EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2014/0016

BETWEEN:

[1] WENDELL ANTHONY
[2] MARVIN ROBINSON

Appellants

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Wildman for the Appellants
Ms. Tiffany Scatliffe with her Mr. Garcia Kirt Kelly for the Respondent

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2016: January 15;
November 23.

Criminal appeal against conviction – Assault occasioning actual bodily harm – Section 58 of the Evidence Act, 2006 – Admittance of statement of virtual complainant into evidence – Discretion of learned magistrate

The appellants, who were at all material times police officers, were charged for unlawfully assaulting Brandon George, causing him bodily harm. Brandon had died before the trial following an unrelated incident, but a statement which he gave to the police in the course of the investigation of the assault charge was tendered and admitted into evidence, without objection. After a trial in the course of which several witnesses gave evidence for the prosecution and the defence, the magistrate found the appellants guilty of the assault. The appellants appealed. In their grounds of appeal, the appellants placed considerable focus on the magistrate's admission and treatment of evidence, including Brandon's witness statement and a statement made to the investigating officer by Brandon's mother. The appellants also criticised the magistrate's assessment of the evidence in the case.

Held: dismissing the appeal and making no order as to costs, that:

1. Section 58(1)(b) of the Evidence Act, 2006 states that in any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as primary evidence of that fact if the person who supplied the information recorded in the statement in question is dead. On that basis, Brandon's witness statement was admissible into evidence. Nonetheless, the court retains a discretion to exclude a witness statement if this is necessary to secure a fair trial of the accused. In this case, the magistrate had no discretion in determining whether the statement was admissible, but he had a discretion as to whether it should be admitted on the facts and circumstances of the case.

   Section 58(1)(b) of the Evidence Act, 2006 applied; Winston Barnes et al v The Queen [1989] UKPC 10 applied.

2. Generally, evidence led in court is subject to the discretion of the magistrate to allow or disallow. A magistrate need not announce every time any evidence is presented that he is exercising his discretion to allow it in for any reason or that in exercising his discretion he took some particular factor or factors into consideration. If, however, the magistrate decides to disallow any evidence presented, then there would be an onus on him to indicate why he is exercising his discretion to disallow it, particularly if his disallowance of it is challenged by one of the parties to the case. In this case, counsel who appeared for the appellants in the lower court expressly stated his non-objection to the admission of the statement. Therefore, there was no need for the learned magistrate to expressly announce that he had exercised his discretion to allow it.

3. An appellate court will only overturn a factual finding made by a lower court if it can be shown that the finding is so against the weight of the evidence as to be obviously and palpably wrong. There was ample evidence in this case on the basis of which the magistrate could and did make the finding that the appellants assaulted Brandon and that in so doing they were not acting in self-defence. The learned magistrate addressed and assessed, quite extensively, the evidence led in court, both by the prosecution and the defence, including Brandon's statement, before making his finding. In the circumstances, the finding by the magistrate that self-defence was not available to the appellants cannot be said to be so against the weight of the evidence as to be obviously and palpably wrong and so justify appellate interference.

4. A magistrate, as the judge of the facts and the law, must be taken to have been aware of and to have applied basic principles relative to the admission and treatment of evidence, unless the contrary is shown to be the case or his reasoning and decision were so clearly based on a lack of awareness or lack of application of the relevant legal principles. In this case, nothing to the contrary

was shown. In such circumstances, the appellate court would not intervene in the magistrate's decision.

5. A statement made to a witness in a context where the maker of the statement cannot or does not give evidence of its content may be inadmissible hearsay evidence when the object of the evidence is to establish the truth of the statement, but not so if the object is to establish the fact that it was made. The relevant statement was not relied on as proof of the truth of its contents, but rather for the fact that it was made to Chief Inspector Frank Devonish as justifying the investigation of and subsequent filing of charges of unlawful assault against the appellants.

   Subramaniam v Public Prosecutor [1956] 1 WLR 965 applied; Kearley v R [1992] 2 AC 228 applied; Ratten v The Queen [1972] 2 AC 378 applied; R v Safi (Ali Ahmed) and Others [2003] EWCA Crim 1809 applied.

JUDGMENT

[1] MICHEL JA: The appellants, who were at all material times police officers, were charged for that on Thursday, 14th June 2012 they unlawfully assaulted Brandon George ("Brandon"), causing him bodily harm. The trial of the appellants took place in the Magistrate's Court of the Territory of the Virgin Islands from 5th February 2014 and concluded on 8th October 2014.

[2] In the course of the trial, six witnesses gave evidence for the prosecution, including Brandon's father and mother, two eye witnesses and two police officers. Brandon had died before the trial as a result of a vehicular accident unrelated to the assault, but a statement which he gave to the police in the course of the investigation of the assault charge was tendered and admitted into evidence. Following an unsuccessful no case submission by counsel for the appellants, five witnesses – all police officers – gave evidence for the defence, including the two appellants.

[3] At the conclusion of the trial on 8th October 2014, the appellants were found guilty of the offence and were subsequently fined $2,000.00 each to be paid within two days, with a two-year prison term in default of payment.

[4] On 29th October 2014, the appellants filed a notice of appeal against their convictions and on 11th March 2015 they filed new grounds of appeal, replacing the original grounds contained in the notice of appeal. Although I have not seen any order giving leave to the appellants to file these new grounds of appeal, the appeal proceeded on the basis of these new grounds, so it would be reasonable to infer that the new grounds of appeal were filed with permission.

[5] The appellants filed skeleton submissions in support of their appeal on 10th June 2015, while the respondent filed submissions in response on 3rd September 2015. Then on 1st October 2015, the day before the scheduled hearing of the appeal, the appellants sought leave to file two additional grounds of appeal, which leave was granted by this Court on 2nd October 2015, and the hearing of the appeal was adjourned to the next sitting of the Court in the Territory during the week beginning 11th January 2016. The appellants then filed further submissions on 6th November 2015 in support of the additional grounds of appeal, while the respondent filed supplemental submissions in response on 15th December 2015.

[6] The appeal was heard on 15th January 2016, with oral submissions made by counsel on behalf of the parties to augment their written submissions.

GROUNDS OF APPEAL

[7] The appellants' grounds of appeal were the following:

" 1. The learned magistrate erred in law, in failing to consider that he had a discretion whether to admit or exclude from the evidence the witness statement of the virtual complainant Brandon George.

2. The learned magistrate erred in law, in failing to direct himself on the witness statement of the virtual complainant Brandon George, tendered into evidence, having regard to the fact that the complainant was not available for cross examination and the Court was deprived of seeing the witness demeanour on giving evidence.

3. The learned magistrate erred in law, in failing to direct his mind to the contents of the witness statement of the virtual complainant, tendered into evidence, in determining whether the defendants were acting under legal self-defence when they were accosted by the virtual complainant.

4. The learned magistrate erred in law, in placing reliance on a medical report, purportedly from the virtual complainant, that was excluded from the evidence, in arriving at his finding of fact that the complainant was injured as a result of injuries inflicted by the defendants.

5. The learned magistrate erred in law, in failing to take into consideration, the good character of the defendants, they being Police Officers, in assessing the evidence and determining the credibility of the defendants and their likelihood to commit the offence with which they were charged.

6. The learned magistrate erred in law, in his assessment of the evidence that was placed before him, and in so doing, placed reliance on inadmissible hearsay evidence.

7. That a major witness for the Prosecution a Denston Johnney, is a person of previous conviction of Criminal Trespass contrary to section 74(2) of the Criminal Code 1997 (as amended). Such evidence the Prosecution was under a duty to establish and their failure to do so is fatal to the conviction.

8. The failure of the learned magistrate to record the evidence that transpired at the visit of the locus in quo is a material irregularity rendering the conviction of the appellants unsafe."

Ground One

[8] On the first ground of appeal, the appellants argued that the magistrate failed to appreciate that he had an inherent discretion to consider whether, in all the circumstances of the case, it was in the best interest of justice to have Brandon's statement admitted into evidence.

[9] The authority of the magistrate to admit the statement into evidence is derived from section 58(1)(b) of the Evidence Act, 2006 of the BVI (hereafter "the BVI Act") which states that "In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as primary evidence of that fact if … the person who supplied the information recorded in the statement in question is dead".

[10] The appellants argued that section 58(1)(b) clearly contemplates that a statement recorded from a person in criminal proceedings is admissible into evidence if the person subsequently dies before the hearing commences. They argued, though, that the section is permissive and not mandatory and does not relieve the court of the residual discretion to consider whether in all the circumstances it would be in the interest of a fair trial to have the statement admitted or excluded.

[11] The appellants cited the Jamaican case of Winston Barnes et al v The Queen[1] in which the Privy Council ruled that even if a deposition of a deceased witness is admissible under applicable statutory provisions, the court nonetheless retains a discretion to exclude it if this is necessary to secure a fair trial of the accused.

[12] The appellants contended that in this case, the magistrate did not exercise this discretion and that the trial was conducted on the basis that the Crown had an automatic right to have Brandon's statement admitted into evidence without any

[1] [1989] UKPC 10.

consideration by the magistrate of the overall fairness of the trial if the statement were to be admitted.

[13] The appellants further contended that the exercise of the discretion was not made redundant because there was no challenge by the defence to the admissibility of the statement and that the court must act in the overall interest of justice, and in so doing must consider whether it would be fair for the statement to be admitted. They asserted that there is nothing on the record to show that counsel for the appellants was invited by the court to consider whether he was objecting to the admissibility of the statement. They asserted too that the record is devoid of any reference to the exercise by the magistrate of his discretion to admit the statement.

[14] In her submission in response, learned counsel for the respondent argued that section 58(1)(b) of the BVI Act uses the word "shall" which, in accordance with section 37(1) of the Interpretation Act,[2] is to be construed as mandatory or imperative and not permissive. She submitted, therefore, that once the statement satisfied the requirements of section 58(1)(b) it had to be allowed into evidence.

[15] The respondent cited the English case of R v Ibrahim[3] as authority for the proposition that once the statement of the deceased witness satisfied the requirements of the equivalent provision to section 58(1)(b) of the BVI Act then it must be admitted. But Ibrahim is not an authority for this proposition. The Court of Appeal in Ibrahim reviewed section 116 of the UK Criminal Justice Act 2003 (hereafter "the UK Act") which contains a provision identical to section 58(1)(b) of the BVI Act, and also reviewed section 125 of the UK Act, section 78 of the UK Police Evidence Act 1984 and Article 6 of the European Convention on Human Rights, and concluded that satisfying the conditions in section 116 of the UK Act rendered the statement of a deceased witness admissible, but that other

[2] Cap. 136 of the Revised Laws of the Virgin Islands 1991.
[3] [2012] EWCA Crim 837.

provisions of the UK Act and provisions contained in the Police Evidence Act 1984 and the European Convention on Human Rights require the court to consider counterbalancing measures, including whether the statement was shown to be reliable, with a view to determining whether the appellant would have a fair trial if the statement was admitted.

[16] Although there are no statutory provisions in the BVI equivalent to the provisions of section 125 of the UK Act, section 78 of the Police Evidence Act 1984 and Article 6 of the European Convention on Human Rights, there are judicial authorities, including Winston Barnes et al v The Queen, which hold that the court can exclude statements admissible under provisions equivalent to section 58(1)(b) of the BVI Act in the interest of the fair trial of an accused person.

[17] There is in my view no doubt that the statement of Brandon George satisfied all of the requirements of section 58(1)(b) of the BVI Act and was admissible in evidence at the trial of the appellants in the court below. There is also in my view no doubt that the magistrate had a discretion, in accordance with the Winston Barnes case, to exclude the statement if he formed the view that its inclusion would result in the appellants being denied a fair trial or (which amounts to the same thing) that its exclusion was necessary in the interest of a fair trial of the appellants. The fact that the word 'shall' is used in section 58(1)(b) of the BVI Act instead of 'may' does indicate (contrary to the submission of the appellants) that the provision is imperative and not permissive, but (contrary to the submission of the respondent) it is imperative only in the sense that the satisfaction of the requirements of section 58(1)(b) renders its admissibility mandatory. There is clearly a difference between admissibility of a statement and its admission – a statement may be admissible but is not admitted, but it cannot be admitted if it is not admissible.

[18] In this case, the magistrate had no discretion in determining whether the statement was admissible in light of section 58(1)(b) of the BVI Act, but he had a discretion

as to whether it should be admitted on the facts and circumstances of the case. He clearly determined that it should be admitted and so it was.

[19] The appellants contended that the magistrate did not exercise any discretion and the trial was conducted on the basis that the Crown had an automatic right to have the statement admitted into evidence without any consideration by the magistrate of the overall fairness of the trial if the statement were to be admitted.

[20] The fact is that there was nothing which occasioned the magistrate to make any pronouncement on his exercise of discretion in the admission of Brandon's statement. The statement was tendered by Chief Inspector Frank Devonish ("Inspector Devonish") when he was giving his evidence before the magistrate. Counsel for the appellants expressly stated his non-objection to the admission of the statement. He expressed no objection to it in his no case submission at the halfway mark or in his closing submission at the conclusion, but instead he sought in both these submissions to use the contents of the statement to the advantage of the appellants.

[21] This was not a jury trial where the judge was required to direct the minds of the jurors to some issue which they have to consider in arriving at their verdict in the case. Every bit of evidence led in the court is subject to the discretion of the magistrate to allow or disallow, but he does not announce every time any evidence is presented that he is exercising his discretion to allow it in for this or that reason or that in exercising his discretion he took some particular factor or factors into consideration. If, however, the magistrate decides to disallow any evidence presented then there would be an onus on him to indicate why he is exercising his discretion to disallow it, particularly if his disallowance of it is challenged by one of the parties to the case.

[22] In any event, Brandon's statement was just one bit of the evidence which the magistrate had before him to arrive at a verdict in the case. Eleven witnesses

gave evidence in the court below, seven of whom (including the appellants as the defendants in the court below) claimed to be eyewitnesses to what transpired between Brandon George and the appellants on 14th June 2012, and the conviction of the appellants was not, in the language of some of the English cases on this subject, based 'solely or decisively' on the statement of Brandon George.

[23] In the circumstances, it cannot be said that the magistrate erred in law in failing to consider that he had a discretion whether to admit or exclude from the evidence the witness statement of Brandon George and, in any event, the admission into evidence of the statement did not render the trial of the appellants unfair.

[24] I would accordingly dismiss ground one of the appellants' grounds of appeal.

Ground Two

[25] On the second ground of appeal, the appellants advanced in their notice of appeal that the magistrate erred in law in failing to direct himself on the witness statement of the virtual complainant, Brandon George, tendered into evidence, having regard to the fact that he was not available for cross examination and the court was deprived of seeing his demeanour while giving evidence.

[26] In their skeleton submissions, the appellants restated their second ground of appeal to say that the magistrate fell into grave error in his lack of treatment of the statement of the virtual complainant which was admitted into evidence.

[27] In advancing their argument on ground two – as originally formulated or as restated – the appellants quoted a passage from paragraph 11-18 of Archbold: Criminal Pleading, Evidence and Practice 2013[4] concerning directions to be given to a jury by a judge in relation to the various provisions of the UK Act. The quoted passage reads as follows:

[4] Sweet & Maxwell 2013.

> "The following propositions are based on authorities decided in relation to the provisions of the *CJA* 1988. Whilst it is not appropriate to lay down precise directions to be given to the jury in all cases (see *R. V. Hardwick, The Times*, February 28, 2001, CA), and whilst the strength of any warning is to be decided upon the basis of the facts of the individual case, the issues and the significance of the statement in the context of the case as a whole, the jury should be warned, especially in a case where the evidence in the statement is disputed, that in assessing the weight of the evidence they should take account of (a) the fact that, unlike evidence given orally in court, it will not normally have been given on oath or affirmation, (b) the fact that it has not been subject to cross-examination, and (c) the circumstances in which the statement was made, particularly if it is apparent that it was made for the purposes of pending or contemplated judicial proceedings, or of a criminal investigation. It will often be appropriate to develop the warning by pointing out particular features of the evidence which conflict with other evidence and which could have been explored in cross-examination."

[28] The appellants then proceeded to argue that where a judge exercises his discretion both at common law and under statute to admit into evidence a statement from a person who is not available for cross-examination, he is obliged to direct a jury, where it is a jury trial, or himself, that the evidence is contained in a statement and as such the witness is not available for cross-examination. The appellants continued their submission by arguing that in the present case the magistrate was obliged to remind himself that he has not heard or seen the witness under cross-examination so that he could properly evaluate the evidence and that he has to weigh up the evidence and consider it along with all the other evidence that he has heard in forming a judgment.

[29] The appellants contended that the magistrate failed to address his mind to the critical issue surrounding the admissibility of the virtual complainant's statement and to evaluate it with other evidence in the case, bearing in mind that he did not see or hear the virtual complainant testify before him.

[30] The appellants then proceeded, in their submission in support of ground two, to address issues of self-defence, of the prosecution satisfying the magistrate on the requisite standard of proof, and of the magistrate arriving at the verdict that he did;

none of which had any bearing on or relevance to the ground of appeal as formulated or restated. The issue of self-defence is however addressed elsewhere in this judgment, while the prosecution satisfying the magistrate on the requisite standard of proof and the magistrate arriving at the verdict that he did are non-issues in this appeal.

[31] In their submissions in response to this ground of appeal, counsel for the respondent submitted that the magistrate did consider Brandon's statement and all the other evidence brought before him, and that he explained how he assessed the evidence presented to him. Counsel further submitted that the magistrate properly assessed all the evidence at the trial and gave sufficient reasons for his decision to convict the appellants.

[32] With respect to the arguments advanced by the appellants in support of their second ground of appeal, the fact is that this is not a trial by judge and jury requiring the judge to direct the jury on the law and its application to the facts of the case before them. The magistrate, as the judge of the facts and the law, need not say in giving his decision that he warned or directed himself that unlike evidence given orally in court, the statement of Brandon George admitted into evidence would not normally have been given on oath or affirmation, or that it had not been subject to cross-examination, or of the circumstances in which the statement was made. Unless the contrary is shown to be the case or his reasoning and decision were so clearly based on a lack of awareness or lack of application of the relevant legal principles, the magistrate must be taken to have been aware of and to have applied basic principles relative to the admission and treatment of hearsay evidence admitted under statute.

[33] Furthermore, although on two occasions in the course of his fifty-page review and analysis of the evidence in the case the learned magistrate made mention of the statement of Brandon George, he did not appear to place any great reliance on it in coming to the conclusion that the appellants were indeed guilty of the assault

upon Brandon. This rendered it even less necessary for the learned magistrate to give detailed treatment to the statement in the course of his judgment by referring specifically to his awareness and application of the basic legal principles involved.

[34] As to the appellants' submission on the issue of self-defence, the magistrate very clearly and extensively reviewed and analysed the evidence relating to self-defence and concluded (at page 47 of his judgment) that self-defence was not available to the appellants. He did so without any reference to the statement of Brandon George, but with reference to the evidence of the alleged eyewitnesses, including the defence witnesses who, by asserting that the appellants did not beat, hit, strike or assault Brandon, effectively took away from the appellants the defence of self-defence.

[35] The issue of the magistrate's treatment of self-defence in the context of the statement of Brandon George will be further addressed in dealing with ground three of the appellants' grounds of appeal, which is specific to this issue.

[36] In the circumstances, it cannot be said that the magistrate erred in law in failing to direct himself on the witness statement of Brandon George having regard to the fact that he was not available for cross-examination and the court was deprived of seeing his demeanour on giving evidence. Or, with respect to the restated ground of appeal, it cannot be said that the magistrate fell into grave error in his lack of treatment of the statement of Brandon George which was admitted into evidence.

[37] I would accordingly dismiss ground two of the appellants' grounds of appeal.

Ground Three

[38] On the third ground of appeal, the appellants argued that the magistrate failed to properly evaluate the witness statement of Brandon George in determining whether the appellants were acting under lawful self-defence. They argued that it is contained in the statement that Brandon disregarded the first appellant's stop

sign “after he was seen riding the scooter with the display of the licence disc”. (I quote the exact words contained in the appellants’ skeleton submissions because I am not quite sure what is intended to be conveyed by them and will not therefore attempt to paraphrase them.) It was in these circumstances, the appellant contended, that they would have been justified in pursuing Brandon and taking possession of his scooter for the purpose of evidence.

[39] The appellants contended that they were well within their rights to use reasonable force to take possession of the scooter from Brandon when they accosted him in his yard. They contended that from his statement it can be seen that Brandon was resisting and trying to prevent them from exercising their lawful right to take possession of the scooter. They contended that the statement further revealed that Brandon himself acknowledged that the appellants were accusing him of an assault against the second appellant. In these circumstances, they contended that they were entitled to use reasonable force to repel and apprehend Brandon.

[40] The appellants submitted that the magistrate failed to give consideration to these issues and that nowhere in his decision did he allude to Brandon’s statement and subject it to the scrutiny that he ought to have in determining where the truth lay. On the contrary, they contended, the magistrate merely recited the evidence of the other witnesses who gave evidence for the prosecution and for the defence and concluded that the appellants were guilty based on his findings.

[41] Finally on this ground of appeal, the appellants submitted that the failure of the magistrate to properly analyse and assess Brandon’s evidence as contained in his statement deprived them of a fair trial.

[42] In her submission in response to this ground of appeal, learned counsel for the respondent argued that the magistrate made a factual finding in relation to self-defence which would only be overturned by a Court of Appeal if it is so against the weight of the evidence led in the case as to be ‘obviously and palpably wrong’.

Counsel quoted dicta of Brooks JA in the Jamaica Court of Appeal in the case of Alrick Williams v R[5] in support of her submission.

[43] Counsel further submitted that the magistrate was best placed to assess the witnesses and that his finding of fact was not against the weight of the evidence in the case. She submitted too that the magistrate did address his mind to Brandon's statement in arriving at his finding on the absence of self-defence. In this regard, counsel in her written submissions quoted the following words of the magistrate from page 40 of his judgment to confirm this:

> "The very important question that needs to be considered is this: was the physical contact unlawful. And in this regard the evidence of Aaron Headley, Denston Johnney and the statement of the Virtual Complainant."

[44] As submitted by counsel for the respondent, an appellate court will only overturn a factual finding made by a court if it can be shown that the finding is so against the weight of the evidence as to be obviously and palpably wrong. This principle has so often been expressed in various verbal formulations by courts within and without the jurisdiction of this Court as not to merit the citing of authority in support.

[45] It is indisputable that there was ample evidence in this case – from the testimony of Aaron Headlley and Denston Johnney in particular and from Brandon's statement – on the basis of which the magistrate could and did make the finding that the appellants assaulted Brandon and that in so doing they were not acting in self-defence. It is also indisputable that the magistrate addressed and assessed, quite extensively, the evidence led in court, both by the prosecution and the defence, including Brandon's statement, before making his finding (at page 47 of his judgment) that, "Self-defence is not available to Marvin Robinson and Wendell Anthony".

[46] In the circumstances, the finding by the magistrate that self-defence was not available to the appellants cannot be said to be so against the weight of the

[5] [2013] JMCA Crim 13.

evidence as to be obviously and palpably wrong and so justify appellate interference. In fact, as stated in the previous paragraph, there was ample evidence on the basis of which the magistrate could and did make that finding and he did so after extensively addressing and assessing the evidence in the case.

[47] It is clear from the quoted words of the magistrate (at page 40 of his judgment) that he did direct his mind to the contents of Brandon's statement in making his finding that self-defence was not available to the appellants.

[48] In the circumstances, I would dismiss ground three of the appellants' grounds of appeal.

Ground Four

[49] On the fourth ground of appeal, the appellants contended that the magistrate fell into grave error in placing reliance on a medical report purportedly from the virtual complainant in circumstances where the medical report was rendered inadmissible. At paragraph 28 of their submissions, the appellants quoted the following words from pages 39 to 40 of the magistrate's judgment:

> "A medical report … was tendered and was deemed inadmissible because of the omission of certain legal requirements; but the fact that it was tendered in (sic) indicative that there was a circumstance that reasonably necessitated it being brought to the attention of the Court."

The appellants then stated (at paragraph 29 of their skeleton submission) that it is clear from the findings of the magistrate that in coming to his findings he placed undue reliance on inadmissible hearsay evidence in alluding to the medical report. The appellants proceeded to quote the following passage from Archbold: Criminal Pleading, Evidence and Practice 2013, page 1445, paragraph 11-1:

> "The basic rule at common law was that hearsay evidence was inadmissible in criminal proceedings. The rule rendered inadmissible "any statement other than one made by a person while giving oral evidence in the proceedings … as evidence of any fact or opinion stated".

The appellants concluded their submission on ground four by contending that the medical report, having been ruled inadmissible, could not form the basis for any

finding of fact or opinion by the magistrate and that, in placing reliance on the medical report, the magistrate was in error and deprived the appellants of a fair trial.

[50] In the respondent's submissions in response, there was no reply or even reference to the appellants' ground four. I take this to be a slip up on the part of counsel for the respondent, but it certainly is not a concession, because counsel for the respondent did argue in oral submissions at the hearing of the appeal that if the appellants contend that the magistrate erred in making a statement, or made a prejudicial statement, or admitted inadmissible evidence, it must be shown that the consequence of the breach is to render the trial unfair. The respondent submitted that no such consequence flowed from any of the alleged statements, prejudicial statements or admissions of inadmissible evidence by the magistrate.

[51] I consider that the statement made by the magistrate to the effect that the fact that a medical report was tendered, although not admitted, was indicative that there was a circumstance that reasonably necessitated it being brought to the attention of the court, was both unnecessary and unadvisable. There is no indication, however, in the judgment, or otherwise, that the magistrate placed 'reliance' far less 'undue reliance' on the medical report in arriving at his finding of fact that Brandon was injured as a result of injuries inflicted by the appellants.

[52] The learned magistrate made the criticised statement in dealing with the issue of "whether there was physical contact with the person of Brandon George and in consequence the reference harm was caused"[6]. In dealing with the issue, the learned magistrate recalled that three of the prosecution witnesses attested to violent contact having been made and virtually all of the witnesses saw injuries on the person of Brandon George. The magistrate recalled also that whilst Brandon was in police custody he was taken to the hospital by the appellants and surmised that there must have been a reason for this. He then added the earlier-quoted

[6] At p. 39 of the magistrate's written judgment and p. 314 of the record of proceedings.

words. Can it, in those circumstances, be concluded that the magistrate relied on the medical report (as urged by the appellants) "in arriving at his finding of fact that the complainant was injured as a result of injuries inflicted by the [appellants]"? The medical report could not, in any event, indicate who caused injuries to someone, but only the fact of the person being injured, which fact the magistrate found was evidenced by the testimony of several witnesses and corroborated by the virtual complainant having to be taken to the hospital whilst in police custody. The fact that the magistrate unnecessarily and unadvisedly added the words that he spoke about the inadmissible medical report, contributed nothing to or took away nothing from the magistrate's answer to the question which he asked himself about physical contact with the virtual complainant causing him harm, and the added words certainly did not 'deprive the appellants of a fair trial' as contended by them in paragraph 31 of their skeleton submissions.

[53] I would accordingly dismiss ground four of the appellants' grounds of appeal.

Ground Five

[54] On the fifth ground of appeal, the appellants complained that the magistrate was in error in failing to consider the good character of the appellants in arriving at his verdict. They argued that the appellants, having each said in evidence that he is a police officer, were asserting their good character and that this fact was totally overlooked by the magistrate and was not considered at all in his assessment of the evidence and the credibility of the witnesses, including the appellants, in arriving at his verdict.

[55] The appellants contended that they asserted their good character by stating their occupations at the commencement of their examination in chief, as follows: in respect of the first appellant – "I am Wendell Anthony, Police Constable #146 of the Royal Virgin Islands Police Force" and in respect of the second appellant – "I am Officer Marvin Robinson". The appellants argued that these statements "suggest that as Police Officers within the Royal Virgin Islands Police Force, the

Appellants were asserting their good character" and that "[t]his fact was totally overlooked by the learned Magistrate and was not considered at all in his assessment of the evidence and the credibility of the witnesses including the Appellants in arriving at his verdict".

[56] They submitted that it is settled law that a defendant of good character is prima facie entitled to character directions as to both credibility and propensity and that such a direction is no longer based on the judge's discretion but on settled principles of law.

[57] The appellants cited the cases of R v Aziz[7] and Anneth Livingston et al v The Queen[8] in support of their submissions on good character.

[58] In response to this ground of appeal, the respondent submitted that it was the duty of defence counsel at the trial to raise the issue of the defendants' good character where it is likely to be to the defendants' advantage. The respondent relied on the case of Teeluck v State of Trinidad and Tobago[9], where the Privy Council held 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 …. 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."[10]

[59] The respondent also submitted that the magistrate acknowledged the fact that the appellants were police officers, because throughout his judgment he made reference to their behaviour as police officers. The respondent argued that the magistrate was not required to specifically state in his judgment that he took the

[7] [1995] 3 All ER 149.
[8] [2012] UKPC 36.
[9] [2005] 1 WLR 2421.
[10] At p. 2431.

good character of the appellants into consideration in arriving at his decision. She cited in support the English case of McKerry v Teesdale et al[11] where it was held that magistrates are not obliged to give detailed reasons for arriving at their decisions and indeed it is not usual for magistrates to do so.

[60] The respondent also submitted, in effect, that the case against the appellants was so overwhelming that it mattered not whether the good character of the appellants was raised by the defence and considered by the court. The respondent cited in support of this submission the decision of the Privy Council in Mark France et al v The Queen[12].

[61] Having considered the submissions of the appellants and the respondent and the cases which they cited in support, I take the view that it is a bit much to say that by stating their occupations at the commencement of their examination in chief the appellants were asserting their good character. In fact, they were doing no more than what every witness ordinarily does at the commencement of his examination in chief. But, even if their statement of their occupations as police officers constituted an assertion of their good character, the magistrate was not required in his written reasons for decision to specifically state that he took into consideration the good character of the appellants, whether in terms of credibility or propensity or both, in arriving at his finding that he believed the witnesses for the prosecution and was satisfied beyond reasonable doubt that the appellants had unlawfully assaulted Brandon George. It is also beyond doubt that there was abundant evidence on the basis of which the magistrate could make the finding that he did, even if the appellants were men of previous good character. Further, as I have stated more than once in the course of this judgment, this is not a trial by judge and jury requiring a judge to direct the jury on the law and its application to the facts of the case before him. Unless the contrary is shown to be the case or the magistrate's reasoning and decision were so clearly based on a lack of awareness

[11] (2000) 164 JP 355.
[12] [2012] UKPC 28.

or lack of application of the relevant legal principles, the magistrate must be taken to have been aware of and to have applied basic legal principles relative to the treatment of the character of the appellants in determining their credibility as witnesses and their propensity as defendants.

[62] In the circumstances, there is no justification for the appellants' submission that the magistrate erred in failing to consider the good character of the appellants in arriving at his verdict.

[63] I would accordingly dismiss ground five of the appellants' grounds of appeal.

Ground Six

[64] On the sixth ground of appeal, the appellants submitted that the magistrate erred in law in his assessment of the evidence that was placed before him and, in so doing, placed reliance on inadmissible evidence.

[65] This ground of appeal, although quite expansive in the statement of it, centres really on the following statement made by the magistrate at page 3 of his judgment:

> "The next person to adduce evidence was Inspector Frank Devonish. He stated that on the 14 June, 2012 while at Police Headquarter (sic) he received a report from Pamela George in person. She reported that her son Brandon George was assaulted by the two defendants."

The appellants submitted that this statement was clearly inadmissible hearsay evidence which ought not to have formed part of the magistrate's decision in arriving at a verdict of guilty against the appellants. They say that the fact that the magistrate alluded to this evidence without any comments on its admissibility shows that it affected the judicial mind in coming to his verdict. They contended that the statement was highly prejudicial to their case as it purported to state and conclude the very issue which the magistrate had to decide, that is, whether the appellants were guilty of assaulting Brandon George. The report from Pamela George to Inspector Devonish was, they contended, an assertion of fact which she

was not competent to make and which evidence Inspector Devonish could not have given in court. The appellants concluded their submission on this ground of appeal by quoting again the statement contained in paragraph 49 above from Archbold: Criminal Pleading, Evidence and Practice 2013.

[66] In response to this ground of appeal, the respondent submitted that there is no basis in fact or in law to support the assertions of the appellants on this ground of appeal. The respondent argued that the learned magistrate placed absolutely no reliance on the testimony of Inspector Devonish in relation to the particular words spoken to him by Pamela George in making her report to him. The respondent further submitted that the context in which the magistrate mentioned the words allegedly spoken by Pamela George to Inspector Devonish was in his review of the evidence of the witnesses, but neither in his findings nor in his conclusion did he refer to these words.

[67] The respondent also contended that the words spoken to Inspector Devonish by Pamela George in making a report to him were not in any event inadmissible hearsay. The respondent referred the Court to four cases - two from the Privy Council, one from the House of Lords and one from the UK Court of Appeal – in support of this submission. The cases referred to were Subramaniam v Public Prosecutor[13], Kearley v R[14], Ratten v The Queen[15] and R v Safi (Ali Ahmed) and Others[16].

[68] From these cases I derive the following principle which I adopt, that is, that a statement made to a witness in a context where the maker of the statement cannot or does not give evidence of its content, may be inadmissible hearsay evidence when the object of the evidence is to establish the truth of the statement, but not so if the object is to establish the fact that it was made. This is the situation in the

[13] [1956] 1 WLR 965.
[14] [1992] 2 AC 228.
[15] [1972] 2 AC 378.
[16] [2003] EWCA Crim 1809.

present case, where the statement made to Inspector Devonish by Pamela George was not relied on as proof of the truth of its contents, but rather for the fact that it was made to Inspector Devonish as justifying the investigation of and subsequent filing of charges of unlawful assault against the appellants.

[69] On this basis, I would dismiss ground six of the appellants' grounds of appeal. But, even if I am wrong on my statement and application of the above principle, I take the view that the learned magistrate did not rely on the testimony of Inspector Devonish in relation to the particular words spoken to him by Pamela George in coming to the conclusion that Brandon George was unlawfully assaulted by the appellants. The magistrate quite clearly articulated in his judgment the findings which he made on the evidence that was before him and the conclusion which he reached on the basis of that evidence, and the impugned statement of Pamela George contained in the testimony of Inspector Devonish was not part of his findings or conclusion. For this reason too, I would dismiss ground six of the grounds of appeal.

[70] I will only add here that the evidence of Inspector Devonish as to the report made to him by Pamela George was not challenged or criticised when he testified in court, when the no case submission was made by counsel on behalf of the appellants or in counsel's closing submissions. It appeared to have merited challenge or criticism by the appellants, who were represented by counsel throughout the trial, only at the stage of appeal when the learned magistrate was no longer able to address the challenge or criticism.

Ground Seven

[71] On the seventh ground of appeal, the appellants stated that they discovered after the trial that Denston Johnney, who was one of the main witnesses for the prosecution, had a criminal conviction which was not disclosed to the court or the defence. He had been convicted by a magistrate on 21st July 2009 for the offence of criminal trespass. They contended that the magistrate in the present case did

place reliance on the evidence of the witness in coming to the conclusion that the appellants were guilty of the offence with which they were charged.

[72] In their written submissions, the appellants contended that it is a cardinal principle of law that in a criminal trial, whenever the prosecution relies on a witness to give evidence of a material fact, it is under a duty to disclose or elicit any evidence of a previous conviction of the witness in order for the tribunal of fact to be in a position to make a proper assessment of the credibility of the witness. The principle, they submitted, is based on the proposition that whenever the prosecution tenders a witness as part of its case, the witness is presumed to be of good character and sound credibility by virtue of the absence of any previous conviction which tends to show that the witness may have been of bad character. They submitted that it is a strict duty imposed on the prosecution and it is part of the fair trial doctrine and the presumption of innocence. They submitted that it is no excuse for the prosecution, in failing to disclose such criminal conviction of the witness, to simply state that it did not know of the previous conviction or that it had failed to make the necessary enquiry of the witness.

[73] The appellants submitted that the principles which they advance on this issue were examined and applied in the case of R v Knightsbridge Crown Court and Another, Ex parte Goonatilleke[17].

[74] In her submissions in response to this ground of appeal, learned counsel for the respondent contended that the circumstances of the Knightsbridge case are materially different from the instant case. She submitted that in Knightsbridge the witness with the undisclosed criminal conviction was the only witness in the case against the defendant and it was on the basis of his evidence only that the defendant was convicted. Moreover, the witness had committed perjury and his evidence of the circumstances under which he left the police force was fraudulent,

[17] [1986] QB 1.

because he testified that he had left voluntarily when in fact he was asked to resign following his conviction for an offence involving dishonesty.

[75] In addressing this ground of appeal, I must first note that I have not been able to locate the authorities for "the cardinal principle of law" and the other propositions advanced by the appellants which render the non-disclosure by the prosecution of a previous conviction of a witness as fatal to the conviction of a person accused.

[76] The case of R v Knightsbridge Crown Court, cited by counsel for the appellants, does not provide authority for the principles and propositions advanced by him. That case was one in which the applicant sought an order of certiorari to quash an order of a court convicting him for the offence of theft. The ground of the application was that the conviction against him was secured by the complainant on the basis of the fraud of the complainant in representing to the court in his testimony that he had voluntarily resigned from the police service when in fact he was asked to resign following his conviction for a criminal offence involving dishonesty. The evidence of the complainant was in fact the only evidence led in court of the offence for which the applicant was charged and the applicant's conviction could only have been secured by the court's acceptance of the credibility of the complainant as against that of the applicant.

[77] Watkins LJ, in delivering judgment in the Court of Appeal in Knightsbridge, expressed the view that had the court below known the truth about the complainant's past, it is more than likely that they would have acquitted the applicant. The learned judge stated that the applicant was entitled to know of the existence of the complainant's previous conviction and that it is the duty of the prosecution to give that kind of information about a witness to the defence if, of course, they are aware of it. He stated further that the complainant's evidence was indispensable to the prosecution and his credit was, therefore, of the highest importance.

[78] The present case is distinguishable from the Knightsbridge case in several respects. Firstly, this is an appeal against a conviction and not an application for judicial review, which invites different considerations. Secondly, the conviction involved in this case is that of a then fifteen–year old who had been charged and convicted of criminal trespass nearly five years before the present case, as opposed to a conviction of a former police officer for an offence involving dishonesty. Thirdly, the person with the previous conviction in this case was one of six witnesses who gave evidence for the prosecution, on the basis of which the appellants were found guilty of the offence for which they were charged, while the person with the previous conviction in Knightsbridge was actually the complainant and the only witness for the prosecution, on whose evidence alone the applicant was convicted.

[79] In addition to all of these factors, there is the proposition advanced by the respondent in supplemental submissions that, by virtue of section 50 of The Criminal Justice (Alternative Sentencing) Act, 2005, if – as in the case of Denston Johnney – a person convicted of a criminal offence was given a non-custodial sentence, then after two years have elapsed since his sentencing, the conviction becomes spent and the person is to be treated for all purposes in law as a person who has not committed or been charged with or is the subject of that conviction.

[80] It is apparent that section 50 of the Criminal Justice (Alternative Sentencing) Act, 2005 provides a complete answer to the appellants' ground 7 because if, as it appears, Denston Johnney was given neither a custodial sentence nor fined upon his conviction for the offence of criminal trespass, then the prosecution, even if they were aware of this conviction, could not disclose it, because Mr. Johnney had to be treated for all purposes in law as a person who had not committed, or been charged with, or been convicted of the offence. There is also no evidence of or any indication that the prosecution was aware of the five-year old conviction of Mr. Johnney. And, unlike the situation in the Knightsbridge case, Denston Johnney

was just one of six prosecution witnesses and his evidence was certainly not the only evidence on the basis of which the appellants were convicted on the assault charge.

[81] I would accordingly dismiss ground seven of the appellants' grounds of appeal.

Ground Eight

[82] The appellants' eighth ground of appeal, as filed on 1st October 2015 and allowed in by this Court on 2nd October, reads as follows:

> "The failure of the Learned Magistrate to record the evidence that transpired at the visit of the locus in quo is a material irregularity rendering the conviction of the Appellants unsafe."

[83] In the submissions filed by the appellants on 6th November 2015 in support of their additional grounds of appeal, the appellants referred to the substance of ground eight as follows:

> "The Learned Magistrate failed to conduct the trial according to Law, by conducting a hearing at the *locus in quo*, without any evidence of the visit to the *locus in quo* being recorded, to determine whether proper procedures were followed at the visit and the nature of the evidence elicited."

[84] In the submissions of 6th November, the appellants cited and reproduced section 52 of the **Magistrate's Co**de of Procedure Act,[18] which they contended "clearly mandates the Magistrate to record all relevant evidence in the trial of the Appellants, and that evidence includes evidence obtained during the visit to the locus in quo and what transpired therein". They also quoted dicta from Lord Denning in the case of Goold v Evans & Co[19] where he states that he thinks that a view is part of the evidence, just as much as an exhibit. They submitted that the evidence given at the locus in quo was a critical part of the evidence on which the magistrate relied in coming to his decision, but that he failed to comply with his statutory obligation of recording this evidence. They stated in their submissions

[18] Cap. 44 of the Revised Laws of the Virgin Islands.
[19] [1951] 2 TLR 1189.

that nowhere in the transcript of evidence is it recorded that the magistrate, along with the witnesses and the accused persons, visited the locus in quo to take evidence. This they said is a serious irregularity in the proceedings and goes to the question of jurisdiction and that, by embarking on this course, the magistrate went outside his jurisdiction, with the result that the proceedings have been compromised for non-compliance with the statute.

[85] The task of understanding the meaning and intent of the appellants' eighth ground of appeal, the supposed substance of it and the submissions in support of it, has been a difficult one. The statement of the ground itself appears to be a complaint about the failure of the magistrate to record the evidence that transpired at the locus in quo. This is transformed in the statement of the substance of the ground in the written submissions, where the complaint is that the magistrate conducted a hearing at the locus in quo without any evidence of the visit to the locus in quo being recorded. There is a further transformation of the appellants' complaint when, in his oral submissions at the hearing of the appeal, counsel for the appellants contend that there was evidence obtained and things which transpired during the visit to the locus in quo which were not recorded by the magistrate. So one is left uncertain as to what is the actual complaint of the appellants in the last of their twice-revised grounds of appeal.

[86] Comprehension of this ground of appeal is rendered the more difficult by the citation of the statutory provision which the appellants contend that the learned magistrate failed to comply with. The statutory provision cited by the appellants in their submission is section 52 of the **Magistrate's Code of Procedure Act**, which comes under Part III of the Act, dealing with preliminary inquiries, and which has no connection whatsoever with visits to a locus in quo.

[87] Of significance too is the fact that the dictum of Lord Denning from the case of Goold v Evans & Co which was quoted in the submission of the appellants was supposed to support a proposition that the evidence given at the locus in quo was

a critical part of the evidence on which the magistrate relied in coming to his decision, but that nowhere in the transcript is it recorded that the magistrate, along with the witnesses and the accused persons, visited the locus in quo to take evidence. But the dictum of Lord Denning sought to be relied upon by the appellants was clearly obiter and, moreover, was not supported by the other two members of the Court of Appeal. In fact, Lord Hordson clearly expressed a contrary view, while Lord Somervell declined to express any view.

[88] Though it is doubtful precisely what it is the appellants are complaining about in relation to the visit to the locus in quo, it is not in doubt that there was a visit to the locus in quo and that evidence was given by Denston Johnney and Aaron Headley either at the locus or following from the visit to the locus. The fact of the visit (or of the "VIEW" as it is referred to in the transcript) and the evidence resulting from it, is recorded at pages 38 to 40 of the transcript of proceedings. So although there may not have been a specific statement in the transcript that the court had undertaken a visit to the locus in quo and that the following evidence was given at the locus or in the court room following from the visit to the locus, it is in fact recorded in the transcript that the visit took place and the evidence arising from it is also recorded in the transcript.

[89] In the circumstances, there was no failure by the magistrate to record the evidence that transpired at the visit to the locus in quo, as complained of in the statement of the ground of appeal; there was no failure by the magistrate to record any evidence of the visit to the locus in quo, as complained of in the statement of the substance of the ground; or no failure by the magistrate to record evidence obtained and things which transpired during the visit to the locus, as complained of by counsel for the appellants in his oral arguments at the hearing of the appeal, and I would accordingly dismiss ground eight of the appellants' grounds of appeal.

[90] Having dismissed all eight of the appellants' grounds of appeal, I would accordingly dismiss the appeal, but with no order as to costs.

Mario Michel
Justice of Appeal

I concur

Davidson Kelvin Baptiste
Justice of Appeal

I concur

Paul Webster
Justice of Appeal [Ag.]