EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0001

BETWEEN:

DANNY BENJAMIN

Appellant

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. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for the Appellant
Ms. Tiffany Scatliffe Principal Crown Counsel for the Respondent

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2015: September 28;
April 6.

Criminal Appeal – Unlawful and malicious wounding – Whether learned trial judge erred in directing jury on the issue of transferred malice – Whether learned trial judge erred in failing to give good character direction – Whether learned trial judge erred in failing to advise jurors on lesser alternative offence – Whether learned trial judge materially misdirected jurors on self-defence- Court of Appeal Act Section 43 - Application of proviso

Mr. Danny Benjamin was charged on an indictment that preferred two counts against him – firstly, that he unlawfully and maliciously wounded August Pond with intent; and secondly, that on the same date and at the same location he unlawfully and maliciously wounded Christian Morillo with intent.

Mr. Benjamin and Mr. Pond were friends. On the day in question, Mr. Pond, Mr. Benjamin and another friend, Lance went to Anna's Bar to have drinks. There were other persons in the bar including three Spanish men. One of the Spanish men seated at this time next to

Mr. Benjamin started to rap. Mr. Benjamin appeared to be agitated and started to shout at the Spanish man whereupon an argument ensued between them. Mr. Pond and others tried to prevent Mr. Benjamin from becoming involved in a fight. Mr. Benjamin pushed Mr. Pond's hand away and went to the Spanish man and confronted him. Mr. Pond made another attempt to get Mr. Benjamin to leave by this time he (Mr. Benjamin) and the Spanish man were locked in a fight. Mr. Christian Morillo pushed Mr. Benjamin and the Spanish man in an effort to separate them.

Mr. Benjamin's friends were able to persuade him to leave the bar, which he did. Mr. Morillo thereafter returned to the bar and sat down. However, Mr. Benjamin did not leave the bar altogether, but went to his vehicle that was parked in front of the entrance of the bar, retrieved a machete from his vehicle and re-entered the bar. Mr. Morillo then heard "Christian be careful" and he observed that Mr. Benjamin was about to chop him. He raised his right hand so as to prevent the impact of the machete. Having been struck by the machete he fell to the ground whereupon Mr. Benjamin struck him again.

The Spanish men unsuccessfully tried to take the machete away from Mr. Benjamin. However, one of them pushed him out of the bar causing him to fall while still holding the machete. Mr. Pond who was at the front of the door talking to the DJ turned around and saw Mr. Benjamin re-entering the bar with the machete. He turned away and continued speaking to the DJ when he felt the machete across his head. He fell to the floor and could not move the left side of his body. Mr. Pond sustained very severe injuries to his skull and consequently had to undergo two major surgeries.

In the court below, the Crown prosecuted its case against Mr. Benjamin in relation to Mr. Pond on the basis of transferred malice; whereas the Crown's case in relation to Mr. Morillo was that Mr. Benjamin intended to harm Mr. Morillo. In his defence, Mr. Benjamin argued that though he intended to strike Mr. Morillo, he was acting in self-defence. Mr. Benjamin also argued that he was acting in self-defence when he accidentally struck Mr. Pond as he was defending him from Mr. Morillo.

In relation to the count that related to Mr. Pond, the learned trial judge directed the jury on the principles that are applicable to transferred malice and self-defence. In relation to the count in which Mr. Morillo was the victim, the judge's direction addressed the offence charged and the defence of self-defence. Despite the fact that Mr. Benjamin had no previous convictions, his then counsel Mr. Rowe did not bring out that fact during the trial and therefore Mr. Benjamin did not get benefit of a good character direction. There is no indication as to when the jury retired to deliberate or the length of time for which they deliberated. They returned with unanimous verdicts in relation to both offences. The learned trial judge thereafter sentenced Mr. Benjamin to ten years in prison on each offence, to run concurrently.

Mr. Benjamin appealed on the grounds that the sentence imposed by the learned trial judge was excessive in all the circumstances of the case; the learned trial judge erred in failing to give a good character direction to the jury in respect of Mr. Benjamin; the learned

trial judge erred in failing to advise the jurors of the statutory and lesser alternative offence of inflicting grievous bodily harm contrary to Section 164 of the Criminal Code of the British Virgin Islands ("the Criminal Code") thereby depriving Mr. Benjamin of a verdict which was properly open to the jurors on the evidence; the learned trial judge materially misdirected the jurors on the issue of self-defence; count 1 of the indictment alleging that the appellant unlawfully and maliciously wounded Augustus Pond intending to do so was defective; and that 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.

Held: allowing the appeal and remitting the matter to the court below for retrial, that:

1. The well-known principle of transferred malice essentially dictates that that where the defendant does an act intending to injure person B, he is guilty of having committed the offence against person B and the defendant's criminality is precisely the same whether it is person A or person B who is injured. Once the actus reus and the mens rea of the same crime coincide, the offence is committed. In order to be able to rely on this principle, the Crown must provide the evidential basis for so doing and cannot abdicate its responsibility by simply relying on a theory that is put forward by the defence. In the present case, the Crown quite erroneously relied on the principle of transferred malice in order to establish the offence in relation to Mr. Pond as the evidence that it adduced did not give rise to any basis for prosecution on this principle. Furthermore, it is clear that the learned judge misdirected the jury in summing up the case in relation to Mr. Pond on the basis of transferred malice as no evidence was led by the Crown in support of this principle. However, given the cogency of the evidence led by the Crown in relation to the ingredients of the offence of unlawful and maliciously wounding with intent, more specifically the overwhelming evidence that may have enabled the jury to infer that Mr. Benjamin had the requisite intention, the learned trial judge's misdirection was not fatal so as to vitiate Mr. Benjamin's conviction.

   Latimer v R (1886) 17 QBD 359 applied; **DPP v Frederick Daley and Another** [2002] 2 WLR 1 applied; **R v Mitchell** [1983] QB 741 applied.

2. It is settled that the question of whether or not to leave an alternative verdict for a lesser offence to the jury involves the exercise of the judge's discretion. It is the law that an appellate court will not lightly interfere with the exercise of the trial judge's discretion. To do so the appeal court must be satisfied that the failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction. The judge in making that decision must take a number of factors into account: (a) the judge must examine all of the evidence, disputed and undisputed and the issues of law and fact to which it has given rise; (b) in considering this matter, the judge is obliged to take into account the question of fairness to the defendant, on the one hand, and proportionality, that is to say, whether the alternative verdict would do justice to the facts of the

case; and (c) the decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case.

Sections 163 and 164 of the **British Virgin Islands Criminal Code** applied; **R v Foster and other Appeals** [2008] 2 All ER 597, 61 applied; **Patrick Facey et al v The Queen** BVIHCRAP2013/0009 (delivered 18th May 2015, unreported) applied.

3. It is plain that the difference between sections 163 and 164 of the **Criminal Code** is that an offence under section 163 requires proof that the defendant intended to wound or cause grievous bodily harm to the victim or to prevent the lawful apprehension while an offence under section 164 may be committed without any such intention. Section 163 is obviously the more serious of the two offences. The overwhelming evidence that was adduced by the Crown pointed to the intention to cause the greater offence. To have left the alternative verdict to the jury may have been unfair to the Crown since that verdict would not have done justice to the facts of the case. Accordingly, the learned trial judge's decision to direct the jury only on the greater offence and his refusal to leave the alternative verdict resulted in no unfairness to Mr. Benjamin and does not undermine the safety of the conviction.

   Sections 163 and 164 of the **British Virgin Islands Criminal Code** applied; **R v Foster and other Appeals** [2008] 2 All ER 597, 61 applied; **Patrick Facey et al v The Queen** BVIHCRAP2013/0009 (delivered 18th May 2015, unreported) applied.

4. It is the law that where a plea of self-defence arises, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was on an objective view a reasonable mistake or not. The law also allows such force to be used as is reasonable in the circumstances as the accused believed them to be. Based on the foregoing principles, it was incumbent on the learned trial judge to direct the jury on both elements of Mr. Benjamin's plea of self-defence, namely Mr Benjamin's honest belief and, taking the circumstances and the danger as Mr Benjamin honestly believed them to be, whether the amount of force which he used was reasonable. It was the learned trial judge's duty to bring home to the jury that they were to judge Mr. Benjamin based on the facts as he, Mr. Benjamin, saw them. There is no indication that this was done and these omissions amounted to misdirections or errors of law which rendered the conviction of Mr. Benjamin unsafe.

   Solomon Beckford v R [1988] AC 130 applied; **Shonovia Thomas v R** BVIHCRAP2010/0006 (delivered 27th August 2012, unreported) applied; **R v Gladstone Williams** (1984) 78 Cr. App. R. 276 applied; **Shaw v R** [2001] UKPC 26 applied; **Balroop v R** [1999] All E R 916 considered.

5. A defendant's good character must be distinctly raised by direct evidence from him or given on his behalf, or by eliciting it during the cross-examination of prosecution witnesses. It is trite law that it is the duty of counsel for the defendant to raise the issue of the defendant's character so that a good character direction could be given and he could have the benefit of it. As the judge is under no duty to raise it himself, there could therefore be no basis for saying that there was a misdirection by the learned judge in omitting to direct the jury on Mr Benjamin's good character.

   Barrow v The State [1998] AC 846 applied; **Teeluck and John v The State of Trinidad and Tobago** [2005] 1 WLR 2421 applied.

6. A defendant who has no prior convictions would be considered as being of good character and would therefore be entitled to a good character direction. In the case at bar, Mr Benjamin was so entitled in that he had no prior convictions. However, in light of the sheer force of the evidence against him, the utility in giving the good character direction given the totality of the circumstances of this case is brought into question. Any potential assistance to Mr Benjamin from a good character direction may have been wholly outweighed by the nature and cogency of the evidence against him.

   Mark France and Rupert Vassell v the Queen [2012] UKPC 28 applied; **Brown v R** [2005] UKPC 18 applied.

7. It is trite law as to when the application of the proviso is suitable. Given the absence of an adequate direction on the central issue in the present case, that is, Mr Benjamin's contention that he acted in self-defence, this Court cannot definitively conclude that no miscarriage of justice has occurred. A proper direction could, even if improbably, have led to a different outcome. Therefore, it is not suitable for this Court to apply the proviso that was stated in section 43 of the Court of Appeal Act in this appeal on the ground that no substantial miscarriage of justice has actually occurred.

   Shaw v R [2001] UKPC 26 applied.

8. A retrial order depends upon whether the interest of justice could be served by such an order. The main consideration is whether in the interest of the community and the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely due to some technical shortcoming in the conduct of the trial or in the directions to the jury. A critical factor is the seriousness of the crime and a countervailing consideration is fairness to the accused. The strength of the prosecution's case at the previous trial is always a consideration. However, the weight to be attached to this factor may vary widely according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion. In the present case, a retrial would serve the interests of justice, the public, as well as interest of the victims. Even though Mr Benjamin had

no previous convictions, the injuries sustained by the victims were very grave. The strength of the prosecution's case was overwhelming. In the circumstances the accused would not be treated unfairly if a retrial were to be ordered. There is a significant public interest in ordering a retrial and the factors present in this case justify the Court's granting leave to the Director of Public Prosecutions to proceed with a new trial of Mr. Benjamin on both counts.

Sherfield Bowen v The Queen ANUHCRAP2005/0004 (delivered 20th June 2007, unreported) applied; **Dennis Reid v The Queen** [1980] AC 343 applied.

JUDGMENT

[1] **BLENMAN JA**: Mr. Danny Benjamin ("Mr. Benjamin") was convicted, by unanimous verdict, of two counts of unlawful and malicious wounding contrary to section 163 of the **Criminal Code of the British Virgin Islands** ("**Criminal Code**"). He was sentenced to ten years in prison on each count, the sentences to run concurrently. He has appealed against his conviction and sentence. Indeed, in his amended grounds of appeal he stated five grounds of appeal. The Crown resists his appeal.

Background

Crown's Case

[2] Mr. Benjamin was charged on an indictment that preferred two counts against him – firstly, that he unlawfully and maliciously wounded August Pond ("Mr. Pond") with intent; and secondly that on the same date and at the same location he unlawfully and maliciously wounded Christian Morillo ("Mr. Morillo") with intent to do so.

[3] Mr. Benjamin and Mr. Pond were friends. On the day in question, Mr. Pond went to Anna's Bar and while there he telephoned Mr. Benjamin to join him for a drink. Mr. Pond arrived at the bar first and Mr. Benjamin and a friend Lance joined him

thereafter. All three of them drank at the bar. There were other persons in the bar including three Spanish men. One of the Spanish men started to rap; Mr. Benjamin was at this time sitting next to the Spanish man who was rapping. The man who was rapping eventually returned to his seat. Mr. Benjamin appeared to be agitated and started to shout at the Spanish man whereupon an argument ensued between the two of them.

[4] Mr. Pond and others tried to prevent Mr. Benjamin from becoming involved in a fight. Mr. Pond realised that Mr. Benjamin was angry so he grabbed him (Mr. Benjamin) as the latter was about to pass him and told him to "leave that alone" and that they "did not come here for that"; they "came to enjoy [them]selves". Mr. Benjamin pushed Mr. Pond's hand away and went to the Spanish man and confronted him. Mr. Pond made another attempt to get Mr. Benjamin to leave but by this time he (Mr. Benjamin) and the Spanish man were locked in a fight. Mr. Christian Morillo pushed Mr. Benjamin and the Spanish man in an effort to separate them; all of this occurred in front of the door. Many persons tried to quash the fight. Mr. Benjamin's friends were able to persuade him to leave the bar, which he did. Mr. Morillo returned to the bar and sat down. However, Mr. Benjamin did not leave the bar altogether, but went to his vehicle that was parked in front of the entrance of the bar, retrieved a machete from his vehicle and before re-entering the bar struck the shutters with the machete. Mr. Pond who was in front of the door saw Benjamin coming and told him "no, no, no, no". Meanwhile, Mr. Morillo was still sitting at the bar, while his friends were outside talking. Mr. Morillo then heard "Christian be careful" and he observed that Mr. Benjamin was about to chop him. He raised his right hand so as to prevent the impact of the machete. Having been struck by the machete he fell to the ground whereupon Mr. Benjamin struck him again.

[5] The Spanish men unsuccessfully tried to take the machete away from Mr. Benjamin; however one of them pushed him out of the bar causing him to fall still holding the machete. By this time, Mr. Pond was at the front of the door talking to the DJ. He turned around and saw Mr. Benjamin re-entering the bar with the machete, but knowing that Mr. Benjamin was his friend he felt no danger. He turned away from Mr. Benjamin to continue speaking to the DJ when he felt the machete across his head. He felt his dread lock in his hands and saw his hair on the floor. He fell to the floor and could not move the left side of his body. In fact, Mr. Pond sustained very severe injuries to his skull and had to undergo two major surgeries.

[6] On this evidence and quite interestingly the Crown accepted that Mr. Benjamin did not intend to injure Mr. Pond but rather only intended to injure Mr. Morillo. The Crown prosecuted its case against Mr. Benjamin, in the court below in relation to Mr. Pond on the basis of transferred malice, whereas the case of the Crown in relation to Mr. Morillo was based on the ground that Mr. Benjamin intended to harm Mr. Morillo. On this appeal, Principal Crown Counsel Ms. Scatliffe took a slightly different position and advocated that there was clear evidence in the case below that Mr. Benjamin intended to inflict harm on Mr. Pond. She seemed however to advance this position as an alternative and not a substitute of the Crown's theory which was based on transferred malice. Indeed, this was the thrust of the Crown's case in relation to the charge in which Mr. Pond was the victim. In relation to Mr. Morillo, Mr. Benjamin accepted that he intended to strike him but argued that he was acting in self-defence. The Crown called Mr. Pond, Mr. Morillo and other witnesses and sought to prove that Mr. Benjamin was not under attack by anyone. The Crown also led evidence to disprove Mr. Benjamin's plea of self-defence.

[7] In relation to the count that related to Mr. Pond, the learned trial judge directed the jury on the principles that are applicable to transferred malice and self-defence. In relation to the count in which Mr. Morillo was the victim, the judge's direction addressed the offence charged and the defence of self-defence. The jury obviously accepted that the Crown had negatived the defence raised and convicted Mr. Benjamin.

Defence's Case

[8] Mr. Benjamin gave evidence on oath. He admitted to being at the bar and drinking with Mr. Pond and Mr. Lance while enjoying himself. He gave a different version of facts from that recounted by the Crown's witnesses, which I will refer to shortly. He had however given a statement to the police by way of interview, before the trial. In his interview with the police, he said that he was defending himself because one Spanish man had pushed him twice at the bar and that he was being beaten by the other Spanish men.

[9] On oath he maintained that while at the bar one of the Spanish men had bounced him three times and when he was in the process of peacefully leaving another one struck him in his face. It was then that the other Spanish men joined in and started to beat him. He fought with them and was defending himself from their attack. He ran to his jeep after he had been beaten by the Spanish men. The men later ran away by the beach.

[10] Mr. Benjamin's defence specifically in relation to Mr. Morillo was that he was acting in lawful self-defence. He said he returned to the bar and tried to defend Mr. Pond and his friend Lance. He saw Mr. Morillo coming towards Mr. Pond and in his effort to protect Mr. Pond from him he swung his cutlass once because he thought Mr. Morillo was close to Mr. Pond. However, when he swung the cutlass, Mr. Pond 'end up' getting hit because Mr. Pond was in front of Mr. Morillo and he

[Mr. Morillo] is a little taller than Mr. Pond. Mr Benjamin maintains that he never intended to hurt Mr. Pond because he was his friend. He says he was only trying to protect him.

[11] It is noteworthy that Mr. Benjamin admitted during cross-examination that during his police interview nowhere did he say that the Spanish people had a problem with Mr. Pond. He admitted that he had said that the Spanish men were chasing and attacking him. Furthermore, despite the fact that Mr. Benjamin had no previous convictions, his then counsel Mr. Rowe did not bring out that fact during the trial and therefore Mr. Benjamin did not get benefit of a good character direction.

[12] After the senior crown counsel and counsel for Mr. Benjamin addressed the jury, the learned trial judge summed up the case to the jury. There is no indication as to when the jury retired to deliberate or the length of time for which the jury deliberated. They returned with unanimous verdicts in relation to both offences. The learned trial judge thereafter sentenced Mr. Benjamin to ten years in prison on each offence, to run concurrently.

[13] Initially, Mr. Benjamin appealed, in person against the sentence. By an amended notice of appeal filed by learned counsel, Mr. Patrick Thompson ("Mr. Thompson") he added other grounds.

[14] The following are the amended grounds of appeal:

(a) The sentence imposed by the learned trial judge was excessive in all the circumstances of the case.

(b) The learned trial judge erred in failing to give a good character direction to the jury in respect of Mr. Benjamin. Mr. Benjamin was entitled to the full good character direction since he gave evidence at trial in his own

defence. Further, or in the alternative, the appellant's trial counsel failed to elicit any evidence as to the appellant's previous good character in circumstances where the appellant's good character was in issue. This was a material irregularity and renders Mr. Benjamin's conviction unsafe and unsatisfactory.

(c) The learned trial judge erred in failing to advise the jurors of the statutory and lesser alternative offence of inflicting grievous bodily harm contrary to Section 164 of the **Criminal Code**. The failure to do so was a material irregularity and deprived Mr. Benjamin of a verdict which was properly open to the jurors on the evidence.

(d) The learned trial judge materially misdirected the jurors on the issue of self-defence. The learned trial judge omitted to direct the jurors as to whether the appellant honestly and reasonably believed that he was acting in self-defence. The learned trial judge also misdirected the jurors by directing them that self-defence only arose if they believed Mr. Benjamin's evidence.

(e) Count 1 of the indictment alleging that the appellant unlawfully and maliciously wounded Augustus Pond intending to do so was defective. It was common ground that the appellant never intended to harm Augustus Pond and the doctrine of transferred malice did not change the appellant's intent. Mr. Benjamin's conviction on count 1 is thus unsafe and unsatisfactory on this basis.

(f) 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 felt 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.

(g) Such other grounds as Mr. Benjamin or his counsel may prepare after perusing the transcript of Mr. Benjamin's sentencing hearing and as the Court of Appeal may permit.

[15] Learned counsel Mr. Thompson argued the grounds of appeal in the following manner:

(i) The transferred malice ground, that is to say that count 1 of the indictment which alleged that Mr. Benjamin unlawfully and maliciously wounded Augustus Pond was defective in conjunction with the learned trial judge's failure to leave in the alternative an offence under section 164 of the **Criminal Code**;

(ii) The learned trial judge's non-direction on Mr. Benjamin's previous good character;

(iii) The learned trial judge's misdirection on self-defence;

(iv) The learned trial judge's direction on a majority verdict before the time for doing so had arisen;

(v) The severity of the sentence imposed by the learned trial judge.

With no disrespect intended to learned counsel, this Court will address the following issues in the manner stated below:

Issues Raised

[16] We are of the view that the following issues arise from the grounds of appeal:

(a) Whether the indictment was properly framed so as to reflect transferred malice;

(b) Whether the learned trial judge ought to have left the alternative verdict of unlawful wounding with the jury;

(c) Whether the good character direction ought to have been given and if so whether its omission undermines the safety of conviction;

(d) Whether the learned judge misdirected the jury on the law of self-defence;

(e) Whether the judge's remarks to the jury as to the circumstances in which they could arrive at a majority verdict were appropriate;

(f) Whether the sentences imposed by the judge were excessive in the circumstances of the case.

Appellant Submissions

The Transferred Malice & Alternative Verdict Ground

[17] Learned counsel Mr. Thompson in the interest of convenience argued the transferred malice and alternative verdict grounds together. Mr. Thompson said that Mr. Benjamin complains that count 1 of the indictment which alleged that the appellant 'did unlawfully and maliciously wound Augustus Pond with intent to do so' was defective. It was common ground at trial that Mr. Benjamin did not intend to injure Augustus Pond. Therefore, it was on this basis that the learned trial judge directed the jurors on transferred malice. There can be no complaint with the learned trial judge's direction on transferred malice since on the facts transferred malice applied. Mr. Benjamin's complaint lies in the form of the indictment since it alleged that the appellant wounded Augustus Pond intending to do so. On the Crown's case, insofar as the doctrine of transferred malice was concerned, Mr. Benjamin wounded Augustus Pond intending to wound Christian Morillo.

[18] Mr. Thompson said that the indictment alleged that Mr. Benjamin wounded Augustus Pond intending to wound Augustus Pond. He stated that the indictment should properly have alleged that the appellant unlawfully and maliciously wounded Augustus Pond intending to wound Christian Morillo. The failure to properly phrase the indictment is fatal to the safety of the appellant's conviction on count 1 of the indictment. It was Mr. Thompson's submission that authority for this proposition is derived from two United Kingdom authorities which deal with this issue. The first of these is the case of **R v Monger**[1] and the second authority of more recent vintage is the case of **R v Slimmings**.[2] Both authorities are cited with approval at paragraph B2.52 of **Blackstone's Criminal Practice** (2012) ("**Blackstone's**"). **Blackstone's** provides that these cases are authority for the proper form of indictment in the case of transferred malice.

[19] In **Monger**, the defendant was charged with 4 counts of wounding. The first two counts alleged that he had wounded A and the third and fourth counts alleged that he had wounded B.[3] After the jurors had retired to consider their verdict, they sought a direction from the learned trial judge as to whether they could convict the defendant of wounding B with intent to cause grievous bodily harm ("GBH") if they came to the conclusion that the defendant aimed the blow at A intending to cause GBH and missed wounding B instead. In **Monger**, the learned trial judge agreed that the doctrine of transferred malice applied but was of the view that on those facts the defendant could only be convicted of unlawful wounding. Section 18 of the **UK Offences Against the Persons Act** which is identical to Section 163 of the **Criminal Code** enabled a specific count charging the defendant with wounding B with intent to cause GBH to A. By parity of the same reasoning, it was open to

[1] [1973] Crim L.R. 301.
[2] [1999] Crim L.R. 69.
[3] The wounding counts were framed in the alternative, that is to say, that D had wounded A and B intending to cause them GBH (Section 18 in the UK/Section 163 in the BVI) or had unlawfully wounded A and B unlawfully (Section 20 in the UK/Section 164 in the BVI).

the Crown at trial to amend the indictment to take account of this fact. Their failure to seek such an amendment deprived the appellant of a verdict to which he would properly have been entitled and as such his conviction on count 1 of the indictment is entitled to be quashed.

[20] Mr. Thompson submitted that **Slimmings** confirms the principle that was stated in **Monger**. Therefore, the jury in **Monger** could not convict the defendant of causing GBH to B where he aimed at A with intent to do GBH to A and struck B since the indictment alleged an intent to do harm to B. The Court of Appeal in **Slimmings** also confirmed that the Court of Appeal was not empowered to amend the indictment and that the ground of appeal although technical and devoid of merit, had to succeed. In those circumstances, a 5 year sentence for inflicting GBH (section 20) was substituted for the section 18 offence. Mr Thompson invited the Court to adopt a similar reasoning since the ratio decidendi in both **Slimmings** and **Monger** is on all fours with the instant case. Mr. Thompson said that if the Court accepts the learning in **Slimmings** and **Monger**, the learned trial judge was obliged to leave the alternative offence of section 164 to the jurors in respect of both counts of the indictment.[4] The section 164 charge properly arose for the reasons set out above. The issue then for the jury was Mr. Benjamin's intent. The jury should have been asked to consider whether Mr. Benjamin possessed the requisite intent for a conviction under either sections 163 or 164 of the **Criminal Code**. Mr. Thompson submitted that the failure to do so deprived the appellant of verdicts to which he would have been entitled and is thus fatal to the safety of the appellant's convictions on counts 1 and 2 of the indictment.

[4] Section 325 of the British Virgin Islands Criminal Code provides:
"Without prejudice to the provisions of the Criminal Procedure Act or to any other provisions of this Code, 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 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 column of the Table, he may be convicted of that other offence although he was not charged with it".

[21] Learned counsel Mr. Thompson pointed out that in **R v Maxwell**[5] the House of Lords was of the view that in any case where the judge fails to leave an alternative offence to the jury, the court before interfering with the verdict must be satisfied that the jury may have convicted out of a reluctance to see the defendant get away with disgraceful conduct. Moreover, in **R v Coutts**,[6] the House of Lords confirmed that once any obvious and viable alternative verdict arose on the evidence, the learned trial judge was required to leave same to the jury. The failure to do so was a material irregularity. Mr. Thompson argued that the learned trial judge was required to leave the jury with the alternative offence under section 164 since it was for the jurors to decide whether the appellant intended to commit the section 163 harm or the section 164 harm on both counts of the indictment. The omission of the section 164 harm left the jurors with a stark choice of either acquitting the appellant altogether or convicting him of the Section 163 offence. The jurors by their verdict were not prepared to let the appellant get away with what was in any view discreditable conduct. Moreover, the case of **The State v Clement Singh**[7] confirms that once the lesser offence was committed in the course of the same transaction which gave rise to the greater charge, the jury would be entitled to return a verdict to either the greater or lesser offence. This authority lends further support to the propositions advanced above.

[22] Mr. Thompson argued that the learned trial judge's failure to leave the lesser verdict to the jurors is fatal to the safety of Mr. Benjamin's conviction. As the court pointed out in the **Clement Singh** case, it was always open to the Crown to take the simpler path and simply include the lesser count on the indictment in addition to amending count 1 to properly reflect Mr. Benjamin's intent to harm Mr. Morillo. This could have been done at any stage during the trial and even after the learned trial judge had completed his summing up to the jurors, since, in view of the

[5] [1990] 1 WLR 401.
[6] [2006] 1 WLR. 2156.
[7] (1995) 51 WIR 128.

evidence, there could be no prejudice to the appellant from this course. The failure to do so as well as the learned trial judge's failure to properly leave the lesser verdict is fatal to the safety of his convictions. Alternatively, Mr. Thompson submitted that Mr. Benjamin's conviction for wounding Mr. Pond with intent to do him grievous bodily harm should be substituted for a conviction for unlawful and malicious wounding contrary to section 164 of the **Criminal Code**. The appellant's 10 year sentence for unlawful and malicious wounding must thus be substituted for some such lesser term as the Court thinks fit.

Failure to Give a Good Character Direction

[23] Mr. Thompson said that at trial Mr. Benjamin was a man of previous good character and gave evidence in his own defence. Mr. Benjamin was thus entitled to both the propensity and credibility element of the good character direction. No such direction was given. He argued that this omission was fatal. In support of his argument he referred to the case of **Teeluck and John v The State of Trinidad and Tobago**[8] in which the Privy Council set out the following propositions on the consequences of a non-direction as to the appellant's previous good character:

> (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.
>
> (iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful

[8] [2005] 1 WLR 2421.

than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a 'good character' direction is always relevant: **Berry v The Queen** [1992] 2 AC 364, 381; **Barrow v The State** [1998] AC 846, 850; **Sealey v The State** (2002) 61 WIR 491, para 34.

(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: **Thompson v The Queen**, at p 844".

[24] Mr. Thompson maintained that Mr. Benjamin's good character was central to his defence since both his credibility as a witness and his propensity to commit the offence were matters for the jury to determine. The absence of that direction means that Mr. Benjamin did not have the benefit of those directions to the jurors. In those circumstances, it is difficult for an appellate court to say that the giving of a 'good character' direction could not have affected the outcome of the trial. Mr. Thompson contended that the jurors were deprived of both the credibility and propensity direction and therefore it cannot realistically be argued that the direction would have not have made a difference.

[25] Mr. Thompson also referred to **Sealey & Headley v The State**[9] where the Privy Council was of the view that "the omission of a good character direction is a defect in the conduct of a trial" and also Henry LJ in **R v Kamar**[10] who stated that a "good character direction is a protection necessary to preserve the fairness of a trial". It

[9] [2002] UKPC 52.
[10] (1999) The Times (London), 14 May.

is for this reason that their Lordships in **Sealey & Headley** were of the view that while it appeared probable that the jury would have convicted the appellant, they were unable to agree that the jury would have inevitably convicted and for this reason allowed the appellant's appeal. This Court is invited by Mr. Thompson to adopt a similar approach. Mr. Thompson said that the case for Mr. Benjamin is to be distinguished from other cases where the appellant in those matters did not give evidence in his own defence. In those circumstances, the only complaint can be that the learned trial judge failed to direct the jurors on the propensity limb and that this direction would not have made a difference. In this case, where the case for Mr. Benjamin rose and fell on the jurors' view of his credibility, Mr. Thompson argued that it is inconceivable that the good character direction would not have made a difference.

[26] He referred to **Vijai Bhola v The State**[11] where the Privy Council referred to **Headley and Sealey** as well as three Privy Council authorities in 2005[12] which all dealt with the issue of the good character direction. Mr. Thompson posited that the question for this Court is whether the outcome of the trial would have been affected had the direction been given. That is, would the jurors have inevitably convicted if they had the benefit of the good character direction. He submitted that there could be no doubt that Mr. Benjamin's credibility was central to the issues which the jurors had to determine. The lack of a good character direction meant that the jurors were not directed to the issue of the Mr. Benjamin's character, that is to say, neither his credibility as a witness nor his propensity to commit the offence were placed in issue before them.

[27] Mr. Thompson posited that it is trite law that the failure by defence counsel to elicit evidence of good character is a viable ground of appeal. In **Campbell v The**

[11] (2006) 68 WIR 449.
[12] Bally Sheng Balson v The State of Dominica [2005] UKPC 2; Brown v R [2005] UKPC 18;Jagdeo Singh v The State [2005] UKPC 35.

Queen,[13] the Privy Council referred to the leading authorities on the issue of a failure to give a good character direction. The Privy Council found that the only plausible explanation for the failure to adduce evidence of good character was defence counsel's incompetence. It follows from this finding that in the appropriate case the failure to adduce evidence of Mr. Benjamin's previous good character may affect the safety of Mr. Benjamin's conviction. It is pellucid that the trial counsel was under a duty to elicit evidence of Mr. Benjamin's good character. Therefore, this Court must be in a position to discern why evidence of the appellant's good character was not adduced. Mr. Thompson posited that the failure to adduce evidence of Mr. Benjamin's good character is relevant to the safety of Mr. Benjamin's conviction. There is no distinction in principle between circumstances where the trial judge is under a duty to give a good character direction and where no direction is given as a result of counsel's failure. Mr. Benjamin was entitled to have the issue of his previous good character drawn to the attention of the jurors. Mr. Thompson commended to the Court the reasoning of Lord Mance at paragraph 45 of **Campbell**:

> "This is the 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".

[28] Mr. Thompson also referred the Court to **R v Maye**[14] and reiterated that the absence of a good character direction is relevant to the safety of Mr. Benjamin's conviction and for this reason his conviction is unsafe and liable to be set aside.

Misdirection on Self-Defence

[29] Mr. Thompson next addressed the issue of self-defence and said that the learned trial judge misdirected the jurors on the issue of self-defence by directing them that self-defence only arose if they believed Mr. Benjamin's evidence. Mr. Thompson

[13] [2011] 2 AC 79.
[14] [2008] UKPC 36.

also complains that the learned trial judge omitted to direct the jurors as to whether the appellant honestly and reasonably believed that he was acting in self-defence. He argued that this was fatal and that as a consequence of this omission Mr. Benjamin did not receive a fair trial. Mr. Thompson highlighted the judge's direction to the jurors:

> "Now I told you I should address you on the issue of self-defence and where self-defence is raised the Prosecution must negative self-defence. The Accused does not have to prove that he was acting in self-defence. So if you find that he was or he may have been acting in self-defence, not guilty of any offence. I told you that the Prosecution must negative self-defence. If you accept the evidence of either Augustus Pond and of Christian Morillo, the issue of self-defence does not arise. You understand? If you accept the evidence of Morillo and Pond, then the issue of self-defence cannot arise. It's only if you accept what the Accused told you, then, and only then, you consider the issue of self-defence".

[30] Mr. Thompson said that is clear that the learned trial judge erred in directing the jurors that it was only if they accepted what Mr. Benjamin told them that they were entitled to consider the issue of self-defence. The effect of the learned trial judge's direction was likely to create the impression in the minds of the jurors that Mr. Benjamin had to lead sufficient evidence to establish self-defence. Mr. Thompson stated that the learned trial judge was correct to direct the jury that self-defence must be negatived by the Crown. He went on to say that if that were all that the learned trial judge said then there could be no realistic complaint. The effect of that direction could only have been undone by the direction that the issue of self-defence arose only if the jurors believed Mr. Benjamin. Counsel submitted that this direction was plainly wrong and renders Mr. Benjamin's conviction unsafe and unsatisfactory as self-defence was the cardinal plank of Mr. Benjamin's defence.

[31] He referenced the learned authors of **Archbold: Criminal Pleading, Evidence and Practice (2015)** at paragraph 7-57 which refers to the fact that a misdirection as to self-defence is a viable ground of appeal against conviction. The authority

of **R v Abraham**[15] was also relied on in support of that proposition. In **Abraham**, the appellant was convicted of causing grievous bodily harm contrary to section 20 of the **Offences against the Person Act**. The issue for the jurors was whether Mr. Abraham was acting in lawful self-defence. The Court of Appeal was of the view that the learned trial judge's statement in his summing up that 'if Mr. Abraham was telling the truth about his version of what transpired' left the jury in doubt as to where the burden lies on establishing self-defence. The Court of Appeal expressly disapproved of this direction in **Abraham** and allowed Mr. Abraham's appeal on this basis. Mr. Thompson submitted that **Abraham** confirms that a careful direction to the jurors on self-defence is mandatory and the absence of a direction which confirms that no burden is imposed on the appellant is fatal to the safety of the appellant's conviction. He pointed out that the reasoning of the Court of Appeal in **Abraham** was expressly approved in **R v Gladstone Williams**.[16]

[32] Mr. Thompson next complained that the learned trial judge failed to direct the jury on Mr. Benjamin's honest mistake of fact. This failure he argued was critical. In **Gladstone Williams**, the Court of Appeal was of the view that the trial judge's directions must make it clear to the jury that it is for the prosecution to eliminate the possibility that the appellant was acting under a genuine mistake of fact. **Abraham** was expressly approved in **Gladstone Williams** and thus confirms that any direction which does not clearly bring home to the jury that the Crown must eliminate the possibility that the defendant was acting under a genuine mistake of fact is liable to be set aside.

[15] (1973) 57 Cr. App. R. 799.
[16] (1984) 78 Cr. App. R. 276.

[33] Mr. Thompson also stated that the decision of this Court of Appeal in the case of **Shonovia Thomas v R**[17] is also instructive. In that case, Baptiste JA confirmed that:

> "The law recognises that where a plea of self-defence is engaged, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was, on an objective view a reasonable mistake or not".

In **Shonovia Thomas**, there was no issue of mistaken belief as to her version of the facts. In the instant case, Mr. Benjamin testified that it seemed to him that Mr. Morillo was coming towards Mr. Pond and when he swung Mr. Morillo got hit on his hand. Mr. Benjamin confirms his mistaken belief that when he swung the cutlass he thought that he was protecting Mr. Pond from attack. It was therefore incumbent on the learned trial judge to direct the jury that they were to consider whether the appellant honestly believed that it was necessary to use force in defence of himself or another.

[34] Mr. Thompson maintained that the learned trial judge was thus required to direct the jury in keeping with the statement of Lord Lane in **Gladstone Williams** that:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the Defendant believed or may have believed that he was being attacked or that a crime was being committed and that force was necessary to protect himself or to prevent the crime then the Prosecution have not proved their case. If however, the Defendant's alleged belief was mistaken and if the mistake was an unreasonable one that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury came to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it he is entitled to rely on it".

[35] Mr. Thompson complained that there is no indication from the summing up that the learned trial judge directed the jurors on how they were to deal with the reasonableness of Mr. Benjamin's belief. He acknowledged that it was open to the

[17] BVIHCRAP2010/0006 (delivered 27th August 2012, unreported).

jurors to find that the appellant's belief that Mr. Pond was under attack was unreasonable but the learned trial judge was required to draw the attention of the jurors to this fact and remind them that the appellant was relying on this belief. The trial judge did not direct the jury to treat the facts as Mr. Benjamin saw them.

[36] Mr. Thompson said that while the learned trial judge gave the classical direction to the jurors on self-defence as approved in **Palmer (Sigismund) v R**,[18] he failed to give the jurors any direction on how they were to deal with the honesty of the belief and the reasonableness of Mr. Benjamin's belief in the facts as he perceived them to be. As a matter of law, Mr. Benjamin was entitled to rely on these facts and the learned trial judge's failure to draw this fact to the attention of the jurors is also fatal to the safety of the appellant's conviction. Therefore, Mr. Thompson submitted that the appellant's appeal against conviction should be allowed.

Directions on Majority Verdict

[37] Mr. Thompson said the learned trial judge directed the jurors that when they retired they must endeavour to arrive at a unanimous verdict and that if they are unanimous they can return at any time. The jurors were directed that the court can accept a majority verdict of 7/2 or 8/1 and that "the court is in a position to accept a majority verdict but two hours must elapse". The jurors were then placed in the care of the jury bailiffs. It is important to note that there is no indication in the record of appeal as to the time at which the jurors retired or how long their deliberations took. In the case of **Flavia Richardson v The Queen**,[19] the absence of any indication as to the time when the jurors left to deliberate and their return was held to be a serious error which resulted in the quashing of the conviction.

[18] (1971) 16 WIR 499.

[19] SVGHCRAP19/2009 (delivered 31st May and 3rd June 2010, reissued with corrections 1st September 2010, unreported).

[38] Mr. Thompson submitted that Mr Benjamin's primary complaint is that the learned trial judge erred in communicating to the jurors the fact that they would have to deliberate for 2 hours before the court could accept a majority verdict. In **Flavia Richardson**, the learned trial judge gave the jurors the same direction as was given to the jurors in the instant case. The Court of Appeal was of the view that this direction did not communicate to the jurors that they were entitled to disagree. Mr. Thompson submitted that the learned trial judge was obliged to follow the procedure as laid down in the **Criminal Practice Directions**[20] on majority verdicts. He argued that it is pellucid that the learned trial judge in the instant case materially departed from that Practice Direction and that his direction had the effect of placing improper pressure on the jury to arrive at their verdict as the learned trial judge made it clear that the jurors had to deliberate for 2 hours before they could deliver a majority verdict. Mr. Thompson accepted that the Practice Direction is directory and not mandatory and that non-compliance is not necessarily fatal. He stated however that this is to be juxtaposed with the principle that where the judge issues an ultimatum or stipulates a deadline a conviction is liable to be set aside. He submitted that the rationale for this salutary principle is that the jury must be free to deliberate without any form of pressure.

[39] In these circumstances, he invited this Court to find that no good reason existed for the learned trial judge's material departure from the Practice Direction. The impact of this departure was likely to have caused the jurors to be aware of a 2-hour time limit to their deliberations. This deadline would have loomed large in their thoughts while they deliberated. Mr. Thompson reminded the Court that the record does not indicate how long they deliberated or at what they time their deliberations began or ended. As a result, he submitted that Mr. Benjamin's conviction is liable to be set aside on this basis.

Sentence

[20] [2002] 1 W.L.R 2870.

[40] Next, Mr. Thompson complained that the ten-year sentence imposed on Mr. Benjamin was excessive in all the circumstances of the case. Firstly, the sentence appears to be at the upper end of sentences imposed for causing grievous bodily harm in the Territory. He submitted that the local authorities on sentencing were ably summarised at paragraphs 32 to 37 of the judgment of Madam Justice Hariprashad-Charles in **R v Franklyn Smith & Travis Smith**.[21] From these authorities, it is possible to discern a sentencing range of 3 to 7 years. Mr. Thompson contended that the sentence imposed by the learned trial judge in the case at bar clearly indicates that he went above the sentencing range and advanced no reasons for the departure from the said sentencing range.

[41] Mr. Thompson secondly submitted that Mr. Benjamin, both in his evidence and mitigation, displayed significant remorse for the injuries that the victims sustained. He stated that it is common ground that remorse is a mitigating factor and confirms that Mr. Benjamin's actions were not premeditated. Therefore, the Crown's submission to the learned trial judge that Mr. Benjamin's actions were pre-meditated was erroneous and prejudicial to Mr. Benjamin. Thirdly, Mr. Benjamin's character witnesses confirmed that the appellant's offending was out of character for the appellant.

[42] Mr. Thompson submitted that the aggravating factors did not significantly outweigh the mitigating factors and thus a sentence at the lower as opposed to the higher end of the range was entirely appropriate. He accepted that guidelines are not meant to be slavishly followed, however stated that they can provide useful guidance on the relevant sentences to be imposed. He submitted that a sentencing range of 5-9 years with a starting point of six years custody was

[21] BVIHCRAP2008/0006 (delivered 5th and 6th May 2008, unreported).

entirely appropriate having regard to the appellant's offence. A 15-year starting point with a 10-year custody period was manifestly excessive.

[43] Mr. Thompson contended that this Court in the exercise of its discretion is empowered to reduce the sentence imposed on Mr. Benjamin to such term as it thinks fit.

Respondent's Submissions

Alternative Offence and Transferred Malice

[44] Principal Crown Counsel Ms. Scatliffe reminded the Court that Mr. Benjamin complains that the learned trial judge failed to instruct the jury that they could find Mr. Benjamin guilty on the lesser offence of wounding contrary to section 164 of the **Criminal Code**. Section 325 of the **Criminal Code** provides:

> "Without prejudice to the provisions of the Criminal Procedure Act or to any other provisions of this Code, 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 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 column of the Table, he may be convicted of that other offence although he was not charged with it".

[45] Ms. Scatcliffe submitted that before the learned trial judge can direct the jury to return a conviction on section 164 of the **Criminal Code**, there must be evidence that was led on which the learned trial judge can direct the jury and this includes the accepted and disputed evidence that was led. The matter is one for the discretion of the learned trial judge. In support of her proposition, she referred to **R v Foster and other Appeals**[22] where the court held:

> "Any requirement to leave an alternative verdict to the jury did not engage an absolute question of law. The situation which arose in the instant cases would not always create an obligation on the trial judge to leave an alternative lesser verdict whenever the defence to the more serious charge on the indictment involved an admission of a lesser offence. A

[22] [2008] 2 All ER 597.

judge would not be in error if he decided that a lesser alternative verdict should not be left to the jury if that verdict could properly be described in its legal or 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 involved an examination of all the evidence and the issues of law and fact to which it had given rise. An erroneous failure by a trial judge to leave an alternative lesser verdict to the jury did not change the statutory test relating to safety, or otherwise, of convictions returned by the jury. Ultimately the single issue for the Court of Appeal was whether the conviction was unsafe*".*

[46] This Court also relied on **R v Foster and other Appeals**[23] in the matter of **Patrick Facey and Michael Facey v the Queen**.[24] In that appeal, Morrison JA [Ag.] delivering the judgment of the Court ruled that the following propositions should be considered in determining whether an alternative verdict should be given to the jury:

(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".* (Emphasis added)

[23] ibid, para. 61.

[24] BVIHCRAP2013/0009 (delivered 18th May 2015, unreported).

[47] Ms. Scatliffe stated that in the case at bar there was evidence to show that Mr. Benjamin had the intent to attack both complainants. She stated further that the difference between the section 163 offence and a section 164 offence is intention. Section 163 clearly requires that there is intent to unlawfully and maliciously wound any person. The evidence that was led showed that Mr. Benjamin intended to maliciously and unlawfully wound the complainants. Mr. Benjamin went to the vehicle, took out the machete and struck the louvers before entering and chopping the complainant. Friends attempted to stop him but he refused to stop. Interestingly, Ms. Scatliffe took issue with Mr. Benjamin's contention that the learned trial judge erred in explaining the concept of transferred malice. She posited that transferred malice arises where the defendant intends to kill or cause grievous bodily harm/serious injury to person A, but person B is killed or injured then the defendant is guilty for harm caused to person B. The harm done must be the same as the harm intended.[25] In relation to Mr. Benjamin's complaint that there was a fault on the indictment, Ms. Scatliffe made reference to paragraph B2.66 of **Blackstone's 2015** which provides what the particulars are for the offence of wounding with intent:

> "A on or about the…day of….unlawfully and maliciously wounded with intent to do him grievous bodily harm".

[48] Ms. Scatliffe said that this clearly shows that in the particulars of the offence, the person who has been injured is named. The proposition advanced by learned counsel for Mr. Benjamin is therefore incorrect. She referred to paragraph 19-265 of **Archbold: Criminal Pleading, Evidence and Practice (2015)** which provides that the evidence must establish that the defendant intended to injure another than the person named in the indictment. Mr. Benjamin in his evidence admitted that he intended to chop Mr. Morillo when Mr. Pond was struck but Mr. Pond stated that the DJ was the person he was speaking to at the time, not Mr. Morillo who was chopped

[25] Archbold: Criminal Pleading, Evidence and Practice (2015), para. 17-24.

prior to that incident. Ms. Scatliffe submitted that there is no evidence in the record to substantiate Mr. Benjamin's assertion.

[49] Ms. Scatliffe referred the Court to rule 11 of the **Indictment Rules**, Schedule to the **Indictment Act. Cap. 32**. This rule provides that it is not necessary to state any intent to cause injury in the particulars of the offence. The authorities cited on behalf of Mr. Benjamin must be read in context. In **R v Monger**,[26] the defendant was faced with counts for both wounding and wounding with intent. Further, it appears that it is a statutory requirement under the provisions of the **Offences Against the Persons Act**. The Court was also referred to the decision of this Court in **Andre Penn v the Queen**[27] where the Court ruled that where there is BVI legislation or statutory provision relating to a specific subject matter, then the UK statute is inappropriate and inapplicable. Ms. Scatliffe submitted that the provisions in the **Indictment Act** are sufficient and that the indictment that was before the jury had no defects.

[50] Ms. Scatliffe submitted that the Crown's case was that there was intent on the part of Mr. Benjamin. He had an encounter with Morillo and others, and despite being prevented or dissuaded, he went to his vehicle, retrieved the cutlass and chopped two persons. Ms. Scatliffe argued that it was a matter for the learned trial judge in his discretion to put an alternative verdict to the jury. This Court cannot simply interfere unless it is shown that the learned trial judge fettered his discretion.

Failure to Give a Good Character Direction

[51] Ms. Scatliffe submitted that it is well-settled law that it was counsel's duty at trial to raise the issue of the client's good character where it is likely to be to the defendant's advantage. In support of her submission she relied on the learning in

[26] [1973] Crim L.R. 301.
[27] BVIHCRAP2013/0006 (delivered 4th June and 29th September 2014, unreported).

Teeluck[28] where Lord Carswell delivering the judgment of the Board said at paragraph 33(v) that:

> "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** [1988] AC 846, 852; following **Thompson v The Queen** [1988] 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: **Thompson v The Queen** at p. 844".

[52] Learned Principal Crown Counsel Ms. Scatliffe reminded the Court that Mr. Benjamin's counsel did not lead any evidence on his good character during the trial. Ms. Scatliffe refers to **Bally Sheng Balson v The State**,[29] a Privy Council decision from Dominica. Balson was convicted of the murder of his girlfriend. His counsel at trial failed to raise in evidence the fact that he never had any previous convictions. This failure was raised as a ground of appeal and at paragraph 2 of the judgment the court ruled that:

> "Although there was an omission on C's part to lead evidence regarding B's good character, for which no satisfactory explanation has been given, a good character direction would have made no difference to the result in the instant case. The only question was whether it was B who had murdered D or whether D was killed by an intruder. The issues about B's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, were wholly outweighed by nature and coherence of the circumstantial evidence".

[53] This point was further explained at paragraph 38 of the judgment:

> "It is clear that the appellant had no previous convictions. This was an omission on counsel's part for which no satisfactory explanation has been given. But their Lordships are the opinion that a good character direction would have made no difference to the result in this case…All the circumstantial evidence pointed to the conclusion that the appellant was the murderer."

[28] [2005] 1 WLR 2421.
[29] [2005] UKPC 2.

[54] Ms. Scatliffe submitted that the case against Mr. Benjamin was so strong that even if a good character direction was given, the outcome would not have changed. There was no evidence led to show that someone other than Mr. Benjamin wounded the two complainants or was wielding a machete at Anna's Bar. He did wound the complainants but tried to justify it by claiming that he was acting in self-defence which was only stated by Mr. Benjamin. The account from other witnesses was that Mr. Benjamin was the aggressor and was defending no one. The fact that the direction was not given is sufficient to only justify an examination of the effect that this may have on the safety of the conviction. In **Vijai Bhola v The State**,[30] the Board held that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction. As Lord Bingham of Cornhill states at paragraph 25 in the case of **Jagdeo Singh v The State**[31] "Much may turn on the nature of and issues in a case and on the other available evidence".

[55] In **Balson v The State**, the Board suggested that depending on the strength and cogency of the evidence, the question of a good character direction may be of no significance. The nature and coherence of the evidence must be examined to determine whether it outweighs the effect of a direction. Ms. Scatliffe also referred to **Mark France and Rupert Vassell v the Queen**.[32] In that judgment, the Privy Council reviewed the authorities on good character directions. The appellants were convicted of the murder of Glenroy Sutherland. They were armed and drove a white Toyota with a blue streak and they pulled up beside the deceased and the deceased's brother. The appellants started to shoot and the deceased when trying to flee was shot and pronounced dead on arrival at the hospital. One of the grounds of appeal is that their counsel failed to lead evidence as to their good

[30] [2006] UKPC 9,14-17.
[31] [2006] 1 WLR 146.
[32] [2012] UKPC 28.

character. The court referred to **Brown (Nigel) v State of Trinidad and Tobago** which stated:

> "The failure of counsel can therefore bring about an unsafe verdict. But it should not be automatically assumed that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel… In the absence of an explanation from counsel, however, as to why he did not raise the issue of the defendant's good character, the Board considers that it is necessary to examine whether the lack of a propensity direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction should have been given". [33]

The court went on to further state that what has to be considered is the strength of the evidence against the appellant. Ms. Scatliffe suggested that the Court consider the overwhelming case against Mr. Benjamin in deciding whether the outcome would have been different if a good character direction was given.

[56] She stated that this Court in **Facey and another v The Queen** ruled that good character must be raised, but the inexplicable absence of such evidence being raised does not render a conviction to be unsafe; the omission of a good character direction is therefore not fatal. She reminded the Court that Mr. Benjamin in this case gave evidence in the matter; he was never asked by his counsel whether he had any previous convictions. In the cross-examination of PC Don Smith, the investigating officer, PC Smith was never asked by Mr. Benjamin's trial counsel whether Mr. Benjamin had any convictions. PC George was not cross-examined at all during the trial. As Mr. Benjamin gave evidence it is arguable that he was entitled to the credibility limb of the direction. However, the Court must assess the evidence against Mr. Benjamin, which Ms. Scatliffe submitted is overwhelming, especially in light of the fact that there is no explanation why his counsel failed to advance evidence of his character.

[33] [2012] UKPC 2.

[57] Ms. Scatliffe opined that in **Teeluck** which is referred to by Mr. Thompson, the evidence was questionable and is therefore distinguishable from the case at bar as the evidence in this case is overwhelming. Ms. Scatliffe referred to the Privy Council judgment in **France and Vassell v the Queen**[34] at paragraph 46:

> "It recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict".

[58] Ms. Scatliffe also relied on **France and Vassell** in support of her contention that the evidence was so overwhelming that the fact that no direction on good character was given could not have in any way undermined the safety of Mr Benjamin's conviction.

Direction on Majority Verdict

[59] Ms. Scatliffe submitted that the learned trial judge did not err in informing the jury of the time period as stated in local legislation. There is no evidence to show or remotely suggest that the learned trial judge pressured the jury. She reminded the Court that section 35 of the **Jury Act**[35] provides that the jury must deliberate for a minimum of two hours before delivering a verdict unless the verdict is unanimous. The learned trial judge told the jury as follows:

> "Madam Foreman, Members of the Jury, I cannot assist you any further save to say that when you retire you must endeavour to arrive at a unanimous verdict. If you arrive at a unanimous verdict you may return at any time. Once you all agree you may return at any time. The Court is in a position to accept a majority verdict, a majority in proportion of 8 to 1 or 7 to 2. The Court is in a position to accept a majority verdict, but two hours must elapse. If you need any further directions, please indicate by way of the Provost Marshall".

[34] [2012] UKPC 28.
[35] Cap. 36.

[60] Ms. Scatliffe submitted that this Court must review the circumstances as to how this direction was given to the jury, as stated in the case of **R v Kazantzis**.[36] The appellant in that case complained that the jury was pressured into their verdict by the trial judge. The Court of Appeal ruled that the jury was not pressured and they had to take into consideration the facts of the case. In the case at bar, the learned trial judge was explaining to the jury what section 35 of the **Jury Act** stated as it relates to the unanimous verdict and the majority verdict. The learned trial judge was correct and obliged to give the majority direction and he has a discretion as to when to give the jury the direction. The learned trial judge has the discretion to give the direction to the jury again at the appropriate time if necessary. The jury retired and returned but the record fails to properly reflect the duration of their deliberation. However, the verdict was unanimous and the learned trial judge had to accept it. There is no evidence that the learned trial judge made any comment that would have made the jurors rush their verdict as occurred in the case of **R v Wharton**.[37] Ms. Scatliffe further submitted that the learned trial judge was perfectly clear in explaining the majority verdict and the jury was not confused or pressured.

[61] Ms. Scatliffe also referred to the recent judgment of this Court in **Facey and another v the Queen** where the St. Vincent authority of **Flavia Richardson** was examined by the court. In the case of **Flavia Richardson** the Court of Appeal found that the trial judge in that case did not comply with the **Jury Act** and the errors were such that it amounted to pressuring the jury. Ms Scatliffe submitted that in the case at bar while there is no indication in the record as to when the jury exited and re-entered the Court for deliberations, they came back with a unanimous verdict which can be returned at any time as prescribed in the **Jury Act.**. The learned trial judge's direction to the jury was a reflection of section 35 of **the Jury Act Cap 36**. The behaviour of the learned trial judge in the case at bar

[36] [2010] EWCA Crim 712.
[37] [1990] Crim LR 877.

was not pressuring on the jury in any way and did not express the consequences of them failing to arrive at a verdict.

The Learned Trial Judge Erred in his Direction on Self-Defence

[62] Ms. Scatliffe said that Mr. Benjamin contends that the learned trial judge misdirected the jury on self-defence. She asserted that he attempts to justify this argument by only referring the Court to a small fraction of the learned trial judge's direction on self-defence. Ms. Scatliffe referred the Court to the case of **Spencer v The Director of Public Prosecutions**,[38] a decision of this Court. Spencer challenged his conviction for murder on the grounds that the trial judge misdirected the jury on self-defence, provocation and accident. The appeal was successful on the grounds that there were misdirections on provocation and accident, but the Court dismissed the ground that there was misdirection on self-defence. In the judgment given by Her Ladyship, Justice of Appeal Blenman, the Court outlined the proper direction to be given on self-defence. Her Ladyship in her judgment stated that the law on self-defence is accurately set out in the Privy Council case of **Palmer v the Queen**.[39]

[63] Ms. Scatliffe submitted that in the case at bar the direction on self-defence cannot be said to be flawed as the learned trial judge reiterated the accepted direction based on the law in **Palmer**. The learned trial judge also referred to the evidence that was led during the trial which both supported and negated self-defence:

> "You, as the law says, your good sense, Madam Foreman and Members of the Jury, will be the arbiters, will be your guide on the question of self-defence. You must say in the circumstances whether self-defence, whether the Accused was acting on necessary self-defence, whether the Accused was acting in necessary self-defence. If you say there was reasonable doubt as to whether or not he was acting in necessary self-defence, if you say that he was acting in –defence, not guilty".

[38] [2014] 5 LRC 613.
[39] [1971] 1 ALL ER 1077 at 1088.

Ms. Scatliffe submitted that the learned trial judge made it clear to the jury that they had to be satisfied that the Crown negated self-defence beyond a reasonable doubt. She stated that the Court in **Spencer** made it clear that there is no specified wording required to direct the jury on self-defence.

[64] Ms. Scatliffe also referred to **Harley v (Alfred) R**,[40] a case decided by this Court. In the appeal, the issue concerned the sufficiency of the Crown's evidence that the appellant Mr. Harley was not acting in self-defence and whether the directions by the judge were proper on the issue of Mr. Harley's belief. Mr. Harley contended that the learned trial judge did not properly explain the reasonable belief. In **Harley**, the Court in quoting **R v Gladstone Williams** stated as follows:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that maybe a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it".

[65] The Court of Appeal held the view that there was sufficient evidence for the jury to have concluded that Mr. Harley was not acting in self-defence. Ms. Scatliffe submitted that based on the circumstances in the case at bar, it can be concluded that the evidence was overwhelming that Mr. Benjamin was not acting in self-defence. The evidence of both complainants shows that Mr. Benjamin was the aggressor. Ms. Scatliffe made reference to paragraph 27 of the **Spencer** judgment which provides:

> "Having said all of this, it is also useful to refer to the pronouncements in Noes, where Hamel-Smith JA said:

[40] (1992) 44 WIR 155.

> 'It cannot be doubted that if the accused had the requisite intention but was acting in self-defence at the material time, he was entitled to an acquittal. But that does not necessarily mean that the direction should be in such terms. It all depends on the way in which the issue is put to the jury. One cannot be allowed, hindsight, to dissect every word in a summing up and conclude that, looked at in isolation, it did not convey the correct or proper meaning to a jury. A jury must be allowed a measure of common sense and a degree of intelligence in dealing with the directions given and the summing up must be looked at as a whole to see whether a wrong or improper impression was conveyed to them".

[66] Ms. Scatliffe submitted that the learned trial judge properly directed the jury on self-defence. She referred the Court to paragraph 9.216 of the second edition of **Taylor on Criminal Appeals** which provides that a proper direction to the jury would state the necessary ingredients for self-defence; the disputes in the evidence led and the findings open to them; the burden of proof; the subjective elements in self-defence and proportionality. The paragraph makes the point that retreating from danger should not be over-explained or given more weight than a factor in self-defence. The learned trial judge's directions to the jury were along these lines and cannot found to be a misdirection.

[67] Ms. Scatliffe in her oral arguments addressed matters that were not canvassed in her written submissions. Indeed she referred the Court to various paragraphs in the transcript where she said that the judge properly addressed the matter of honest but mistaken belief. Finally, she argued that the issue of Mr. Benjamin's honest but mistaken belief did not arise in the case therefore the judge was under no obligation to direct the jury on this. She maintained that Mr. Benjamin's convictions were safe.

Appeal against Sentence

[68] As it relates to Mr. Benjamin's contention that the sentence of ten years imprisonment was manifestly excessive, Ms. Scatliffe submitted the Court must consider whether the learned trial judge properly applied the principles of sentencing and properly weighed the mitigating and aggravating factors. There was no written sentencing judgment in this matter. However, the Crown had outlined the aggravating factors as follows: the use of a weapon, specifically a machete; multiple victims and that one of the complainants suffered lifelong injury. The mitigating factors were the young age of Mr. Benjamin at the time of the offence, the fact that he assisted with helping the complainant Mr. Pond to the hospital and the fact Mr. Benjamin had two young children. Ms. Scatliffe reminded the Court that the offence was a serious one.

[69] It is noted that Mr. Benjamin has referred the Court to the **United Kingdom Sentencing Guidelines Council Definitive Guidelines on Assault**. In this Court's ruling in **Facey and Another v The Queen** it was ruled that the guidelines are not formally applicable in the BVI and can only assist as a comparative tool. The Court further acknowledged that the sentences for wounding with intent varied widely.[41]

[70] Ms. Scatliffe invited the Court to review the factors that are to be taken into account by the sentencer in seeking to determine the appropriate sentence for an offence such as the instant one. In this regard, she said that the UK Guidelines reference the fact that the court should determine culpability and harm caused, or intended, by reference only to the factors that comprise the factual elements of the offence. The guidelines then addressed the fact that the seriousness of the injuries should be taken into consideration and be juxtaposed against the ranges provided for by the relevant laws. Unlike the statutory provision in the UK which

[41] BVIHCRAP2013/0009, para. 65 (delivered 18th May 2015, unreported).

provides for a maximum of 16 years for offenders depending on severity, the local provisions allow for life imprisonment.

Discussion and Conclusion

Transferred Malice and Alternative Offence

[71] I propose first to briefly refer to the well-known principle of transferred malice upon which the Crown relied in prosecuting one of the counts. The locus classicus which established the principle of transferred malice is **Latimer v R**.[42] The principle to be extrapolated from this case is that where the defendant does an act intending to injure person B he is guilty of having committed the offence against person B. Indeed, the criminality of the defendant is precisely the same whether it is person A or person B who is injured. It is the law that once the actus reus and the mens rea of the same crime coincide, then the offence is committed. In order to be able to rely on the principle or doctrine of transferred malice, the Crown must provide the evidential basis for so doing. Since it is the Crown that has the obligation to establish its case against the defendant beyond reasonable doubt, it is the Crown's responsibility to lead the relevant evidence necessary to establish the elements or ingredients of the offence.

[72] The Crown cannot abdicate its responsibility by simply relying on a theory that is put forward by the defence.[43] This brings me to examine whether there was any evidence of transferred malice before the court at first instance. The Crown quite erroneously relied on the principle of transferred malice in order to establish the offence in relation to Mr. Pond as the evidence that was adduced by the Crown did not give rise to any basis for prosecution on the ground transferred malice. In this regard, I am in total agreement with Principal Crown Counsel Ms. Scatliffe that the evidence that was marshalled by senior crown counsel who then appeared on

[42] (1886) 17 QBD 359.
[43] DPP v Frederick Daley and Another [2002] 2 WLR 1; R v Mitchell [1983] QB 741.

behalf of the Crown addressed the elements of unlawful and malicious wounding and there was evidence on which the intention to do so to arose in relation to Mr. Pond. Mr. Pond's evidence is that he was speaking to the DJ when he saw Mr. Benjamin coming with the machete. He felt no fear because Mr. Benjamin was his friend. He continued speaking to the DJ and while so speaking he felt the chop to his head.

[73] Ms. Scatliffe was adamant that there was evidence before the court of first instance which bore out the fact that Mr. Benjamin intended to unlawfully wound Mr. Pond. I agree with her entirely that there was evidence which pointed to the intention to unlawfully and maliciously harm Mr. Pond. There is no doubt in my mind based on the evidence that was adduced by the Crown there was no basis for the Crown to have accepted the defendant's theory namely that he did not intend to wound Mr. Pond but rather that Mr. Pond was chopped when he (the defendant) intended to chop Mr. Morillo. This theory did not accord with the evidence led by the Crown and the learned senior crown counsel who prosecuted the trial at first instance quite erroneously accepted that theory as the basis of its prosecution in the absence of any evidential basis.

[74] In oral submission, Ms. Scatliffe conceded that the Crown in its opening and closing address to the jury relied on transferred malice but said that was only the Crown's opinion and it was up to the jury to reject or accept it. Ms. Scatliffe in her oral submissions further indicated that the thrust of the Crown's case was that Mr. Benjamin intended to cause harm to both Mr. Morillo and Mr. Pond; the Crown's case was not prosecuted on the basis of transferred malice. If this is what had occurred I would have had no difficulty in agreeing with this. However, this is not what happened. The Crown clearly presented the case against Mr. Benjamin in which Mr. Pond was the victim on the basis of transferred malice, namely that Mr. Benjamin intended to wound Mr. Morillo but instead wounded Mr.

Pond; it was not simply an opinion. What is more is that the learned trial judge summed up to the jury on the count that dealt with Mr. Pond on the legal ingredients of transferred malice. It was based on this principle that Mr. Benjamin was convicted in relation to Mr. Pond.

[75] I have no doubt that the learned judge erred in summing up the case in relation to Mr. Pond on the basis of transferred malice. The clear evidence that was adduced by the Crown in relation to that count did not point to the commission of the offence by way of transferred malice. In this regard, I agree with Ms. Scatliffe. There was overwhelming evidence from which it could have been inferred that Mr. Benjamin intended to wound Mr. Pond. Insofar as the direction of transferred malice was given, it was a clear misdirection. However, given the quality of the evidence that was led by the Crown this misdirection is not fatal so as to vitiate the conviction. The Crown led cogent evidence that dealt with the ingredients of the offence of unlawful and maliciously wounding with intention. More specifically on the Crown's case there was overwhelming evidence that may have enabled the jury to infer that Mr. Benjamin had the requisite intention.

[76] I propose now to succinctly address in passing Mr. Benjamin's complaint in relation to the way in which the indictment was framed on the issue of transferred malice. I accept fully Ms. Scatliffe's submission that even if the Crown had relied on the basis of transferred malice on the count in relation to Mr. Pond, there is absolutely no legal requirement to have the indictment framed so as to indicate transferred malice on its face.

Alternative Lesser Offence

[77] I come now to address the issue of the lesser offence of unlawful wounding and whether the learned judge should have left this alternative count with the jury.

Alternative Verdict

Section 163 and 164 of the **Criminal Code** stipulates:

> "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 without any weapon or instrument, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years."

It is plain that the difference between the two sections is that an offence under section 163 requires proof that the defendant intended to wound or cause grievous bodily harm to the victim or to prevent the lawful apprehension while an offence under section 164 may be committed without any such intention. Section 163 is obviously the more serious of the two offences.

[78] It is settled that the question of whether or not to leave an alternative verdict for a lesser offence to the jury involves the exercise of the judge's discretion. In **Patrick Facey et al v The Queen**,[44] the learned Morrison JA helpfully distilled the four principles that are relevant to the determination of the issue as to whether or not the trial judge erred in not leaving the alternative verdict to the jury and if in so doing has affected the safety of the conviction. It is the law that an appellate court will not lightly interfere with the exercise of the trial judge's discretion. In order to be able to do so, the appeal court must be satisfied that the failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction. Ms. Scatliffe quite correctly pointed out that the difference between section 163 and 164 of the **Criminal Code** is that section 163 requires proof of intention to commit whereas section 164 does not. In

[44] BVIHCRAP2013/0009 (delivered 18th May 2015, unreported)

R v Foster and other Appeals the Criminal Division of the Court of Appeal stated through Sir Igor Judge P as follows:

> "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 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 in substantial, 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 case" which this court lacks. On appeal the problem which arises is not whether a direction in relation a lesser alternative verdict was omitted, and whether to omission was erroneous, but whether the safety of the conviction is undermined".[45]

[79] I have no difficulty in accepting the correctness of the arguments advanced by Principal Crown Counsel Ms. Scatliffe in relation to the fact that the learned trial judge did not leave the lesser office to the jury. It is trite that the discretion is given to the trial judge in determining whether to leave the lesser offence with the jury. The law is clear. The judge in making that decision must take a number of factors into account: (a) the judge must examine all of the evidence, disputed and undisputed and the issues of law and fact to which it has given rise; (b) in considering this matter, the judge is obliged to take into account the question of fairness to the defendant, on the one hand, and proportionality, that is to say, whether the alternative verdict would do justice to the facts of the case; and (c) the decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case.

[45] [2008] 2 All ER 597, 61.

[80] In the case at bar, the overwhelming evidence that was adduced pointed to the intention to cause the greater offence. Accordingly, I have no doubt that the judge's refusal to leave the alternative verdict resulted in no unfairness to Mr. Benjamin. In fact, to have done so may have been unfair to the Crown since the alternative verdict would not have done justice to the facts of the case. It was very proportionate for the judge to have directed the jury only on the greater offence. In my view, the learned trial judge was quite right not to leave the alternative verdict to the jury and his failure to do so does not undermine the safety of the conviction.

[81] Bearing those principles in mind, I remind myself of the very high quality of evidence that was adduced by the Crown, including the circumstances of the offence, namely, the type of weapon that was used to inflict harm, the nature of the wounds the victims received and the fact that there was evidence that Mr. Benjamin left the bar and went to his vehicle in order to retrieve the machete which was used to inflict the injury. This is juxtaposed with Mr. Benjamin's evidence that he returned to the bar after being beaten armed with the machete in the hopes of defending his friend Mr. Pond who he thought was being beaten by the Spanish men.

[82] In the case at bar, there was ample evidence from which the jury could have concluded that both Mr. Pond's and Mr. Morillo's injuries were inflicted unlawfully and maliciously and with the intention to do each of them grievous bodily harm. I accept Ms. Scatliffe's oral arguments that there was a lot of evidence from which the jury could have concluded that Mr. Benjamin intended to wound both victims. It must also be remembered that Mr. Benjamin's defence was that he chopped Mr. Morillo while he was acting in self-defence; in relation to Mr. Pond he asserted that he was in process of defending Mr. Pond whom he thought was under attack by the Spanish men and in the process of chopping Mr. Morillo with the machete

Mr. Pond was injured. I am of the view that given the totality of circumstances of the case it was open to the learned judge to take the view that a direction on the alternative verdict of unlawful wounding was likely to divert the jury's attention from Mr. Benjamin's defence of self-defence. The learned trial judge must have felt that the proportionate position was not to leave the alternative verdict with the jury.

[83] I am fortified in my view since there was no evidence to show that Mr. Benjamin wounded either Mr. Pond or Mr. Morillo unintentionally. Also, I have no doubt that the learned trial judge fairly left the issue to the jury which arose on the evidence. I reiterate that had the judge left the alternative verdict to the jury, it would have seriously impacted Mr. Benjamin's defence of self-defence.

[84] In any event, in all of the circumstances the safety of the conviction was not undermined. Accordingly, the learned trial judge's exercise of discretion not to leave the alternative verdict to the jury cannot be impugned.

Good Character Direction

[85] I turn now to the failure to give the good character direction.

[86] Learned counsel quite helpfully reminded the Court of the leading cases on good character such as **Teeluck**. There is no need to repeat them since it is common ground that no evidence was placed before the learned trial judge upon which he could have given the good character direction. It is trite law that it is the duty of counsel for the defendant to raise the issue of the defendant's character so that a good character direction could be given and he could have the benefit of it. The judge is under no duty to raise it himself.[46] There could therefore be no basis for saying that there was a misdirection by the learned judge. However, Mr. Benjamin gave evidence and in the circumstances of the case at bar both Mr. Benjamin's

[46] Teeluck [2005] 1 WLR 2421.

credibility and propensity to commit offences of that type were brought into focus. It must be remembered that the main thrust of his defence is lawful self-defence because he thought that after he had been beaten by the Spanish men, the same men were attacking his friend, Mr. Pond.

[87] There is agreement that Mr. Benjamin was a man of good character in that he had no prior convictions. I am of the considered view he was entitled to the benefit of a "good character" direction from the judge when summing up to the jury. 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. For reasons which will become clear shortly, the propensity limb of the good character direction would have served little purpose.

[88] **Barrow v The State** is authority for the proposition that the defendant's good character must be distinctly raised by direct evidence from him or given on his behalf or by eliciting it during the cross-examination of prosecution witnesses.[47] In my view, it is inexplicable why Mr. Benjamin's then counsel did not raise the issue of his good character during the trial. I do not agree with learned counsel Mr. Thompson that both Mr. Benjamin's credibility as a witness and his propensity to commit the offences were very relevant matters to the jury's consideration. I am not of that view given the fact that Mr. Benjamin's defence was that he acted in self-defence and that he thought that his friend Mr. Pond was under attack and sought to defend him. I do not see how, in these circumstances, Mr. Benjamin could have benefitted from the propensity limb of a good character direction given the sheer force of the evidence adduced by the prosecution. However, given the fact that there was a clash of credibility between the prosecution and defendant in

[47] [1998] 52 WIR 493.

the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute.[48]

[89] In **France and Vassell**, Lord Kerr at paragraph 46 referred to **Nigel Brown** and said that the Board observed that these would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. **Jagdeo Singh** and **Teeluck** were obvious examples, but it is recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it exposed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case was within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction on those issues and evidence.

[90] I do not agree that **Balson v The State** is clearly distinguishable from this case. In that case the only question was whether it was B who murdered D or whether D was killed by an intruder. In those circumstances, the Privy Council correctly held that the issues of B's propensity to violent conduct and credibility as to which a good character reference might have been of assistance, were wholly outweighed by the nature and coherence of the circumstantial evidence.

[91] It must be remembered that while Mr. Benjamin gave evidence on oath he did not put his good character in issue neither did he use it to buttress his defence. Also of significance is the fact that he was represented at the trial by counsel. There is nothing to suggest that he was poorly advised by counsel not to put his good character in issue or that then counsel failed to carry out his instructions. Indeed

[48] Brown (Nigel) v State of Trinidad and Tobago [2012] UKPC 2.

there is nothing before us to indicate that this failure was his counsel's fault. It is accepted however that where the defendant is evidently of good character, the trial judge would be well advised to ask counsel whether he intends to put his character in issue.[49] Nevertheless it is noteworthy that the learned trial judge quite fairly reminded the jury that it was for the prosecution to prove his guilt beyond a reasonable doubt. In addition, the sheer force of the evidence against Mr. Benjamin brings into question the utility in giving the good character direction given the totality of circumstances of this case. [50] This is not to say that in another appropriate case the failure to give the good character direction could be fatal. However, for reasons which will become obvious very shortly it is not necessary for us to provide a definitive answer to this ground, in this appeal. Accordingly, the determination of this ground of appeal is best left to an appropriate occasion.

[92] For the sake of completeness, it is important to understand the fact that the omission of a good character direction is not inevitably fatal to the fairness of the trial or to the safety of a conviction. In **Jagdeo Singh**, Lord Bingham posited that "much may turn on the nature of and issues in a case, and on the other available evidence".[51] It is instructive that in **Brown v R** even though the trial judge failed to give a good character direction the appeal was dismissed. The Board observed as follows at paragraph 38:

> "[The jury] had the advantage of seeing and hearing [the appellant] when he gave evidence and of forming their judgment about his apparent credibility from his testimony and his demeanour. They also had the evidence of the eyewitness… and were able similarly to judge his credibility. Their Lordships do not wish in any way to minimise the importance of good character or of the proper direction being given by trial judges. They do consider, however, that in a case of the present type such a direction will be of less significance in assisting the jury to come to a correct conclusion than in other types of prosecution".

[49] Gilbert v The Queen [2006] 1 WLR 2108.
[50] Balson v The State, Lord Hope.
[51] See also: Brown (Nigel) v The State of Trinidad and Tobago [2012] UKPC 2 at paras. 30-36, Lord Kerr J.

[93] I am therefore of the view that given the circumstances of this case and for reasons which will become obvious very shortly, it is unnecessary to determine whether the fact that a good character direction was not given is fatal to the safety of the conviction.

Failure to Properly Direct the Jury on Self-Defence

[94] As alluded to earlier, Ms. Scatliffe sought to persuade this Court that the learned trial judge property directed the jury on the defence of self-defence. Further, she argued that Mr. Thompson had only referred this Court to a small portion of the judge's summing up. She maintained that the summing up was adequate and was based on the **Palmer** direction. Specifically, Ms. Scatliffe referred the Court to this aspect of the judge's summation:

> "You, as the law says use your good sense, Madam Foreman and members of the jury, will be the arbiters, will be your guide on the question of self-defence. You must say in the circumstances whether self-defence, whether the accused was acting in necessary self-defence. If you say there was reasonable doubt as to whether or not he was acting in necessary self-defence, or if you say that he was acting in self-defence, not guilty".

[95] The parties are agreed that on Mr. Benjamin's case the issue of self-defence arose. In fact self-defence was at the heart of his case. The gravamen of his defence was that he believed that he was being attacked and therefore he defended himself and chopped Mr. Morillo. He also told the jury that he believed his friends Mr. Pond and Lance were also being attacked and it was in seeking to defend Mr. Pond that the latter sustained the serious injury. Ms. Scatliffe posited that the judge adequately addressed the question of Mr. Benjamin's belief and in support of her proposition referred to the decision of **Harley v R** in which the Court of Appeal relied on the principles that were enunciated in **R v Gladstone**

Williams. Ms. Scatliffe sought to buttress her case by arguing that the Crown led overwhelming evidence to negative Mr. Benjamin's defence of self-defence. It is significant that Mr. Benjamin's main complaint is that the learned trial judge did not give the jury a proper direction on self-defence in general and in particular failed to address the issue of his honest belief, but rather focused on the objective aspect of the belief.

[96] Mr. Thompson argued that this failure by the trial judge rendered the trial unfair and undermined the safety of Mr. Benjamin's conviction. Mr. Thompson maintained that the judge failed to give the jury an adequate **Palmer** type direction on the issue of self-defence. Mr. Thompson's other complaint in relation to the learned trial judge's summing up is that the judge failed in his direction of self-defence to address the issue of whether Mr. Benjamin may have been labouring under a genuine mistake of fact. Mr. Thompson said that this omission rendered the trial unfair and the conviction should be quashed. Learned Principal Crown Counsel, Ms. Scatliffe acknowledged the importance of such a direction as recognised in **Harley v R** where the Court quoting **R v Gladstone Williams** stated as follows:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that maybe a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected - Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it".[52]

[97] However, Ms. Scatliffe maintained that the learned trial judge properly directed the jury on the issue of self-defence without specifically addressing Mr. Benjamin's

[52] (1984) 78 Cr. App. R 276.

complaints stated above. Firstly, there is no doubt that at the heart of the defence was Mr. Benjamin's honest belief. It was incumbent on the learned trial judge to address Mr. Benjamin's honest though mistaken belief in his direction to the jury – Indeed, in **Solomon Beckford v R** the Board in allowing the appeal and quashing the conviction held that:

> "…the prosecution had to prove that the violence used by the defendant was unlawful; that, therefore, if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself or another from attack and the force used was no more than was reasonable to resist the attack, he was entitled to be acquitted…since the intent to act unlawfully would be negatived by his belief, however mistaken or unreasonable, although the reasonableness of the alleged belief was material in deciding whether the defendant had a genuine belief; that, accordingly, the trial judge misdirected the jury as to self-defence; and that, as it could not be concluded with the utmost certainty…that a jury properly directed would necessarily have returned the same verdict, the proviso… could not be applied". [53]

[98] In **Solomon Beckford** the judge had directed the jury on self-defence as follows:

> "that a man who was attacked in circumstances where he reasonably believed his life to be in danger, or that he was in danger of serious bodily injury, might use such force as on reasonable grounds he thought necessary to resist the attack, and if in using such force he killed his assailant he was not guilty of any crime".[54]

This direction was held to have rendered the trial unfair. Nowhere, in the case at bar, did the learned trial judge address Mr. Benjamin's honest belief.

[99] Baptiste JA delivering the judgment of this Court in **Shonovia Thomas v R** referenced the principle espoused in **Gladstone Williams and** stated that "the law recognises that where a plea of self-defence is engaged, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was, on an objective view a reasonable mistake or not".[55]

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[53] [1988] AC 130.
[54] ibid, 131.
[55] BVIHCRAP2010/0006 (delivered 20th January and 27th August 2012, unreported), para. 51.

[100] Applying the principles distilled above, I have no doubt the learned judge was required to direct the jury on the reasonableness of Mr. Benjamin's belief and his honest but mistaken belief in keeping with Lord Lane's pronouncement in **Gladstone Williams** and the Board's very helpful pronouncement in **Solomon Beckford**. There is no indication that this was done. This was indeed a serious non-direction.

[101] Mr. Thompson quite properly made no criticism of the judge's directions on the burden being placed on the prosecution to negative self-defence. Indeed, the judge correctly directed the jury on this aspect of the plea of self-defence. In contradistinction, Mr. Thompson's criticism of the learned judge's direction in relation to the omission to address the honest but mistaken belief of Mr. Benjamin is well-founded. It is trite that the law allows such force to be used as is reasonable in the circumstances as the accused believed them to be. It was incumbent on the judge to bring home to the jury that they were to judge Mr. Benjamin based on the facts as he, Mr. Benjamin, saw them. Mr. Thompson was adamant that the trial judge failed to address this issue and this failure was fatal to the safety of the convictions.

[102] In **Shaw v R**,[56] the Board had to address the issue of honest but mistaken belief at paragraph 19, Lord Bingham stated:

> "In the opinion of the Board it was necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration:
> (1) Did the appellant honestly believe or may he honestly have believed that it may be necessary to defend himself?
> (2) If so, and taking the circumstances and danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?"

And at paragraphs 20 and 21 His Lordship stated as follows:

> "The Board cannot find that a direction to this effect was given. The passages relied on by the appellant point towards an objective approach.

[56] [2001] UKPC 26.

> Even if it were accepted that the passages relied on by the Director might lead an intelligent juror to view the matter through the appellant's own eyes, this was not enough. Self-defence was the crux of the appellant's defence to these very grave charges. The rudiments of that defence should have been stated in clear and simple terms which left no room for doubt. In the Board's opinion this was not done. There was accordingly a misdirection. But that conclusion does not, without more, entitle the appeal against either conviction to succeed.
>
> It is first necessary to ask whether,… this misdirection was potentially prejudicial to the appellant. This issue has caused the Board very great difficulty and anxiety".

[103] Lord Bingham went on to assess the case and he stated as follows:

> "Despite real misgivings, and recognising that a jury would probably have rejected the appellant's plea of self-defence even if properly directed, the Board concludes that the misdirection was potentially prejudicial to him. The jury may have rejected the appellant's plea of self-defence because [the victim] in fact had no weapon and there was in fact no weapon in the van. This would have been an unsound conclusion, since it was not the actual existence of the threat but the appellant's belief as to the existence of a threat which mattered. The jury were obliged to assess the situation as it appeared to the appellant, a factual enquiry which was pre-eminently one for them which (it may be) they never carried out and which the Board cannot safely undertake itself".

[104] Though not canvassed in her written submissions Principal Crown Counsel, Ms. Scatliffe, in her oral arguments to this Court, submitted that the trial judge properly dealt with the issue of Mr. Benjamin's honest but mistaken belief. In this regard, she referred the Court to page 64 of the transcript at line 12 where the learned judge having recounted the evidence led by the Crown directed the jury thus:

> "So again if you accept this evidence to the extent that you feel sure you will ask yourselves whether he was defending himself or he was defending his friend Pond who himself was trying to restrain him that night from hitting, attacking the Spanish guy. You will decide".

[105] In further support of this contention, Ms. Scatliffe also referred the court to the principal passage where the judge having referred to the evidence told the jury at page 64 of the transcript:

> "So that is the issue you have to decide whether seriously in a nutshell, whether he was acting in self-defence".

Ms. Scatliffe posited that in the above-quoted sections the learned judge addressed the honest belief aspect of the plea. With due respect to Ms. Scatliffe, the sections of the summation to which she referred do not in the slightest way address the matter of Mr. Benjamin's honest but mistaken belief.[57]

[106] Accordingly, Ms. Scatliffe's argument is flawed. The learned judge was required to give the jury clear and unequivocal direction on the issue of Mr. Benjamin's honest but mistaken belief in keeping with the pronouncements made by Lord Bingham even though no prescribed words have to be used. The learned judge failed to do so. In order to underscore this point, it is important to examine other aspects of the learned judge's direction to the jury. The learned judge at page 49(a) of the transcript said this:

> "As Mr. Rowe told you, if he reasonably believed that his friend was under attack, he would have justification to act in self-defence of his friend, this is what the law says in relation to self-defence".

[107] Next, the learned judge at page 49 of the transcript stated as follows:

> "It is both good law and good sense that a man who is attacked first of all, you have to find, before you consider the issue of self-defence, you have to find that he was attacked, because so far as Pond, his friend is saying, he was the aggressor that night. The inference here was that if Mr. Benjamin was the aggressor he could not avail himself of the defence of self-defence".

This is a misdirection.[58] However, this point was not even taken on appeal so I will refrain from making any further comment.

[57] Shonovia v The State per Baptiste JA.
[58] Balroop v R [1999] All E R 916.

[108] At page 51-53 of the transcript, the learned judge then referred to the statement that Mr. Benjamin had given to the jury and paraphrased it. Critically the judge said at page 53, lines 1-5:

> "Again you have to ask yourself this important question: In these circumstances could you honestly and reasonably say that he was defending Danny, he was defending Pond. You will have to answer that question".

Principal Crown Counsel Ms. Scatliffe defended the correctness of the latter direction. However, I have no doubt that this direction was potentially prejudicial to Mr. Benjamin. The question to be determined is not whether the jury honestly and reasonably believed that Mr. Benjamin was defending himself and Mr. Pond but (a) whether Mr. Benjamin was defending himself and (b) if so, taking the circumstances and the danger as the appellant honestly believed them to be, was the amount of force which he used reasonable.

[109] In the appeal at bar, in similar vein to the situation with Lord Griffiths in **Solomon Beckford**, even though this Court may have real misgivings and recognises that the jury would probably have rejected Mr. Benjamin's plea of self-defence even if properly directed, I have no doubt that the misdirection was potentially prejudicial to him. The prosecution has argued that the jury may have rejected Mr. Benjamin's plea on the basis that Mr. Pond was not attacked and Mr. Benjamin was not defending him (based on the prosecution's evidence). This would have been an unsound conclusion, since it was not the actual existence of a threat but Mr. Benjamin's belief as to the existence of a threat which mattered. This omission is very egregious and fatal since both Mr. Morillo and Mr. Pond testified that at no time was Mr. Pond attacked by the Spanish men. In fact, Mr. Pond told the jury that it was Mr. Benjamin who was in a fight with another man and he (Mr. Pond) was one of the peacemakers who tried to part the fight. To the contrary, Mr. Benjamin's evidence was that he was hit in the face by one of the Spanish men

and immediately thereafter while he was standing by the door a slim short one came and bounced him twice. He also said "then all of them that was in the corner jumped me. I did not see Mr. Pond or Mr. Lance anywhere around. I was trying to fight them off".

[110] Mr. Benjamin's further evidence was that he was eventually able to run away and they followed him towards his jeep. He said at page 67 of the transcript:

> "I myself was looking around to see where Mr. Pond and Mr. Lance was because all three of us was in the bar together so I thought he was in the fight inside the bar still. So when my jeep door close I saw the guys running away, so I was going back to try to help he and Lance because I didn't know what was going on".

[111] Another crucial aspect of Mr. Benjamin's evidence, he said at pages 67 and 68 of the transcript from lines 18 to 29:

> "And when I came back to come and try to protect these two because I left them in the bar, that was when I swing the cutlass because Christopher Morillo behind, Pond was close to the door and Christian was behind of him. Pond was at the front, he was almost outside the door and Morillo was more inside the bar so I thought that Morillo was coming towards Pond so when I swing, Morillo put up his hand because he is a shorter than Pond, but Pond was in front of him so Pond end up getting his and he got his hand chopped."

[112] Later in his evidence Mr. Benjamin said it is only once that he swung the cutlass. After giving some more evidence, he said that "I was only trying to protect Pond but I end up getting the bad of the stick".

[113] There can be no doubt that on Mr. Benjamin's case the summation required a careful direction on his honest but mistaken belief. Taking a position that was not canvassed in her written arguments in oral submissions when faced with the uphill task of addressing the omission, Learned Principal Crown Counsel Ms. Scatliffe quite astonishingly posited that Mr. Benjamin's honest but mistaken belief was not in issue at the trial and therefore the learned trial judge was under no obligation to

direct the jury on this aspect of self-defence. Apart from the fact that the main thrust of Mr. Benjamin's defence was his honest but mistaken belief that his friend was being attacked, there is no doubt that in any case in which the plea of self-defence is raised it is incumbent on the judge in directing the jury to address both elements of the plea namely, (1) the subjective element, i.e., the defendant's honest belief and (2) if so, taking the circumstances and the danger as the appellant honestly believed them to be was the amount of force which he used reasonably based. There is no discretion in this regard. Therefore, I agree with Mr. Thompson that the learned judge ought to have directed the jury on Mr. Benjamin's honestly but mistakenly held belief that his friend was being attacked and that it was in defence of Mr. Pond that he swung the cutlass. I also agree with Mr. Thompson that the learned judge did not at all address this in the summation, that is, Mr. Benjamin's honest but mistaken belief and how it was to be treated by the jury (as enunciated by Lord Griffiths in **Solomon Beckford**). These omissions amounted to misdirections or errors of law. The jury was obliged to assess the situation as it appeared to Mr. Benjamin - a factual inquiry which was pre-eminently one for them which they never carried out and which this Court cannot safely undertake itself.

[114] In my view, given the absence of adequate direction on the central issue in the case, Mr. Benjamin's contention that he acted in self-defence, I cannot be sure that no such miscarriage of justice has occurred.[59]

The Proviso

[115] Though not canvassed in her written submissions, Ms. Scatliffe, in passing and very briefly in her oral submissions, urged this Court to apply the proviso and uphold the conviction, since taking all of the circumstances of the case the jury would have come back with the same verdict. It is trite law as to when the

[59] Shaw v R [2001] UKPC 26.

application of the proviso is suitable and indeed, there is much learning on whether the proviso should be applied. I am not of the considered view that the appeal is suitable for this Court to apply the proviso that was stated in section 43 of the **Court of Appeal Act** on the ground that no substantial miscarriage of justice has actually occurred. Lord Bingham writing on behalf of the Board, when faced with a similar request, in **Shaw v R** for the application of the proviso said this at paragraph 32:

> "Given the absence of an adequate direction on the central issue in the case, the appellant's contention that he acted in self-defence, the Board cannot be sure that no such miscarriage of justice has occurred. A proper direction could, even if improbably, have led to a different outcome".

[116] Those pronouncements are instructive and I am in total agreement with them.[60] I have no alternative but to allow the appeal on the ground that this misdirection rendered the conviction of Mr. Benjamin unsafe. Having allowed the appeal on the basis that the judge's misdirection to the jury on the defence of self-defence constituted errors of law which rendered the trial unfair and the safety of the convictions undermined, it has become unnecessary to address the other grounds of appeal.

Retrial

[117] Having allowed Mr. Benjamin's appeal the only question to be determined is whether a retrial should be ordered. Lord Diplock in delivering the judgment of the Board in **Dennis Reid v The Queen**[61] stated the principles which should guide an appellate court in considering or not a new trial should be ordered. At page 349, His Lordship said:

> "Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is

[60] See also: Anderson v R [1978] WLR. On the application of the proviso which supports my view that the application of the proviso is totally inapplicable.
[61] [1980] AC 343.

> the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury".

[118] In **Sherfield Bowen v The Queen**,[62] learned Rawlins JA as he then was acknowledged that the Privy Council reiterated that the issue of a retrial order depends upon whether the interest of justice could be served by such an order. The main consideration is whether in the interest of the community and the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely because of some technical shortcoming in the conduct of the trial or in the directions to the jury. Their Lordships said that a critical factor is the seriousness of the crime. A countervailing consideration is fairness to the accused. In **Reid**, Lord Diplock at page 350 stated:

> "…there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the trial and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial".

[119] There is no doubt that the strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration. However, except in the two extreme cases that have been referred to, the weight to be

[62] ANUHCRAP2005/0004 (delivered 20th June 2007, unreported), para. 46.

attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion.

[120] Applying the principles that were enunciated in **Reid** and **Bowen** to the appeal, I have no doubt that a retrial would serve the interest of justice as well as the interest of the public and that of the victims. Mr. Benjamin was tried for two serious offences. The maximum sentence that could be imposed is life in prison. Even though he had no previous convictions, the injuries sustained by the victims were very grave. It is noteworthy that on conviction he was sentenced to ten (10) years in prison on each count. The strength of the prosecution's case was overwhelming. I am of the considered opinion that the accused would not be treated unfairly if a retrial were to be ordered. Mr. Benjamin has only served a small portion of the sentence of ten years. There is a significant public interest in ordering a retrial and the factors present in this case justify the Court's granting leave to the Director of Public Prosecution to proceed with a new trial of Mr. Benjamin on both counts if the prosecution so decides.

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

Louise Esther Blenman
Justice of Appeal

Dame Janice M. Pereira, DBE
Chief Justice

Paul Webster
Justice of Appeal