Facey, were both charged with unlawfully and maliciously wounding Mr. Loraine Springer with intent to cause him grievous bodily harm

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

("wounding with intent"), an offence contrary to section 163 of the Criminal Code[1] of the Virgin Islands ("the Code"). The prosecution's case was that on the evening of 30th July 2011, Mr. Springer, and Ms. Avar McFarlane, the then girlfriend, now wife, of the first appellant were at work at Pusser's East Restaurant in Fat Hog's Bay, Tortola and during the course of the evening the two had a work related argument. Later that night, Mr. Springer received a text message from the first appellant saying that he, Mr. Springer, should "go and look your own woman" otherwise "I will fuck you up". Mr. Springer telephoned the first appellant and the two exchanged words during the course of which Mr. Springer told the first appellant he could not beat him "one on one", to which the first appellant replied "I going deal with you".

Following the telephone conversation, at about 12:30 am, Mr. Springer was standing outside his residence waiting for a friend to pick him up when the two appellants drove up in a vehicle, parked and approached him on foot. The first appellant pulled out a machete from the back of his neck and swung it at Mr. Springer, grazing Mr. Springer's neck. Mr. Springer tried to wrestle the machete from the first appellant and, while doing so, the second appellant struck Mr. Springer on the head with the flat side of a machete he took from behind him (the second appellant). Mr. Springer continued to struggle with the first appellant and the second appellant then inflicted a cut to Mr. Springer's shoulder with the machete. It was only when Mr. Springer's roommate emerged from his residence that the appellants' fled to the parked vehicle with the machetes and drove off. Mr. Springer went to the police station and made a report to Police Constable Harris Walters, who took him to the hospital for treatment. As a result of the incident, Mr. Springer was wounded on the top of his head and received 10 stitches.

Sergeant Steve George, a witness for the prosecution, indicated that shortly after midnight, whilst he was off duty, he was standing outside a friend's residence when he observed the second appellant enter a vehicle and drive away. The second appellant, who was now carrying a cutlass, returned about 15 to 20 minutes later with the first appellant and the second appellant went into the bushes and emerged without the cutlass. Later that day PC Walters arrested both appellants. Upon being cautioned, the first appellant said: "I do not deny the fact that I attacked Tony, however, he got me upset".

At trial, the first appellant elected to give evidence in his defence; however, the second appellant opted to exercise his right of silence. The defence's case was that the first appellant received a text message from Ms. McFarlane on the evening of 30th July 2011 saying that Mr. Springer came to work drunk and was harassing her. He proceeded to text Mr. Springer to tell him to leave Ms. McFarlane alone. Mr. Springer then called him, they exchanged words and Mr. Springer suggested to him that he come out so that he, Mr. Springer, could slap the first appellant, to which the first appellant said he was coming. The first and second appellant then drove to Mr. Springer's residence and when they approached Mr. Springer he had a machete in his hand. The first appellant and Mr. Springer started wrestling with each other. Whilst wrestling, the machete hit Mr. Springer's head and Mr. Springer let go of the machete. The first appellant then picked up the machete to avoid Mr. Springer "rushing" him and he and the second appellant left and

[1] Act No. 1 of 1997, Laws of the Virgin Islands.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

drove home. When the first appellant got home he threw the machete into the bush. The first appellant denied that he had gone to Mr. Springer's house with the intention of assaulting him and he also denied that he or the second appellant had struck Mr. Springer with "any machete". In response to a question from counsel, he indicated that he had never been in any problems with the police before.

The appellants were both convicted of wounding with intent and sentenced to 10 years' imprisonment. The appellants appealed their convictions and sentences on the grounds that the trial judge ought to have left the alternative verdict of unlawful wounding contrary to section 164 of the Code to the jury; the trial judge ought to have given a good character direction in relation to the second appellant; the trial judge erred in advising the jurors of the fact that they could deliver a majority verdict before the time for doing so had properly arisen; and the sentences imposed by the trial judge were excessive in the circumstances of the case.

Held: dismissing the appeal and affirming the convictions and sentences of the appellants, that:

1. The question whether or not to leave an alternative verdict for a lesser offence to the jury in a particular case involves an examination by the trial judge of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise. In considering this matter, the judge is obliged to take into account the question of fairness to the defendant, on the one hand, and the question of proportionality, on the other. That is to say, whether the alternative verdict would do justice to the facts of the case. The decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case, and the manner of the judge's exercise of this discretion will not lightly be interfered with on appeal. Ultimately, the question on appeal is whether the judge's failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction.

   Regina v Maxwell [1990] 1 WLR 401 applied; **Regina v Coutts** [2006] 1 WLR 2154 applied; **R v Foster and other appeals** [2008] 2 All ER 597 applied; **The State v Singh (Clement)** (1995) 51 WIR 128 applied; **R v Foster and other appeals** [2008] 2 All ER 597 applied.

2. In the instant case, there was considerable evidence from which the jury could have concluded that Mr. Springer's injuries were inflicted by the appellants unlawfully, maliciously and with the intention to do him grievous bodily harm. On the evidence and in the light of the perfectly fair direction to the jury on the possible effect of the appellants' case, it was entirely open to the learned trial judge to take the view that a direction to the jury on the alternative verdict of unlawful wounding was apt to divert their attention from the essential issue in the case, that is, whether Mr. Springer's injuries were inflicted by the appellants, with the intention of causing grievous bodily harm, or whether the injuries came about accidentally. In these circumstances, a direction on unlawful wounding might only have served to offer the jury a compromise which, on the Crown's case, simply did

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

not arise and on the appellants' case, would have done a serious injustice to their defence. There was simply no evidence tending to establish that the appellants might have inflicted wounds to Mr. Springer unintentionally.

3. A defendant who has no previous convictions of any significance is entitled to the benefit of a good character direction from the judge. Generally speaking, the defendant's good character must be distinctly raised, either by direct evidence given by and/or on his behalf, and/or by eliciting it in cross-examination of prosecution witnesses. However, in an appropriate case, the failure of counsel to put the defendant's good character in issue may itself, particularly if unexplained, make a guilty verdict unsafe. But, the omission of a good character direction is not inevitably fatal to the fairness of the trial or to the safety of a conviction, as much may turn on the nature of and issues in a case and on the other available evidence. In this case, the good character direction to the jury in relation to the first appellant was necessitated by the fact that the first appellant, who gave sworn evidence, explicitly put his character in issue. However, not only did the second appellant opt to remain silent, but he neither put any suggestions to the prosecution witnesses nor called any witnesses with a view to establishing his good character. Accordingly, the second appellant not having given evidence, the force of any argument that the absence of the credibility limb of the good character direction rendered the conviction unsafe would be greatly diminished. Further, it was impossible to see how, in the light of the cogent evidence which the jury clearly accepted of the second appellant's participation in the attack on Mr. Springer, a propensity direction would have benefitted him. In the circumstances, this was a case in which any potential assistance to the second appellant from a good character direction was wholly outweighed by the nature and coherence of the evidence against him.

   Teeluck v State of Trinidad and Tobago [2005] 1 WLR 2421 applied; **Jagdeo Singh v State of Trinidad and Tobago** [2006] 1 WLR 146 applied; **Nigel Brown v State** [2012] UKPC 2 referred; **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28 applied; **Balson v The State** (2005) 65 WIR 128 applied.

4. When directing a jury on a unanimous or majority verdict, the overriding principle is that no pressure must be exerted on a jury to return a verdict and they should be free to deliberate uninfluenced by any promise or threat. Where the judge issues an ultimatum or stipulates a deadline, the conviction is liable to be set aside. The jury must not be made to feel that it is incumbent on them to concur with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so. Despite the fact that the trial judge in the instant case, quite unnecessarily at that stage of the proceedings, did give some indication to the jury of the proportions in which they would need to be divided before a majority verdict would be acceptable, he did not go further to suggest any consequences of a failure to reach agreement. Having told the jury of what the law required for a majority verdict, the judge was content to leave the matter with the comment that

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

"the time for a majority verdict has not yet arrived". No hint of prejudice caused to the appellants by the judge's remarks was suggested. Further, the jury returned a unanimous verdict after the expiration of the relevant two hour period for a majority verdict. In all the circumstances, it cannot be said that, by these remarks, the judge imposed undue pressure on the jury to arrive at the verdict which they did.

Flavia Richardson v The Queen SVGHCRAP2009/0019 (delivered 3rd June 2010, reissued with corrections 1st September 2010, unreported) distinguished; **R v Shields and another** [1997] Crim LR 758 referred.

5. An appellate court will not usually interfere with a trial judge's sentencing decision unless that decision is shown to be manifestly excessive or wrong in principle. In the instant appeal, the learned trial judge acknowledged that the appellants were persons of good character and explicitly took into account the favourable evidence given in mitigation on their behalf. However, as an aggravating factor, the judge was particularly struck by the fact that the appellants' attack on Mr. Springer was premeditated and emphasised that the appellants had armed themselves with machetes. Finally, the judge pointed out that the maximum penalty to which the appellants were liable was life imprisonment. In all the circumstances, taking into account the material which was placed before the judge and bearing in mind all the relevant factors, including the nature of the appellants' attack on Mr. Springer, the extent of his injuries and the appellants' good character, it could not be said that the sentences imposed by the learned trial judge were either manifestly excessive or wrong in principle.

Vincent Olalekan Fadairo v The Queen [2012] EWCA Crim 1292 referred.

JUDGMENT

Introduction

[1] **MORRISON JA [AG.]**: The appellants are brothers. On 4th July 2013, after a trial before Redhead J and a jury in the High Court of Justice of the Virgin Islands (Criminal Division), they were convicted of the offence of wounding Mr. Loraine Springer on 31st July 2011, with intent to cause him grievous bodily harm, contrary to the provisions of section 163 of the **Criminal Code**[2] of the Virgin Islands ("the Code").

[2] Act No. 1 of 1997, Laws of the Virgin Islands.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[2] This is an appeal by both appellants against their convictions and sentences. As regards the convictions, they complain that the trial judge erred in: (i) not leaving the lesser offence of unlawful wounding[3] to the jury; (ii) failing to give a good character direction to the jury in respect of the second appellant; and (iii) advising the jury that they could deliver a majority verdict before the time for doing so had properly arisen. With regard to sentence, each appellant complains that the sentence imposed by the judge was excessive in all the circumstances of the case.

[3] Mr. Springer, who was also known as 'Tony', was the principal witness for the prosecution at the trial. Reliance was also placed on the evidence of Sergeant Steve George ("Sergeant George"), Police Constable Harris Walters ("PC Walters"), and Dr. Christopher Roberts ("Dr. Roberts"). For the defence, the first appellant gave evidence in his own behalf and called two witnesses: Ms. Abigail Smartt ("Ms. Smartt") and Ms. Avar McFarlane ("Ms. McFarlane").[4] For his part, the second appellant exercised his right to remain silent. After the close of the case for the defence, the prosecution was permitted to call a rebuttal witness, Mr Alister McMaster ("Mr. McMaster").

The Case for the Prosecution

[4] At the material time, Mr. Springer was the head chef at Pusser's East, a restaurant in Fat Hog's Bay, Tortola. In the late afternoon of 30th July 2011, he reported for work sometime between 5:30 pm and 6:00 pm, having been there earlier in the day to do some "prepping" for the evening's work. Ms. McFarlane, who was employed as a waitress at Pusser's East, was one of the persons working with him that evening. At that time, Ms. McFarlane and the first appellant, who had also been employed at Pusser's East previously, were, as Mr. Springer described them, "boyfriend and girlfriend".

[3] Contrary to section 164 of the Code.

[4] By the time the trial came around, the first appellant and Ms. McFarlane had been married to each other for a year and three months and she had become Mrs. McFarlane-Facey. However, for ease of reference, we will continue to refer to her in this judgment, intending no disrespect, as Ms. McFarlane.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[5] During the course of the evening, Mr. Springer, who was in the kitchen and Ms. McFarlane, who was in the dining area, had a work related disagreement. As a result, Ms. McFarlane, who was upset and angry, entered the kitchen. While there she made a call on her cellular phone (which was not permitted in that area) and Mr. Springer testified, "she start screaming, getting on". After Mr. Springer had had a word with her, he attracted the attention of Mr. McMaster who was the manager on duty that night. After Mr. McMaster also spoke to Ms. McFarlane, she left the kitchen and the remainder of the evening then passed uneventfully. In due course, Ms. McFarlane left the restaurant and, about an hour later – at about 12:10 am to 12:15 am the following morning – Mr. Springer also left.

[6] Mr. Springer got a ride home that night from some police officers who happened to be on patrol in the area of the restaurant but he did not intend to remain at home as he was scheduled to go with a friend to the Festival Village. As he was getting ready to go out again, he received a text message on his cellular phone from the first appellant. According to Mr. Springer, the message was, "if I want the fucking woman…Go and look your own woman…otherwise I will fuck you up".[5] Mr Springer then called the first appellant's number. When the first appellant answered the call, Mr. Springer asked, "what kind of nonsense you text me",[6] to which the first appellant replied, "Yo, I going fuck you up".[7] Mr. Springer then told the first appellant that he (Mr. Springer) was not afraid of him and after further exchanges between them, that the first appellant could not beat him "one on one". To this, the first appellant replied, "I going deal with you"[8] and the conversation ended shortly after that.

[7] At approximately 12:30 am, Mr Springer went downstairs to his gate to await his friend's arrival. After standing there for about 15 minutes, he looked eastwards where he observed a deep blue coloured Kia motor vehicle (which he knew to be the first appellant's) drive up and park in front of Miss Jennings' store

[5] Transcript of trial proceedings (2nd July 2013), p. 28, lines 21 – 25 to p. 29, lines 1 -3.
[6] Ibid, p. 29, lines 20 – 21.
[7] Ibid, p. 29, lines 23 – 24 and p. 30, lines 3 – 4.
[8] Ibid p. 21, line 2.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

approximately half a mile away.[9] Shortly after that, he saw two persons approaching on foot from the east, but took his eyes off them to look in the other direction to see if his friend was coming. Then, with the area in which he was standing brightly lit by an outside light from a nearby supermarket, Mr. Springer turned to the east again and saw the appellants, "close right up to me". The first appellant brought his right hand up, pulled a machete from the back of his neck and swung it at Mr. Springer, grazing him by his ribs on his left side. Mr. Springer then tried to wrestle the machete away from the first appellant and, while this was going on, the second appellant struck Mr. Springer on the right side of his head with the broad (or flat) side of a machete which he too took from behind him. The second appellant then asked Mr. Springer, "what my brother do you?" before adding, "we going fucking kill you".[10] Mr. Springer continued to wrestle with the first appellant in an effort to get the machete from him, while the second appellant used his machete to inflict a cut to Mr. Springer's right shoulder. Mr Springer then had to let go of the first appellant.

[8] At this point, Mr. Springer's roommate, Ms. Karen Doherty,[11] ran from upstairs screaming, "Patrick, what wrong with you? All you not going kill Tony tonight".[12] The first appellant then came back at Mr. Springer with his machete and gave him a cut on the top of his head, whereupon Mr. Springer ran to Ms. Doherty and held her, while she screamed out for help. The appellants fled with the two machetes, running back to the vehicle parked up the road and driving off in an easterly direction. Mr. Springer then went to the East End Police Station, where he made a report to PC Walters at around 12:40 am.[13] Observing what appeared to be "lots of blood" running from a wound at the top of Mr. Springer's head, PC Walters

---

[9] In evidence Mr. Springer gave the distance as "Probably about a half a mile…pass a mile probably", but from the physical demonstration of the distance which he gave in court it does not appear that it could have been as far away as that (see Transcript of trial proceedings, 2nd July 2013, pp. 32-33).
[10] Transcript of trial proceedings (2nd July 2013), p. 37, lines 18 – 21.
[11] Ms. Doherty was also Mr. Springer's assistant at Pusser's End.
[12] Transcript of trial proceedings (2nd July 2013), p. 39, lines 8 – 10.

[13] By pure coincidence, as it turned out, PC Walters had been among the group of policemen by whom Mr. Springer had been given a drive home earlier that evening.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

transported him to Peeble's Hospital, where he in due course received 10 stitches to his head.

[9] At around midnight that same night, Sergeant (then Constable) George, who was off duty, was in the yard of a friend's home in the Major Bay area talking to a couple of friends. The lighting in the area, emanating from a street light as well as light from the friend's house, was good. From a distance of about 100 feet, Sergeant George observed the appellants, who were previously known to him by sight, though not by name, in the following circumstances. First, he saw the second appellant running towards a vehicle,[14] which was parked under the street light, get into the vehicle and drive away at a fast speed. About 15 to 20 minutes later, the vehicle returned, still being driven by the second appellant, but he was now accompanied by the first appellant and both appellants then exited the vehicle, the second appellant with a cutlass in his hand. While the first appellant, who had nothing in his hand, stood at the front of the vehicle, the second appellant went around the back of the vehicle, cutlass still in hand, and up an embankment into "a bushy area with trees and shrubs". The second appellant entered the bushes, then emerged from them without the cutlass and re-joined the first appellant. Both appellants then walked off together to a house next door.

[10] Later that morning, at about 4:00 am, PC Walters went in search of the first appellant at his residence in Major Bay. He did not find him there, however, he did speak to Sergeant George, who, as it happened, had just returned from the Festival Village and was again standing in his friend's yard. As a result of what Sergeant George told him, PC Walters, accompanied by Sergeant George, went up the embankment which the latter had earlier observed the second appellant climb. A search was conducted in the bushes and a machete with a silver, rusty blade and a black handle was found at a distance of about 100 feet from the first appellant's residence. The machete was secured by PC Walters in an exhibit tube, duly labelled and put in evidence at the trial. Although the machete was initially sent for forensic testing, no testing was ever done. PC Walters'

[14] Sergeant George described the vehicle as a "kind of greenish SUV".

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

explanation for this was that there had been a heavy shower of rain for a couple hours before the machete was found.

[11] PC Walters returned to the first appellant's residence a couple of hours later and this time the first appellant was at home. PC Walters, after informing the first appellant of the report that Mr. Springer had made against him and "another gentleman", cautioned him. The first appellant's response was: "I do not deny the fact that I attacked Tony, however, he got me upset."[15] In answer to PC Walters' enquiry as to who was the other person who had been with him at the time, the first appellant pointed to the second appellant, who was standing beside him. When PC Walters next put to the second appellant Mr. Springer's complaint against him and cautioned him, the second appellant responded: "I went with my brother." PC Walters then arrested the appellants on suspicion of wounding with intent and took them to the East End Police Station where they were both separately interviewed under caution. In the interviews, neither appellant said anything about the incident involving Mr. Springer and neither complained about being attacked by him.

[12] By the time of trial, the doctor who had originally attended to Mr. Springer at Peebles Hospital was no longer there. So Dr. Roberts, who had prepared a medical report based on the attending doctor's notes, was called to give evidence based on Mr. Springer's medical records. His evidence was that, in the early morning of 31st July 2011, Mr. Springer had presented at the hospital with a 7 cm laceration to the scalp and some bruising to the right shoulder region. The laceration was sutured and Mr. Springer was treated with antibiotics and other medication and discharged later that same day. Dr. Roberts classified the laceration as serious, but not life threatening. Under cross-examination, he agreed that, first, if someone were to "broadside someone to the right side of their head with that cutlass…there [is] a likelihood you would see some injury or mark"; and, second, the notes which he had seen reflected only one injury to Mr

[15] Transcript of trial proceedings (3rd July 2013), p. 7, lines 3 – 4. When it was put to PC Walters in cross-examination by counsel for the appellants that the first appellant "never said anything to incriminate himself with respect to the injuries of Loraine Springer", the officer disagreed with this suggestion.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Springer's head. Finally, Dr. Roberts said there was no indication from the notes that Mr. Springer's blood alcohol level had been checked.

The Case for the Defence

[13] The first appellant elected to give evidence in his defence. He identified himself as a 31 year old Jamaican who had lived in this jurisdiction for 10 years. His evidence was that, in 2011, he was employed as a chef at Pusser's, Road Town and he lived with Ms. McFarlane, who was then his girlfriend, at Major Bay, East End.

[14] On the evening of 30th July 2011, he was at home at "about after 6:00". He received a text message from Ms. McFarlane, who was at work, telling him that, "Tony came to work drunk and has been harassing she and I must tell Tony to leave her alone".[16] As a result, he sent a text message to Mr. Springer, saying "why don't you leave Avar alone and go look a woman for yourself…Why don't you go look a woman for yourself".[17] The first appellant denied threatening or telling Mr. Springer that he would "fuck him up" in the text message he sent him. Close to midnight, the first appellant said he received a telephone call from Mr. Springer, who said: "Patrick, what you text my phone for? You think I want your fucking woman? I don't want your bitch...why don't you go and mind your children in Jamaica?"[18] His response was to ask Mr Springer whether he (the first appellant) had ever done him anything yet, to which Mr. Springer replied, "[Why] you don't come out let me slap you lil short self".[19]. The first appellant then said, "I coming".

[15] The first appellant told the court that, shortly afterwards, he and the second appellant travelled together in his blue Kia Sportage jeep to Mr. Springer's residence. Neither of them was armed. When they arrived, Mr. Springer was at his gate. As the first appellant approached him, Mr. Springer made a step towards him and the first appellant said, he saw, "like he have a machete in his hand".

---

[16] Transcript of trial proceedings (3rd July 2013), p. 29, lines 5 – 6.
[17] Ibid, lines 14 – 16.
[18] Ibid, p. 30, lines 12 – 22.
[19] Ibid, p. 31, lines 24 – 25 to p. 32, line 1. The first appellant gave his height as 5' 7".

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

According to the first appellant, he then held on to Mr. Springer's hands and the two of them started to wrestle with each other. This is the first appellant's account of what next ensued:[20]

> "After we were there wrestling, I hold his two hands and I was there like that. After I hold him, we was there wrestling. My brother saying, 'youth man, stop it.' That is what he call me in Jamaica. He saying 'youth man, stop it'. So while we was there wrestling, after the machete hit he head…
>
> After it hit he head, he let go the machete. So as he let it go, I dropped his hand and picked up the machete."

[16] The first appellant denied that he had gone to Mr. Springer's house with the intention of assaulting Mr. Springer and he also denied that either he or the second appellant had struck Mr Springer with "any machete". He had picked up the machete because he feared that Mr. Springer might pick it up again and "rush" him and after that, the first appellant said, in response to the second appellant's repeated urging, "yo, youth man, let's go", they both got back into the jeep and drove home. Once there, as soon as he stepped out of the jeep, he "walked towards the front of the vehicle and throw the machete over in the bush".[21] Finally, in answer to his counsel's question, the first appellant stated that he had never been in any problems with the police before.

[17] Ms. Smartt, who was at the material time employed at Pusser's East as the person responsible for takeout orders (the "takeout person"), gave evidence for the first appellant. She told the court that she was at work in the late afternoon of 30th July 2011. She recalled when Mr. Springer, who was the chef on duty on the 4:00 pm – 10 pm shift that day, arrived at about 6:00 pm. Her evidence was that Mr. Springer "came to work drunk, smelling of alcohol".[22] During the course of the evening, Ms. Smartt observed Mr. Springer in conversation with Ms. McFarlane, during which he told her to "go call you big belly man".[23] In answer to questions from the jury, Ms. Smartt said that Mr. Springer was not too drunk to carry out his

[20] Transcript of trial proceedings (3rd July 2013), p. 36, lines 13 – 22.
[21] Ibid, p. 38, lines 2 – 4.
[22] Ibid, p. 69, lines 3 – 4.
[23] Ibid, p. 70, line 16.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

duties, since "he still worked the night". Further, while she did not report his intoxication to the manager on duty, "other staff did".

[18] The first appellant's second witness was Ms. McFarlane, who at the material time was a waitress at Pusser's East. By the time of the trial, she and the first appellant had been married for a year and three months. Her evidence was that, although she and Mr. Springer had initially had an "okay" relationship, by 30th July 2011, they were not speaking to each other. Mr. Springer was, she said, "bossy [and] ignorant". That evening, Ms. McFarlane testified, he came to work drunk and "acting strange".[24] In the presence of all the other persons in the kitchen,[25] Mr. Springer assaulted her by placing his hand on her waist from behind, towards her bottom, holding her hand tightly behind her and shaking her, pelting paper at her and pushing her several times. She spoke twice to the manager about what had happened and also sent a text message to the first appellant about Mr. Springer's behaviour. However, she made no complaint to the police officers who passed by the restaurant at closing time that night. At the end of her night's work, she drove herself to the home which she shared with the first appellant, where she again told him what was going on. The first appellant left the home with nothing in his hands.

[19] As we have already indicated, the second appellant, after being advised by the judge of his rights, opted to remain silent.

The Rebuttal Evidence

[20] Mr. McMaster confirmed that he was the manager on duty at Pusser's East on the night of 30th July 2011. Mr. McMaster told the court that Mr. Springer did not appear to him to be drunk that night. While he did have occasion to speak with Mr. Springer and Ms. McFarlane about the noise caused by an argument between them in the kitchen, Ms. McFarlane had made no complaint to him about having been harassed and/or assaulted by Mr. Springer. As far as he was aware, Ms. McFarlane was "fine" when she left work that night.

---

[24] Ibid, p. 80, line 10.

[25] Estimated by Ms. McFarlane, in answer to a question from the jury, at about four persons.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

The Summing-up

[21] The experienced trial judge directed the jury in generally unexceptionable terms. For the moment, it is only necessary to mention three matters in particular. First, the judge left the case to the jury entirely on the basis that, in order for them to find the appellants guilty of the offence for which they were charged, the prosecution was required to satisfy them on the evidence that the first appellant had injured Mr. Springer with the intention to do him grievous bodily harm. The jury were accordingly told that if they did not accept, or if they had any reasonable doubt that that was the first appellant's intention, both appellants would be not guilty.[26] Second, the learned judge gave the jury a good character direction along standard lines in respect of the first appellant,[27] but not in respect of the second appellant. And third, just before inviting the jury to retire at the end of the summing-up, the learned trial judge told them this:[28]

> "Madam Foreman, Members of the Jury, I cannot assist you any further, save to say that when you retire you must endeavor to arrive at a unanimous verdict. That is a verdict upon which you have all agreed. If you arrive at a unanimous verdict, you can return at any time. The Court can accept a majority verdict in proportion of seven to two or eight to one. Any other division will not be accorded [sic]. You understand? Seven agree one way, two disagree; eight agree one way, one disagree [sic]. Any other division is not (inaudible). However the time for a majority verdict has not yet arrived. You will have to stay two hours if you are delivering a majority vote."

The Verdict

[22] The record indicates that the jury retired at 1:10 pm and that the luncheon adjournment was then taken. Court resumed at 3:18 pm and the jury is recorded as having returned at 3:20 pm.[29] Unanimous verdicts of guilty of the offence of wounding with intent having been returned against both appellants, the matter was then adjourned for sentencing. In due course, after evidence and submissions in

---

[26] Transcript of trial proceedings, (4th July 2013), pp. 88 – 89.
[27] Ibid, pp. 115 – 117.
[28] Ibid, p. 117, lines 13 – 25.
[29] Ibid, p. 118

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

mitigation were taken, the appellants were sentenced in the manner already indicated.

The Grounds of Appeal

[23] In a notice of appeal filed on their behalf on 8th August 2013, the appellants challenged the sentences imposed by the learned trial judge as being excessive in all the circumstances of the case. When the appeal came on for hearing on 12th January 2015, learned counsel, Mr. Patrick Thompson, who appeared for the appellants *amicus curiae*, sought and was given leave to argue the following additional grounds of appeal:[30]

1. "The learned trial judge erred in failing to advise the jurors of the statutory and lesser alternative of inflicting grievous bodily harm contrary to Section 164 of the Criminal Code. The medical evidence adduced on the Crown's case indicated that the wound sustained by the complainant was serious but not life threatening. In those circumstances, it was incumbent on the learned trial judge to draw to the attention of the jurors the lesser offence pursuant to Section 164. The failure to do so was a material irregularity and deprived the Appellants of a verdict which was properly open to the jurors on the evidence."

2. "The learned trial judge erred in failing to give a good character direction to the jury in respect of the 2nd named Appellant. The 2nd named Appellant was entitled to a good character direction and the lack of this direction was a material irregularity, particularly since the learned trial judge gave a good character direction in respect of the 1st named Appellant. Further or in the alternative, the Appellant's counsel at trial failed to elicit any evidence as to the Appellant's previous good character. This was a material irregularity and renders the Appellant's conviction unsafe and unsatisfactory."

3. "The learned trial judge erred in advising the jurors of the fact that they could deliver a majority verdict before the time for doing so had properly arisen. The jurors may have been unduly pressured to arrive at a verdict since the learned trial judge expressly directed them that they would have to stay 2 hours if they were delivering a majority verdict. This direction could only have either confused or pressured the jurors and this misdirection renders their verdict unsafe."

[30] Numbering ours.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[24] We will deal with the issues arising from these grounds in the following order: (i) whether the judge ought to have left the alternative verdict of unlawful wounding to the jury ('the alternative verdict issue'); (ii) whether the judge ought to have given a good character direction in relation to the second appellant ('the good character direction issue'); (iii) whether the judge's remarks to the jury as to the circumstances in which they could arrive at a majority verdict were appropriate ('the majority verdict issue'); and (iv) whether the sentences imposed by the judge were excessive in the circumstances of the case ('the sentence issue').

The Alternative Verdict Issue

[25] In order to understand how this issue arises, it is necessary to set out sections 163 and 164 of the **Code**:

> "163. Any person who unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person with intent so to do or with intent to resist or prevent the lawful apprehension or detainer of any person, commits an offence and is liable on conviction to imprisonment for life.
>
> 164. Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years."

[26] The significant difference between the two sections is that an offence under section 163 requires proof that the defendant wounded or caused grievous bodily harm to the virtual complainant with intent to do so or to resist or prevent lawful apprehension, while an offence under section 164 may be committed without any such intention. As appears from the obvious disparity in punishment between them, the section 163 offence ('wounding with intent') is the greater and the section 164 offence ('unlawful wounding') is the lesser of the two offences.

[27] Section 325 of the **Code** provides that:

> "where a person is charged with an offence mentioned in the first column of the Table set out in Schedule 2, if the court finds that he is not guilty of the offence charged but that, on the evidence before the court he is guilty of another offence under a section of this Code referred to in the third

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

column of the Table he may be convicted of that lesser offence although he was not charged with it."

[28] As Mr. Thompson pointed out, a comparison of the first and third columns of the table in Schedule 2 of the **Code** confirms that unlawful wounding under section 164 is the lesser of the two statutory offences. Also, in **Regina v Coutts**,[31] Lord Bingham described the fact that a defendant accused of wounding with intent may be convicted of unlawful wounding if the evidence establishes the wounding, but leaves doubt about the intent, as one of a number of "familiar examples" of the power of the jury to convict of the lesser offence under the English equivalent of section 325.[32]

[29] Accordingly, Mr. Thompson submitted that the appellants, having been charged under section 163 for the greater offence of wounding with intent, the learned trial judge ought to have left to the jury the alternative verdict of unlawful wounding under section 164. His failure to do so had therefore deprived the appellants of the possibility of the jury finding them guilty of the lesser offence, thus rendering their convictions of the greater offence unsafe and unsatisfactory.

[30] For the prosecution, learned Principal Crown Counsel, Ms. Scatliffe, emphasised that the question whether or not to leave an alternative verdict to the jury is purely a matter for the discretion of the trial judge and that the judge's exercise of that discretion will not lightly be interfered with on appeal. The case for the prosecution against the appellants was plainly put on the basis that they had injured Mr. Springer with the intention required by section 163 of the **Code** and it was therefore entirely for the judge to determine whether the question of an alternative verdict arose on the evidence.

[31] Mr. Thompson referred us to the decisions of the House of Lords in **Regina v Maxwell**[33] and **Regina v Coutts**, as well as the decision of the Court of Appeal of

[31] [2006] 1 WLR 2154 at p. 2160.
[32] Section 6(3) of the Criminal Law Act 1967.
[33] [1990] 1 WLR 401.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Guyana in **The State v Singh (Clement).**[34] In addition, Ms. Scatliffe referred us to the decision of the Court of Appeal of England and Wales in **R v Foster and other appeals**.[35] As there is no real dispute between the parties as to the applicable principles, it is convenient to consider these authorities together briefly.

[32] In **Regina v Maxwell**, the House of Lords expressly approved the Court of Appeal's view that, in deciding whether or not to leave an alternative verdict to the jury, '[t]he right course will vary from one case to another, but the judge should always use his powers to ensure, so far as practicable, that the issues left to the jury fairly reflect the issues which arise on the evidence'.[36]

[33] In **Regina v Coutts**, after detailed consideration of a number of English, Australian and American authorities on the principles underlying the exercise of the judicial duty to leave alternative verdicts to the jury, Lord Bingham said this:[37]

> "The public interest in the administration of justice is...best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support...I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment."

[34] **R v Foster** was a decision of a full court[38] of the Criminal Division of the Court of Appeal. Among the matters which the court was called upon to consider were the ambit and application of the decision in **Regina v Coutts**. Writing for the court, again after a full review of the relevant authorities, Sir Igor Judge P. said the following:[39]

---

[34] (1995) 51 WIR 128.
[35] [2008] 2 All ER 597.
[36] Quoted in the judgment of Lord Ackner at p. 408.
[37] At p. 2167.
[38] Sir Igor Judge P, Latham LJ, Grigson, Smith and Pitchford JJ.
[39] At para. 61.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> "Accordingly, not every alternative verdict must be left to the jury. In addition to any specific issues of fairness, there is what we shall describe as a proportionality consideration. The judge is not in error if he decides that a lesser alternative verdict should not be left to the jury if that verdict can properly be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case…The judgment whether a 'lesser alternative verdict' should be left to the jury involves an examination of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise. Within that case-specific framework the judge must examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the judge enjoys 'the feel of the case' which this court lacks. On appeal the problem which arises is not whether a direction in relation to a lesser alternative verdict was omitted, and whether its omission was erroneous, but whether the safety of the conviction is undermined."

[35] And finally, in **The State v Singh** the Court of Appeal considered, among other things, the circumstances in which a trial judge ought to give a direction on a lesser offence in a trial which proceeded on an indictment for the greater offence. In a judgment with which Bernard JA and Persaud JA [Ag.] agreed, Bishop C emphasised the need for there to be some evidence of the lesser offence:[40]

> "in contemplating whether a direction ought to be given about convicting for the lesser offence…a court or judge is to be satisfied, as a matter of law, that there is *some evidence* that tends to establish the elements of *the lesser or included offence* and that the very evidence also points to successive acts that tend to implicate the prisoner in the commission of the full offence charged, save and except that his acts, when closely examined, appear to fall short of the commission of the said full offence or an attempt at its commission; but appear to be within the parameters of the lesser offence."

[36] From this brief survey of the authorities to which we were referred by counsel, it is in our view possible to derive the following propositions:

[40] At p. 156.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[i] The question whether or not to leave an alternative verdict for a lesser offence to the jury in a particular case involves an examination by the trial judge of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise.

[ii] In considering this matter, the judge is obliged to take into account the question of fairness to the defendant, on the one hand, as well as the question of proportionality. That is to say, whether the alternative verdict would do justice to the facts of the case.

[iii] The decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case, and the manner of the judge's exercise of this discretion will not lightly be interfered with on appeal.

[iv] Ultimately, the question on appeal is whether the judge's failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction.

[37] In the instant case, there was considerable evidence from which the jury could have concluded that Mr. Springer's injuries were inflicted unlawfully and maliciously and with the intention to do him grievous bodily harm. First, there was the first appellant's telephone threat to Mr. Springer (coming on the heels of the text messages), "Yo, I going fuck you up", followed by his promise, "I going deal with you". Second, there was the fact that the appellants deliberately set out together for Mr. Springer's home after Ms. McFarlane's report to the first appellant on what had transpired between her and Mr. Springer at the restaurant earlier on the evening of 30th July 2011. Third, there was the fact, on Mr. Springer's evidence, both appellants were armed with machetes. Fourth, there was the second appellant's statement to Mr. Springer that, "We going fucking kill you". Fifth, there was the fact that the appellants only appeared to desist from their attack on Mr. Springer when Ms. Doherty came on the scene and started

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

screaming. Sixth, there was the fact that, upon returning home after the altercation with Mr. Springer, the first appellant disposed of a machete in the bushes. Seventh, there was the first appellant's statement after caution that, "I do not deny the fact I attacked Tony, however, he got me upset".

[38] In answer to the charge, the first appellant initially placed the machete in Mr. Springer's hand, but said that it was in trying to wrestle it away from him that the machete fell onto Mr. Springer's head. So, in essence, the defence was accident. In this regard, the learned judge directed the jury, in terms of which no complaint has been made, as follows:[41]

> "What that means is that the Accused, Patrick Facey is saying that he did not intend any injury to Loraine or Tony. He said he was wrestling with him and a cutlass connected with his head. That's how he received the injury. In other words his mind is not on the act. So that was an accident. If you say it was an accident, neither Patrick Facey nor Michael Facey will be guilty of the offence of wounding. If you say it might have been an accident, equally not guilty because it means the Prosecution would have failed to satisfy you to the extent that you feel sure that it is, it was [not] an accident.
>
> If you positively say that it was not an accident and you say that Patrick Facey maliciously, unlawfully and maliciously wounded Springer with the intent to do him grievous bodily harm, guilty of that offence. And if you say that Michael Facey acted with Patrick Facey for a common purpose of wounding Loraine Springer, then they both will be guilty of the offence. Is that clear?"

[39] It seems to us that, on the evidence, and in the light of this perfectly fair direction to the jury on the possible effect of the appellants' case, it was entirely open to the learned trial judge to take the view that a direction to the jury on the alternative verdict of unlawful wounding was apt to divert their attention from the essential issue in the case, that is, whether Mr Springer's injuries were inflicted by the appellants, with the intention of causing grievous bodily harm, or whether the injuries came about accidentally. In these circumstances, a direction on unlawful wounding might only have served to offer the jury a compromise which, on the

[41] Transcript of trial proceedings (3rd July 2015), pp. 114 – 115.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Crown's case, simply did not arise; and on the appellants' case, would have done a serious injustice to their defence.

[40] We therefore consider that the challenge to the learned trial judge's decision not to leave the alternative verdict of unlawful wounding to the jury has not been made good in this case. There was quite simply no evidence tending to establish that the appellants might have inflicted wounds to Mr. Springer unintentionally. In this regard, given the statutory definition of the offence of wounding with intent, absolutely nothing turns on whether those wounds were life threatening, or 'merely' serious.

The Good Character Direction Issue

[41] There is no dispute in this case as to the circumstances in which a trial judge is required to give a good character direction. In their admiral skeleton arguments, Mr. Thompson and Ms. Scatliffe between them referred us to most of the leading modern authorities on good character directions. In **Teeluck v State of Trinidad and Tobago**,[42] it was held (not for the first time) that a defendant who has no previous convictions of any significance is entitled to the benefit of a good character direction from the judge. Such a direction will generally contain two limbs: first, a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character; and second, a propensity direction, that is, that a person of good character is less likely to commit a crime, especially one of the nature with which he is charged. Generally speaking, the defendant's good character must be distinctly raised, either by direct evidence given by and/or on his behalf, and/or by eliciting it in cross-examination of prosecution witnesses.[43] However, in an appropriate case, the failure of counsel to put the defendant's good character in issue may itself, particularly if unexplained, make a guilty verdict unsafe. But it is also well recognised that the omission of a good character direction is not inevitably fatal to the fairness of the trial or to the safety of a

[42] [2005] 1 WLR 2421.

[43] Although it is now recognised that, in a case where the defendant is obviously of good character, the judge would be well advised to ask counsel whether he intends to put his character in issue – see Gilbert v The Queen [2006] 1 WLR 2108.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

conviction. For, as Lord Bingham observed in **Jagdeo Singh v State of Trinidad and Tobago**,[44] "[m]uch may turn on the nature of and issues in a case, and on the other available evidence."[45]

[42] Mr. Thompson, in our view, realistically makes no complaint in the instant case about the full and careful way in which the trial judge directed the jury on the significance of the first appellant's good character to the case. Those directions were clearly necessitated by the fact that the first appellant, who gave sworn evidence, explicitly put his character in issue. But the second appellant opted, as has been seen, to remain silent. In addition, he neither put any suggestions to the prosecution witnesses nor called any witnesses with a view to establishing his good character. So the question which arises is whether in these circumstances the judge was obliged to give a good character direction in respect of the second appellant.

[43] Mr. Thompson submitted that the judge was so obliged and that his failure to do so is a matter which affects the safety of the second appellant's conviction. In our view, despite the attractive way in which it was urged, this contention is plainly unsustainable. In the first place, the second appellant was at all stages of the trial represented by counsel (not Mr. Thompson) and nothing has been put forward by or on his behalf to suggest that he was either poorly advised by counsel or that counsel had failed to carry out his instructions. There is therefore no basis to suppose that the second appellant's decision not to give evidence and his failure to put his good character in issue was the result of counsel's default. Secondly, the second appellant not having given evidence, the force of any argument that the absence of the credibility limb of the good character direction rendered the conviction unsafe would, as Lord Kerr said in **Mark France and Rupert Vassell v The Queen**,[46] be "greatly diminished". And thirdly, it is in our view impossible to see how, in the light of the cogent evidence which the jury clearly accepted of the second appellant's participation in the attack on Mr. Springer, a propensity

[44] [2006] 1 WLR 146, at para 25
[45] See also Nigel Brown v State [2012] UKPC 2 at paras 30-36 (Lord Kerr).
[46] [2012] UKPC 28 at para 48.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

direction would have benefitted him. This then is a case in which it seems to us, any potential assistance to the second appellant from a good character direction was, as Lord Hope put it in **Balson v The State**,[47] "wholly outweighed by the nature and coherence" of the evidence against him.

The Majority Verdict Issue

[44] Section 35 of the **Jury Act**[48] of the Virgin Islands sets out the circumstances in which it is open to the trial judge to accept a majority verdict:

> "A verdict of a jury shall not, in any proceeding, be accepted within two hours after the conclusion of the Judge's summing up, unless it is unanimous; but, after the expiration of two hours from the conclusion of the summing up, any verdict, in which seven of them agree, may be accepted as the verdict of the whole, unless it is the verdict of guilty, or not guilty, of a capital charge, which shall not be accepted at any time unless it is unanimous."

[45] The issue in this case arises out of the judge's remarks to the jury immediately before inviting them to retire.[49] Mr. Thompson submitted that the trial judge fell into error by telling the jury before they retired that they could only return a majority verdict after retiring for at least two hours. The consequence of this, it was submitted, was to place improper pressure on the jury to arrive at their verdict and the appellants' convictions should therefore be quashed on this basis.

[46] For these submissions, Mr. Thompson placed great reliance on the decision of this court in **Flavia Richardson v The Queen**,[50] in which the relevant provision of the **Jury Act**[51] of Saint Vincent and the Grenadines was in *pari materia* with section 35. The appellant was charged with manslaughter and before giving the case to the jury, the trial judge directed them in terms not entirely dissimilar to the judge's directions in the instant case:[52]

---

[47] (2005) 65 WIR 128 at para 38.
[48] Cap. 36, Revised Laws of the Virgin Islands 1991
[49] See para. 21 above.
[50] SVGHCRAP2009/0019 (delivered 3rd June 2010, reissued with corrections 1st September 2010, unreported).
[51] Cap. 28, Revised Laws of Saint Vincent and the Grenadines 2009, section 13.
[52] At para. 2.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> "It is important that you reach if you can a unanimous verdict. Unanimous mean[s] a verdict of which [sic] all of you are in agreement. That is all of you are saying the same thing, either not guilty or guilty. Now if you are unanimous, that is, if you all agree on same verdict [sic], you may return at any time. However, if you cannot all agree and you are in agreement 8:1 or 7:2, meaning eight (8) saying one thing and one (1) saying another, then you can only return after you have considered the matter for two full hours. If you are divided 6:5 or 5:4, you have not arrived at a verdict. If after three hours you cannot agree on a verdict, I may recall you, I may give you further directions if that is necessary or I may discharge you from this case. Remember if you are unanimous, you can return at any time. If you are divided 7:2 or 8:1, then you must consider the matter for at least two full hours before you can return to deliver your verdict."

[47] The record did not disclose the time at which the jury retired or the time at which they returned with the unanimous verdict of guilty. On appeal, it was argued that three hour period referred to by the judge had no statutory basis. Further, that by stating the time frame within which a unanimous or a majority verdict could be delivered before the jury retired to deliberate, the judge had placed undue pressure on them to arrive at a verdict.

[48] In a judgment delivered by Edwards JA, the court explained the applicable rule in this way:[53]

> "The overriding principle is that no pressure must be exerted on a jury to return a verdict and they should be free to deliberate uninfluenced by any promise and intimidated by any threat. It has long been recognized that that where the judge issues an ultimatum or stipulates a deadline, the conviction is liable to be set aside.(1) [See R v Baker [1997] EWCA Crim 2966 Per Lord Mantell citing R v McKEnna at Fn41]. The jury must be free to deliberate without any form of pressure, whether by way of promise, threat or otherwise. They must not be made to feel that it is incumbent on them to concur with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so."

[49] In the absence of any provision in either the **Jury Act** or the **Criminal Procedure Code**[54] of Saint Vincent and the Grenadines regulating jury management and the

[53] At para. 5.
[54] Cap. 172, Revised Laws of Saint Vincent and the Grenadines 2009.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

time when a majority verdict direction must be given to the jury in Saint Vincent and the Grenadines, the Court's attention was attracted[55] to the current English practice and procedure as set out in the **Practice Direction (Criminal Proceedings: Consolidation)**[56] ("the practice direction"). Under the rubric, 'majority verdicts', the practice direction makes the point that "it is inadvisable for the judge and indeed for advocates to attempt an explanation of [the relevant statutory provision[57]] for fear that the jury will be confused". Nevertheless, the practice direction does sanction a direction to the jury along the following lines before they retire:

> "As you may know, the law permits me in certain circumstances to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

[50] The practice direction also goes on the stipulate[58] that, at whatever stage the jury return, the time at which they left the jury box for the jury room, the time of their return and the aggregate of each such period is to be stated in open court.

[51] On the basis of this material, the court in **Flavia Richardson v The Queen** came to the conclusion[59] that the directions of the trial judge in that case were not in compliance with the required practice and procedure applicable to jury trials in Saint Vincent and the Grenadines and had the effect of "placing improper pressure on the jury to arrive at their verdict". Further, "there was no compliance with the requirement for the time when the jury leaves the Court room and the time when the jury return to the jury box to be recorded and stated publicly". These errors were regarded as sufficiently serious to warrant the quashing of the resultant conviction and sentence.

---

[55] On the basis of section 3(2) of the Criminal Procedure Code, which stipulates that the procedure and practice observed by and before the Crown Court in England must be applied.
[56] [2002] 1 WLR 2870, para 46.1.
[57] Section 17(3) of the Juries Act 1974.
[58] At para 46.5.
[59] At para 16.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[52] Ms. Scatliffe contended that **Flavia Richardson v The Queen** was clearly distinguishable from the instant case, since there was no record in that case of the times when the jury had either retired or returned to court with their verdict. She submitted that in this case there was no evidence of any undue pressure having been brought to bear on the jury to arrive at a verdict within a particular time frame. Nothing in particular turned, it was submitted, on the trial judge having said something to the jury about the precondition of a majority verdict when he did, since it would always have been open to him to repeat it if it became necessary.

[53] In this regard, Ms. Scatliffe sought support from the statement by the learned editor of **Taylor on Criminal Appeals**[60] that, "Where the judge erred in giving a majority direction too early, the judge is able to correct the error by re-directing the jury and then giving the majority direction at a later stage." In **R v Shields and another**,[61] which is the authority cited in the text for this proposition, the judge was invited by counsel to discharge the jury after the error was discovered. The Court of Appeal considered that although what had occurred was clearly in breach of the relevant practice direction, the judge had a discretion when the error was discovered whether to correct it by way of further direction or to allow the application to discharge the jury. It was held that he could not be faulted for having chosen to further direct the jury, particularly as no prejudice was suffered by the appellant as a result.

[54] **R v Shields** therefore supports Ms. Scatliffe's point that, had the jury in the instant case failed to arrive at a verdict after two hours, there could have been no complaint, assuming the absence of any prejudice to the appellants, if the trial judge had then given them a full majority verdict direction. But, of course, this is not what happened in this case – the jury in fact returned their unanimous verdict after the expiration of the two hour period. So the question is whether the decision in **Flavia Richardson v The Queen** obliges us to say that, by foreshadowing to the jury the possibility of a majority verdict before the necessity to do so had

[60] Edited by Paul Taylor (2nd edn., Oxford University Press),para 9.357.
[61] [1997] Crim LR 758.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

arisen, the judge brought undue pressure to bear on the jury to return a unanimous verdict of guilty against the appellants.

[55] We have come to the clear conclusion that this case is distinguishable from **Flavia Richardson v The Queen**. Firstly, as Ms. Scatliffe pointed out, there was nothing on the record in that case to show the time that the jury actually spent in deliberation before returning a unanimous verdict. This was, as we have seen, a clear breach of the guidance provided by the practice direction.[62] It was therefore impossible to assess whether that verdict may not in reality have been a forced compromise to avoid the two hour delay that a majority verdict would have necessitated or if it was in fact the product of the jury's unhurried reflection on the issues in the case. In this case, on the other hand, the record reveals that the jury were in fact out of court for a total of two hours and ten minutes.[63] Despite some discussion between Bench and Bar during the hearing of the appeal as to whether that period might have been interrupted by a break for lunch, it appears to us that, in the absence of any indication to the contrary, it must be assumed that it was not. To do otherwise would be pure speculation.

[56] Secondly, despite the fact that, as in **Flavia Richardson v The Queen**, the trial judge in the instant case, quite unnecessarily at that stage of the proceedings, did give some indication to the jury of the proportions in which they would need to be divided before a majority verdict would be acceptable, he did not go further to suggest any consequences of a failure to reach agreement. In **Flavia Richardson v The Queen**, on the other hand, the learned judge told the jury plainly that, if they could not agree on a verdict after three hours, "I may recall you, I may give you further directions if that is necessary or I may discharge you from this case."[64] Quite apart from the fact that the three hour deadline suggested by the judge had no statutory warrant, this was, it seems to us, a clear instance of the exertion of a form of pressure on the jury to return a verdict within a particular time at the very outset of their deliberations.

[62] See para 50 above.
[63] See para 22 above.
[64] At para. 2.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[57] In the instant case, having told the jury of what the law required for a majority verdict, the judge was content to leave the matter with the comment that "the time for a majority verdict has not yet arrived". No hint of prejudice caused to the appellants by the judge's remarks has even been suggested. In all the circumstances, it cannot be said, in our view, that by these remarks, which were in fact not vastly different from those sanctioned by the practice direction,[65] the judge imposed undue pressure on the jury to arrive at the verdict which they did.

[58] But this having been said, we consider it open to question whether even remarks as innocuous as those made by the judge in this case can add any real value to the proceedings, at a stage when the need for the jury to give any consideration to the matter of a majority verdict has plainly not yet arisen. We therefore think that it would be best for trial judges, if it is felt necessary to say anything on the matter at all at this stage, to confine themselves to the entirely neutral formula sanctioned by the practice direction.

The Sentence Issue

[59] At the sentencing hearing before the trial judge, learned counsel for the prosecution invited the court to approach the matter on the basis that the appellants, neither of whom had any previous convictions, were men of good character.[66] On the basis of a detailed review of a number of previous sentences imposed in cases from this jurisdiction and from the United Kingdom, the prosecution suggested sentences in the instant case in the range of 5 – 7 years' imprisonment, taking into consideration the injuries sustained by Mr. Springer. Learned counsel for the appellants, who highlighted their previously unblemished record and produced two witnesses in mitigation, suggested non-custodial sentences.

[65] Cf para. 49 above
[66] Transcript, Tab 6, page 7.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[60] The learned judge disagreed with both counsel. He considered non-custodial sentences to be out of the question, given the pre-meditated and unprovoked nature of the attack on Mr. Springer. For much the same reasons, the judge equally considered the range suggested by counsel for the prosecution to be too low. Taking all factors into account, the learned judge concluded[67] that, "being as lenient as is humanly possible in this case", sentences of 10 years' imprisonment were appropriate.

[61] Mr. Thompson submitted that the sentence thus imposed was manifestly excessive, principally on the basis that the period of 10 years' imprisonment ordered by the judge exceeded the sentencing range submitted by the prosecution. Ms. Scatliffe, on the other hand, submitted that the judge had taken into account all relevant factors and that the sentences imposed should accordingly remain undisturbed.

[62] Both counsel referred us to the Assault - Definitive Guideline ("the guideline") issued by the Sentencing Council[68] for England and Wales, particularly in relation to the offence of causing grievous bodily harm with intent to do grievous bodily harm. Under section 18 of the **Offences Against the Person Act 1861**, this is an offence which, as in this jurisdiction, now carries a maximum sentence of life imprisonment. The guideline provides for the determination by the sentencing court of the category of seriousness in which the particular offence falls; the fixing of a starting point within the sentencing range suggested for that category; and the upward or downward adjustment from the starting point in keeping with the various factors identified in the guideline for increasing or reducing the seriousness of the particular offence.

[63] Category 1 comprises offences of "greater harm" (normally involving serious injury) **and** higher culpability. Category 2 comprises offences of greater harm (normally involving serious injury) **and** lower culpability, or lesser harm **and** higher

---

[67] Transcript of trial proceedings (10th July 2013), p. 42, lines 1 – 2.
[68] In accordance with section 120 of the Coroners and Justice Act 2009.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

culpability. And category 3 comprises offences of lesser harm **and** lower culpability. Factors indicating greater and lesser harm, as well as factors indicating higher and lower culpability are listed. Among the factors indicating higher culpability are a significant degree of premeditation, the use of a weapon and an intention to commit more serious harm than actually resulted from the offence. The appropriate starting points and category ranges are set out in the guideline as follows:[69]

Offence Category	**Starting Point**	**Category Range**
Category 1	12 years' custody	9 - 16 years' custody
Category 2	6 years' custody	5 - 9 years' custody
Category 3	4 years' custody	3 - 5 years' custody

Contending that the instant case falls within category 2, Mr. Thompson pointed out that the 5-9 years range applicable to that category roughly coincided with the range of 5-7 years which the prosecution had suggested to the judge.

[64] Having determined the appropriate range and starting point, the guideline next requires the court to individualise the sentence to be imposed on a particular offender by reference to the several listed aggravating (for example, any previous convictions) and mitigating (for example, no previous or no relevant/recent convictions) factors. The guideline also makes the point that,[70] "in some cases, having considered these factors, it may be appropriate to move outside the identified category range".

[65] The guideline is not, of course, formally applicable in this jurisdiction. And although counsel for the prosecution did bring it to the judges' attention in this

[69] At p. 5.
[70] Ibid.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

case,[71] it does not appear to have had any particular role in the trial judge's ultimate sentencing decision. But we have spent a moment on it primarily because we consider that it can provide a helpful comparative tool to ensure an orderly and coherent approach to the difficult task of sentencing in cases of wounding with intent, in which the range of possible injuries and *sequelae* will often vary widely.

[66] So the question that remains is whether, taking into account the material which was placed before the judge and bearing in mind all the relevant factors, including the nature of the appellants' attack on Mr. Springer, the extent of his injuries and the appellants' previous good character, the sentence of 10 years' imprisonment imposed was excessive? In approaching this question, we bear in mind, as we must, the consideration that an appellate court will not usually interfere with a trial judge's sentencing decision, unless that decision is shown to be manifestly excessive or wrong in principle.[72]

[67] The first point of note is that, as counsel for the prosecution readily acknowledged before the judge, the large majority of the cases from this jurisdiction referred to as supporting a sentencing range of 5-7 years' imprisonment for wounding with intent involved early pleas of guilty.[73] It must therefore be assumed, in our view, that the defendants in those cases had the benefit of some kind of discount for having saved the court, the complainant and the wider community the ordeal of a contested trial. Secondly, as counsel for the prosecution also told the judge, some of those cases were concluded at a time when the maximum sentence for wounding with intent was five years' imprisonment and must therefore be viewed with some caution now that the maximum sentence for the offence is life imprisonment.[74] Although the learned judge did not say so, it could well be that

[71] Transcript of trial proceedings (10th July 2013), pp. 6 and 17-18
[72] Archbold Criminal Pleading, Evidence and Practice (Sweet & Maxwell 2012), para 7-135.
[73] Transcript of trial proceedings (10th July 2013), pp.8 – 14.
[74] In perhaps the most egregious of them, The Queen v Wayne Fahie, BVIHCR1998/0008 (delivered 19th October 1998, unreported) the defendant pleaded guilty to wounding his girlfriend with intent, having attacked her with a machete and caused injuries which resulted in the amputation of her left hand. Upon his plea of guilty, he was sentenced to 4 years' imprisonment.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

his immediate rejection of the range proposed by counsel for the prosecution was based on considerations along these lines.[75] Mr. Thompson's big point on appeal against sentence, which is that the judge ought not to have rejected the sentencing range proposed by counsel for the prosecution, may therefore also fall away on the same basis.

[68] More to the point perhaps is the decision of the Court of Appeal of England and Wales in **Vincent Olalekan Fadairo v The Queen**,[76] to which we were referred by Ms. Scatliffe. The complainant in that case sustained a knife wound, 3 cm in length and 7 cm deep, just under his left eye. However, there was no functional or neurovascular damage and the wound was washed out and closed with stitches. The appellant was convicted after trial of wounding with intent. Although acknowledging that the complainant had suffered no permanent damage to his eye, the judge considered that "there was no doubt at all that [the defendant] endeavoured to stab him in the eye..."[77] Applying the guideline, the judge therefore classified the offence in category 1 and determined the appropriate starting point to be 10 years. The judge then considered the mitigating and aggravating factors affecting sentence (in mitigation, that the defendant, who was 19 at the time of the offence, was "not a very young man but sufficiently young for it to be a mitigating element";[78] and, as aggravating factors, that the weapon used was a knife, the attack was premeditated and the defendant already had previous convictions). In the result, the defendant was sentenced to 11 years' detention as a young offender. This sentence was upheld by the Court of Appeal. The court considered that, in the light of the serious aggravating factors identified by the judge, he had been entitled to treat the offence as falling within category 1, despite the fact that the complainant had suffered no lasting injury and to sentence the defendant as he did.

---

[75] See Transcript of proceedings (10th July 2013), p. 19, line 24, where the judge told Crown counsel, tersely and without elaboration, "I don't agree."
[76] [2012] EWCA Crim 1292.
[77] Quoted at para. 7.
[78] Quoted at para. 8.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[69] In the instant case, the learned trial judge, acknowledging that the appellants were persons of good character, explicitly took into account the favourable evidence given in mitigation on their behalf.[79] However, as an aggravating factor, the judge was particularly struck by the fact that the appellants' attack on Mr Springer was premeditated, observing that "[y]ou cannot have people in society because someone upset you, you go to the person's home with a machete and chop them"[80]. Further, the judge repeatedly emphasised that the appellants had armed themselves with machetes and that, "They could have killed the man. They could have killed him."[81] And finally, the judge pointed out that the maximum penalty to which the appellants were liable is life imprisonment, observing to the appellants directly, "You see how serious it is?"[82]

[70] In all of these circumstances and having given the matter our most anxious consideration, we have come to the conclusion that it cannot be said that the sentences imposed by the learned trial judge are either manifestly excessive or wrong in principle. We would therefore decline to disturb them.

Disposal of the appeal

[71] The appeal is therefore dismissed and the appellants' convictions and sentences affirmed.

C. Dennis Morrison, QC
Justice of Appeal [Ag.]

I concur. **Dame Janice M. Pereira, DBE**
Chief Justice

I concur. **Louise Esther Blenman**
Justice of Appeal

[79] Transcript of trial proceedings, pp. 41-42.
[80] Ibid, p. 36.
[81] Ibid, p. 38.
[82] Ibid, p. 41.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm