BAHAMAS JUDICIAL EDUCATION INSTITUTE

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The Judiciary of the Commonwealth of The Bahamas

CRIMINAL BENCH BOOK

A Publication of The Bahamas Judicial Education Institute

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Produced by: The Court Services Council

Printed by: The Office Authority Limited

Design and layout: Paria Publishing Co. Ltd.

ISBN Hardcover: 978-976-97661-0-5
ISBN E-Book: 978-976-97661-1-2

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Foreword

The administration of criminal justice stands as one of the most solemn responsibilities entrusted to the Supreme Court of The Bahamas. In every courtroom, the pursuit of truth, the protection of rights, and the maintenance of public confidence converge. This Bench Book is offered as a practical and principled guide to that enduring task.

Designed for judicial officers presiding over criminal matters, the Bench Book distills procedural norms, evidentiary standards, and sentencing frameworks into a coherent and accessible reference. It reflects the evolving jurisprudence of our courts, the constitutional imperatives, the statutory architecture of our criminal law, and the ethical considerations that underpin fair trial rights. Whether addressing bail applications, jury directions, or sentencing considerations, the Bench Book aims to support consistency, clarity, and judicial independence.

In compiling this resource, we have drawn upon the collective wisdom of the Bench both locally and regionally and distilled the best practices, and the lived realities of our criminal justice system.

While commendation appears elsewhere for the many talented judicial practitioners who have contributed to this Bench Book, I could not leave this foreword without expressing my personal gratitude and that of the Judiciary for the tireless efforts of the Hon. Mr. Justice Peter Jamadar JCCJ, the Hon. Mme. Justice Renae Mckay and Elron Elahie in bringing this project to completion.

To our colleagues who serve in the Criminal Division: may this Bench Book assist you in navigating complexity with confidence, in exercising judgement with compassion, and in upholding the rule of law with unwavering integrity.

Let it be a tool not only of reference, but of reflection on the solemnity of our charge, the dignity of those who appear before us, and the enduring promise of justice in a democratic society.

The Honourable Sir Ian Winder, Kt.
Chief Justice, The Bahamas

Introduction

A well-functioning criminal justice system is fundamental to maintaining law and order, ensuring societal stability, and supporting sustainable economic and social progress. When criminal justice systems operate with fairness, efficiency, and effectiveness, they foster public confidence and reinforce the legitimacy of justice institutions. Within the framework of the constitutional principles in The Bahamas, such as the right to legal protection, due process, and a fair hearing, judiciaries are bound by the rule of law to consistently uphold these standards. Meeting these expectations is essential to serving all court users equitably. Additionally, judicial officers and institutions are held to high ethical standards, including independence, impartiality, competence, diligence, and timeliness. These principles thus create both institutional and professional obligations, ensuring accountability in the delivery of justice.

The development of this Criminal Bench Book supports judicial officers in fulfilling the qualitative and quantitative obligations that they are constitutionally and ethically required to maintain. At the institutional level, it stands as a vital tool for The Bahamas, and equally valuable to other Caribbean jurisdictions that share comparable legal frameworks and practices. Moreover, this Bench Book enhances access to justice for a broad cross-section of individuals, as it can readily serve attorneys, court users and members of the public as a foundational reference on legal principles and procedural best practices.

Development of the Bench Book

A draft of the Criminal Bench Book was prepared by the Judiciary of The Bahamas containing twenty-three chapters. The draft was then presented to the CAJO for further development and finalisation. Over twelve months, the CAJO worked with the Judiciary to build out areas of law, guidelines, and directions with a focus on local and regional jurisprudence. The publication has gone through rounds of rigorous research, writing, review, and editing to ensure, as far as possible, accuracy, relevance, and comprehensiveness.

The Bench Book utilises a hybrid approach to citations – a mix of OSCOLA and regional best practice. This ensures that cases, both reported and unreported, are appropriately identified so that they may be easily located in various databases. In particular, for Bahamian cases, the Court, File Number, and specific judgment date are included.

Throughout the Bench Book, the use of "accused" has generally been replaced with "defendant" in keeping with developing international standards. In addition, gendered references such as "he, him, himself, she, her, herself" have been replaced with the neutral and inclusive terms, "they, themselves". It is important to note that replacements were not made in direct quotations to maintain the integrity of quoted material, and in some illustrations where the use of gendered pronouns was intentional.

This Bench Book references a number of sources across chapters. These include:

Criminal Bench Book for Barbados, Belize, and Guyana (Caribbean Association of Judicial Officers, 2023)
Criminal Charge Book (Australia)
Crown Court Compendium (Judicial College of England and Wales, July 2024)
Criminal Trial Courts Bench Book (Judicial Commission of New South Wales, October 2025)
Longley Compendium (The Bahamas)
Criminal Bench Book (Supreme Court of Judicature of Jamaica, 2017)
Criminal Bench Book 2015 (Judicial Education Institute of Trinidad and Tobago)

Acknowledgements and Appreciation

This Bench Book would not at all be possible without the vision of The Hon Sir Ian Winder, Chief Justice of The Bahamas. As well, the team representing the Judiciary of The Bahamas who worked with the CAJO to ensure timely and accurate completion. This team was comprised of:

The Honourable Chief Justice Sir Ian Winder, Kt.
The Honourable Mr. Justice Bernard Turner, The Bahamas Court of Appeal
The Honourable Mme. Justice Guillimina Archer-Minns
The Honourable Mme. Justice Renae McKay
The Honourable Mr. Justice Andrew Forbes
The Honourable Mme. Justice Jeanine Weech-Gomez
The Honourable Mr. Justice Neil Brathwaite
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The CAJO, as a regional association of judicial officers, is committed to strengthening

justice system capacity and professional performance in all Caribbean member territories. One consistent contribution is through the development of relevant researched based knowledge products and tools (thecajo.org). This Criminal Bench Book falls under this category. The CAJO is honoured to have been chosen to partner with the Judiciary of The Bahamas and contribute to the delivery of this initiative, which will redound to the benefit of the People of The Bahamas.

The CAJO team that worked diligently to complete this publication included: Elron Elahie, Research and Programme Coordinator, Mrs Kavita Deochan, Attorney-at-Law, Mrs Kerine Dobson-Aqui, Attorney-at-Law, Mrs Shail Pooransingh, Attorney-at-Law, and The Hon Mr Justice Peter Jamadar, Judge of the CCJ and Chairman of the CAJO. Special thanks must also be given to Alice and Dominic Besson of Paria Publishing for their creativity and expertise in the layout and design of this publication.

The Hon Mr Justice Peter Jamadar
Chair, CAJO and Judge, CCJ

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Chapter 1 – Summing-Up

In this Chapter: **Structure of a Summing-up | Summing-up Checklist**

Structure of a Summing-up

Generally, juries participate in criminal trials in the Supreme Court in this jurisdiction. However, under the **Trial by Judge Alone (Miscellaneous Provisions) Act, 2024** which came into force on 31 March 2025, a person committed to stand trial in the Supreme Court may elect to be tried by a judge sitting without a jury. Section 13 of the Act makes that provision by amending the **Criminal Procedure Code Act, Chapter 91** as follows:

> (a) in section 141, by the deletion of subsection (1) and the substitution of the following—
>
> > "(1) Every person committed for trial before the Supreme Court shall be tried on information preferred by the Attorney-General, and such trial shall be had by and before a judge and a jury to be summoned, drawn and empanelled according to the provisions of the Juries Act or any law for the time being in force repealing and replacing that Act, unless the person committed for trial elects to be tried by judge alone pursuant to the Trial By Judge Alone (Miscellaneous Provisions) Act, 2024."

For jury trials, the judge supervises the selection and swearing in of the jury, giving the jurors a direction about their role in the trial of deciding the facts and warning them not to discuss the case with anyone else. At the start of the trial, the judge ensures that all parties involved are given the opportunity for their case to be presented and considered as fully and as fairly as possible. Once all of the evidence has been heard, the trial judge's function is to sum up the law and evidence for the jury's consideration, and to put the defendant into their charge for deliberation and thereafter their verdict (see ss 179 and 180 of the **Criminal Procedure Code Act, Chapter 91)**.

Currently, there is no particular case law or formula in The Bahamas that sets out the main elements that a summing-up must contain. However, the appellate court, in assessing whether a Judge's summing-up is balanced and/or fair, would have regard to the summing-up as a whole and the circumstances of the particular case. Bahamian judges also employ international and regional legal material and/or case law to assist in formulating fair and balanced summations. These legal materials include but are not limited to:

a. ***Halsbury's Laws of England*** (5th edn, 2021) vol 27, paras 412-426

b. ***David Ormerod and David Perry (eds), Blackstone's Criminal Practice 2026 (36th edn, OUP 2025),*** D18.21-D18.45

c. ***Mark Lucraft, Archbold: Criminal Pleading, Evidence and Practice 2026, (Sweet & Maxwell Ltd 2025)*** Part XVI, Section D

d. Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024)

e. Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (Caribbean Law Publishing Company 2017)

f. Judicial Education Institute of Trinidad and Tobago (JEITT), ***Criminal Bench Book 2015*** (Supreme Court of Judicature of Trinidad and Tobago 2015)

g. Caribbean Association of Judicial Officers (CAJO), ***Criminal Bench Book for Barbados, Belize, and Guyana*** (CAJO 2023)

Bahamian judges also use a compilation of directions compiled by the Retired President of the Court of Appeal and Chief Justice, Sir Hartman Longley known as the ***Longley Compendium***. The ***Longley Compendium*** includes complete summations from the Retired President of the Court of Appeal and Chief Justice, Sir Burton Hall, dating from the 1990s.

The application of this combined approach is evidenced in the following cases:

a. ***Stubbs v R; Davis v R; Evans v R*** **(The Bahamas CA, SCCrApp Nos 203 and 280 of 2013 and 8 and 106 of 2014, 8 July 2016 and 24 January 2019)**

b. ***Rolle v R*** **[2016] 2 BHS J No 130 (The Bahamas CA, SCCrApp No 107 of 2014, 29 September 2016)**

c. ***Taylor v R; Evans v R*** **(The Bahamas CA, SCCrApp Nos 70 and 71 of 2013, 17 September 2015)**

d. ***Bodie v DPP*** **(The Bahamas CA, SCCrApp No 60 of 2016, 30 January 2023)**

e. ***Capron v DPP*** **(The Bahamas CA, SCCrApp No 13 of 2011, 26 March 2013)**

In addition, the following serves as a checklist for a standard summing-up to a jury in criminal proceedings. It is not an exhaustive list of every possible area which may need to be addressed in your directions, but it provides useful guidance.

Chapter 1 – Summing-Up

Summing-Up Checklist

While there is no prescribed format, useful guidance for what should be covered in a summing-up can be found in the ***Criminal Bench Book 2015*** at pg 1, which sets out the following areas: (i) General Directions; (ii) Charges on the Indictment; (iii) Summarise the case for the Prosecution; (iv) Deal with issues arising out of the Prosecution's case; (v) Summarise the case for the Defence; (vi) Deal with issues arising out of the Defence's case; (vii) Jury's approach to issues; (viii) Additional points to note. The Bench Book includes a checklist at pg 4.

A Summing-up Checklist can also be found at pg 3 of the Supreme Court of Judicature of Jamaica, ***Criminal Bench Book 2017***.

The material below draws on elements from the Trinidad and Tobago and Jamaica Bench Books to provide a general checklist for a standard summing-up to a jury in criminal proceedings. It is not an exhaustive list of every possible area which may need to be addressed in your directions but is intended to provide useful guidance.

Category	Items
Main Elements	The Court of Appeal of Trinidad and Tobago in ***Chandler v The State*** **(Trinidad and Tobago CA, Crim App No 19 of 2011, 12 December 2013)**, referring to the judgement of Ibrahim JA in ***Jairam v The State*** **(Trinidad and Tobago CA, Crim App Nos 35 and 36 of 1988,15 December 1993)**, sets out the five main elements that a summing-up must contain: • The directions in law, both general and specific • A summary of the facts of the case for the Prosecution and the case for the Defence • An identification of the issues or questions in the case which arise for the jury's determination • An evaluation and analysis of the evidence on each issue or question so identified • The jury's approach to verdict.
General Directions	• Function of judge and jury (jury, where applicable) • Burden and standard of proof • Separate treatment of counts (where applicable) • Separate treatment of defendant/s (where relevant) • Elements of each offence including, as appropriate: intention/ recklessness/dishonesty, etc. • Joint responsibility • Defences, as appropriate: alibi, self-defence, accident, etc

Chapter 1 – Summing-Up

Category	Items
Summary of the case for the Prosecution and the Defence separately	• Tell the story; Engage the jury • Set out all material aspects • Do not recite the evidence; avoid reading large segments of evidence from the transcripts or your notebook
Deal with issues arising out of the case for the Prosecution and the Defence	• Inconsistencies in the Prosecution's case • Hearsay matters (e.g. dying declarations) • Confessions, mixed statements, etc. • Identification parades • Hostile Witnesses • Complainant in sexual offence cases – child witnesses – video evidence • Identification evidence: Visual ID (Turnbull)/ Fingerprints/ Identification by voice, DNA, etc. • Circumstantial evidence • Joint enterprise (in whatever form it may arise on the facts of the case) • Co-defendants • Corroboration • Delay • Evidence requiring caution • Bad/Good Character • Alibi • Self-defence • Provocation • Lies told by the defendant • Silence of the defendant at trial • Silence of the defendant upon arrest/at interview
Guidance to the Jury	Provide guidance to the jury as to how they are to reach their verdict. Example: Consider the alibi of the defendant. The defendant said they were (…). If you accept this evidence, you must find the defendant Not Guilty; if you reject this evidence, it does not mean that the defendant is guilty. Go back to the Prosecution's case and see if they have made you sure (…). If you are sure, then you may convict.
Proper Approach to Issues	• Provide guidance to the jury as to how they are to reach their verdict • Set out the order of options for verdict where applicable • Unanimity of verdicts • Availability of exhibits.

Chapter 1 – Summing-Up

Category	Items
Other matters (where applicable)	• How to ask questions • Dispersal overnight, resumption and conduct during breaks in deliberation • Majority decision • Regarding the use of Artificial Intelligence, see ***The Crown Court Compendium,*** Appendix VI, at pgs 27-2 and 27-4 for guidance.

Chapter 2 – Fitness to Plead

In this Chapter: **General Scope | Relevant Legislation | Useful Cases**

Fitness to Plead is a fundamental principle of criminal justice. It refers to a defendant's ability to understand and participate in the legal process, a prerequisite to a fair trial. Upon arraignment, a defendant is required to enter a plea of guilty or not guilty when the charges are read by the Court. A determination of the defendant's fitness to plead demands the balancing of the individual's right to make autonomous decisions regarding their trial, with their ability to effectively participate in it. The purpose of a fitness to plead inquiry, is to protect the rights of vulnerable individuals who are unable to defend themselves in court and to preserve natural justice in the legal system, while balancing the needs to see justice served and to protect the public in prosecuting crimes. The preliminary issue is to determine whether the defendant is fit for trial.

General Scope

A person is deemed unfit to plead if they are incapable of understanding the proceedings, unable to put forward any defence, challenge jurors, provide proper instructions to Counsel or follow any of the evidence to be adduced before the Court (see Robert McPeake (ed), ***Criminal Litigation and Sentencing*** (24th edn, OUP 2018) at pg 234).

The general test for fitness to plead is summarized by the Privy Council in ***Taitt v The State*** **[2012] UKPC 38, (2012) 82 WIR 468** at paras 15 and 16. Where the issue of fitness to plead arises, the following must be ascertained by the court:

a. whether the incapacity of the defendant is genuine;

b. whether the defendant can plead to the charge or not; and

c. whether the defendant has the ability to comprehend the course of the trial proceedings and put forward a proper defence.

Further, in ***Taitt*** at para 16, the Court noted that, "…the quality of his instructions to counsel or of any evidence that he may wish to give is not to the point. The emphasis is on his ability, or his inability, to do those things."

The burden of proof as to whether the defendant is unfit to plead depends on which party raises the issue before the Court. If it is raised by the Defence, then the burden of proof is to establish on a balance of probabilities that the defendant is unfit. Once raised by the Prosecution, the burden of proof is to establish beyond reasonable doubt that the defendant is unfit (***Robertson v R*** **[1968] 1 WLR 1767, [1968] 3 All ER 557**).

Chapter 2 – Fitness to Plead

The Court in ***Taitt***, citing ***R v M*** **[2003] EWCA Crim 3452** (UK CA, 14 November 2003), advocated that when assessing a defendant's fitness, consideration ought to be given to whether the defendant:

a. is capable of understanding the charges against them;

b. is able to decide to plead guilty or not guilty;

c. is able to exercise the right to challenge the jurors;

d. can articulate a defence which they wish to be put forward by their attorney;

e. is able to follow the proceedings throughout the trial;

f. is capable of giving evidence in their own matter, if they wish.

Once the defendant is deemed to have the capability to do all of the above, they are deemed to be fit to plead and be tried before a court of law. However, if the trial Judge finds that the defendant is incapable of doing the above-mentioned, then it ought to be concluded that the defendant is not fit to plead.

In ***DPP v P*** **[2007] EWHC 946 (Admin), [2007] 4 All ER 628**, at para 61, the Court advanced important questions and went on to address these as follows:

> (i) The fact that a court of "higher authority" has previously held that a person is unfit to plead does not make it an abuse of process to try that person for subsequent criminal acts. The issue of the child's ability to participate effectively must be decided afresh (see [60], above).
>
> (ii) Where the court decides to proceed to decide whether the person did the acts alleged, the proceedings are not a criminal trial (see [55], above).
>
> (iii) The court may consider whether to proceed to decide the facts at any stage. It may decide to do so before hearing any evidence or it may stop the criminal procedure and switch to the fact-finding procedure at any stage (see [54], above.
>
> (iv) The district judge should not have stayed the proceedings at the outset as he did without considering the alternative of allowing the trial to proceed while keeping P's situation under constant review.
>
> (v) If the court proceeds with fact finding only, the fact that the defendant does not or cannot take any part in the proceedings does not render them unfair or in any way improper; the defendant's art 6 rights are not engaged by that process (see [55], above).

Chapter 2 – Fitness to Plead

A person is capable of standing trial if they are able to understand the course of trial proceedings and the evidence, and to exercise the right to give evidence themselves. They are not capable of standing trial if they merely only understand the indictment and can plead to it (see ***Reid v R* (1961) 3 WIR 404**; ***R v Pritchard* (1836) 7 C & P 303, (1836) 173 ER 135**).

In ***Pritchard*** the defendant in this instance was a "deaf mute" who was of sound mind. Alderson B's direction to the empanelled jury on determining whether the defendant was fit to plead, at pgs 304-305, provides:

> There are three points to be inquired into:— First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence— to know that he might challenge any [jurors] to whom he may object— and to comprehend the details of the evidence…if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters.

In ***R v Belle*** **[2017] 1 BHS J No 146** (The Bahamas CA, 22 June 2017), following receipt of a psychiatric and psychological report provided by the Crown, Issacs, J had to determine the custody and care of the defendant who was determined to be unfit to plead and stand trial by a jury at the time of the hearing. In his Ruling, reference was made to ss 155(2) and 192 of the **Criminal Procedure Code Act, Chapter 91** in consideration of his decision and cited at paras 6 and 7:

> 6. As put as early as 1836 by **Parke J.** in **R v Pritchard 7 C & P 306**:
>
> > "If a man in his sound memory commits a capital offence, and before his arraignment becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity is removed."
>
> 7. Although the Defendant may be discharged from Sandilands if his medical care removes his incapacity to such an extent that he can re-enter society, the criminal charge against him would remain unresolved. The Privy Council in **Richard Brown v The Queen [2016] UKPC 6** addressed this issue where the Board said:
>
> > "If the Defendant recovered his sanity, there was nothing in the Act to prohibit the Crown from sending the Defendant back to the court with a view to his arraignment and trial. Otherwise, if the appellant's argument were correct, an innocent defendant

> who had been found unfit to plead, and then recovered his health would have no possibility of acquittal but would remain liable to executive detention for the rest of his life."

Once the issue of a defendant's fitness to plead is raised, the Court may empanel a jury to try the defendant's sanity. Evidence of the defendant's sanity is presented and the jury upon hearing the same makes a finding of their insanity and fitness to stand trial (see s 155(2) of the Criminal Procedure Code Act). If the jury finds the defendant unfit to stand their trial the Court should order them to be taken to a hospital or any public institution which caters to the specific needs of the defendant, who is to be kept until discharged by an order of the Governor General (see s 192(1) of the Act).

NOTE: The issue of fitness to plead is different from the defence of insanity which is relevant to the time of commission of the offence in respect of the indictment. Fitness to plead deals with the defendant's mental capacity at the time of trial (see the Judicial Education Institute of Trinidad and Tobago (JEITT), ***Criminal Bench Book 2015*** at pg 7).

Relevant Legislation

The **Criminal Procedure Code Act, Chapter 91** makes provisions for and sets out the procedure to be followed in criminal cases for matters relative to the mental capacity of a defendant. The relevant provisions of the CPC that identify the Court procedure on a determination of the defendant's fitness to plead are provided below.

Section 99	Without prejudice to the provisions of sections 155 and 191 of this Code (relating to cases in which an accused person on trial on information may be found to be insane at the time of arraignment or to have been insane at the date of the offence with which he is charged), when in the course of any trial or preliminary inquiry the court has reason to suspect that the accused person is of unsound mind so that he is incapable of making his defence, the court shall inquire into the fact of such unsoundness and for this purpose may receive evidence and may postpone the proceedings and remand the accused person for a medical report.

Chapter 2 – Fitness to Plead

Section 100	100. (1) If, in a case referred to in the preceding section, the court finds that the accused person is of unsound mind and incapable of making his defence, it shall postpone further proceedings in this case. (2) If the case is one in which bail may be taken, the court may release the accused person on sufficient surety being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance, if called upon, before the court or any officer of the court appointed in that behalf. (3) If the case is one in which bail may not be taken or if sufficient surety cannot be given or the court, for any sufficient reason, considers that bail ought not to be granted, the court shall report the matter to the Governor-General who may order the accused person to be detained in any hospital or other place appointed by any law for the reception or custody of lunatics; and the Governor-General may from time to time make such further order in the case for the detention, treatment or otherwise of the accused as the circumstances may require. Pending the order of the Governor-General in any such case the court shall direct that the accused person be remanded in custody.
Section 101	When an accused person appears to be of sound mind at the time of a preliminary investigation, notwithstanding that it is alleged that, at the time when the act was committed in respect of which the accused person is charged, he was insane within the meaning of section 92 of the Penal Code, the court shall proceed with the case and, if the accused person ought, in the opinion of the court, to be committed for trial on information, the court shall so commit him.
Section 102	Whenever any preliminary investigation or trial is postponed under the provisions of section 99 or 100 of this Code, the court may at any time resume the preliminary investigation or trial, unless the accused person is detained in pursuance of an order by the Governor- General given under the provisions of subsection (3) of section 100, and require the accused to appear or be brought before such court, when, if the court finds him capable of making his defence, the preliminary investigation or trial shall proceed, but if the court considers the accused person still to be incapable of making his defence, it shall act as if the accused were brought before it for the first time.

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Section 103	If an accused person is confined in a hospital or other place appointed by law for the reception or custody of lunatics, under the provisions of this Code or any order made in exercise of any power conferred by this Code, and the registered medical practitioner in charge of such hospital or place certifies that the accused person is capable of making his defence, the Governor-General may order that such accused person shall be taken before the court having jurisdiction in the case to be dealt with according to law, and the certificate of such medical officer shall be receivable by the court as *prima facie* evidence of the capacity of the accused person.
Section 155	155.(1) If an accused person upon being arraigned upon any information stands mute of malice or will not, or by reason of infirmity cannot, answer directly to the information, the court may, if it thinks fit, order the Registrar, or other proper officer of the court, to enter a plea of not guilty on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. (2) If it appears, before or upon arraignment, that an accused person may be insane, the court may order a jury to be empanelled to try his sanity, and the jury shall thereupon, after hearing evidence for that purpose, find whether he is or is not insane and unfit to stand his trial. If the finding of the jury is that the accused person is insane and unfit to stand his trial the provisions of section 192 of this Code shall apply.
Section 191	Where in any information any act or omission is charged against any person as an offence and it is given in evidence on his trial for that offence that he was insane so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom he is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.
Section 192(1)	Where any person is found to be insane before or upon arraignment, in accordance with the provisions of subsection (2) of section 155 of this Code, or a special verdict is found against him under the provisions of section 191 of this Code, the court shall order him to be conveyed to any hospital or other place for the time being appointed under any law to be a public lunatic asylum or for the reception of criminal lunatics, there to be kept until discharged by order of the Governor-General.

Chapter 2 – Fitness to Plead

Section 92 of the **Penal Code, Chapter 84** makes provisions for the criminal status of "an insane person". It provides that:

> 92. A person accused of an offence shall be deemed to have been insane at the time he committed the act in respect of which he is accused —
>
> (1) if he was prevented, by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused;
>
> (2) if he did the act in respect of which he is accused under the influence of an insane delusion of such a nature as to render him, in the opinion of the jury or of the court, an unfit subject for punishment of any kind in respect of such act.

The Bahamas' **Mental Health Act, 2022** which came into force on 1 September 2024, seeks to also offer some guidance for Bahamian Judges to handle cases involving the fitness to plead of defendants suspected of having a mental illness. Mental illness is an extremely sensitive area that has become more prevalent in society. Countries such as The Bahamas are now seeking ways in which the law can better deal with mentally ill defendants. Bahamian Judges also employ the procedure developed by the Eastern Caribbean Supreme Court [Criminal] in Deaf/Mute and Fitness to Plead Cases.

Provisions from the **Mental Health Act** that are relevant to the matter of fitness to plead are as follows:

Section 12	In particular, subsection (4) which prohibits restriction of contact or communication from several authorities including a judge or officer of the court by a person admitted to a mental health facility.
Section 23	Facilitated admission of a person diagnosed with or suspected of having a mental illness.
Section 26	Discharge report for voluntarily admitted person with mental illness.
Sections 27 – 28	Care and treatment of persons diagnosed with or exhibiting symptoms of mental illness.
Section 35	Designation of health facility for persons in custody with mental illness.
Section 36	Examination and assessment by psychiatrist of a person in custody with a mental illness.
Section 37	Admission to a mental health facility by Court order of a person accused of a crime.
Section 38	Admission on referral of a person in custody with a mental illness to a mental health facility or health facility.

Chapter 2 – Fitness to Plead

Section 39	Report on Assessment of the mental health status of a person in custody.
Section 40	Treatment in the Department of Correctional Services of a person in custody diagnosed with a mental illness.
Section 41	Review of mental health status of a person in custody admitted for mental health treatment.

Useful Cases

Some useful cases which provide further guidance are as follows:

a. ***Strachan v R*** **BS 1985 CA 11 (The Bahamas CA, Criminal Side No 9 of 1984, 28 February 1985)**

b. ***Bodie v DPP*** **(The Bahamas CA, SCCrApp No 60 of 2016, 30 January 2023)**

c. ***Francois v DPP*** **(The Bahamas CA, SCCrApp No 165 of 2010, 8 December 2020)**

d. ***Stubbs v R*** **(The Bahamas CA, SCCrApp No 35 of 2021, 10 June 2021)** [appealed to the Judicial Committee of the Privy Council, appeal was allowed]

e. ***R v Marshall*** **[2019] 1 BHS J No 159 (The Bahamas CA, Voluntary Bill of Indictment No 95/4/2018, 12 December 2019)**

Chapter 2 – Fitness to Plead

Example 1

The sole issue you have been empanelled to determine is whether the defendant is under such a disability that they are not fit to be tried on this indictment.

As it is the Defence who asserts that this defendant is under such a disability, it is for the Defence to prove that he is not fit to be tried. They need only prove this on the balance of probabilities. This means that the Defence must show that it is more likely than not that this defendant is unfit to stand trial. It is a lesser burden than that required in the average criminal case where the Prosecution must prove guilt beyond a reasonable doubt so that you feel sure.

The test which you must apply is this: is the defendant capable of understanding these proceedings so that they can:

a. Put forward any proper defence they might have; and

b. Challenge a juror to whom he might have cause to object; and

c. Give instructions to his lawyers. This means that he must be capable of telling his lawyer what his case is and whether he agrees or disagrees with what the witnesses have to say; and

d. Follow the evidence.

Members of the Jury, if the defendant can do all of these things, you must find that they are fit to be tried. If you are sure or you find on a balance of probabilities that the defendant cannot, you must find that they are not fit to be tried.

Chapter 2 – Fitness to Plead

Example 2

Mr. Foreman, members of the Jury, the time has come for me to sum up and thereafter you will retire to the jury room to consider the verdict which you should return. It is my duty to direct you as to the law, and with respect to the law you must take what I tell you as being correct and act upon it. You however are the sole judges of the facts. You must apply the law as I explain it to the facts as you find them and arrive at your verdict.

The law with respect to this issue is to be found in s 155 of the **Criminal Procedure Code Act, Chapter 91** which reads as follows:

> 155. (1) If an accused person upon being arraigned upon any information stands mute of malice or will not, or by reason of infirmity cannot, answer directly to the information, the court may, if it thinks fit, order the Registrar, or other proper officer of the court, to enter a plea of not guilty on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.
>
> (2) If it appears, before or upon arraignment, that an accused person may be insane, the court may order a jury to be empanelled to try his sanity, and the jury shall thereupon, after hearing evidence for that purpose, find whether he is or is not insane and unfit to stand his trial. If the finding of the jury is that the accused person is insane and unfit to stand his trial the provisions of section 192 of this Code shall apply.

Members of the Jury, this defendant therefore stands before you on the issue of whether the defendant is fit to plead to the charges on the indictment of ARMED ROBBERY & RECEIVING. The sole issue you have been empanelled to determine is whether this defendant, XY is under such a disability that he is not fit to be tried on this indictment.

As it is the Defence who asserts that this defendant is under such a disability, it is for the Defence to prove that he is not fit to be tried. They need only prove this on the balance of probabilities. This means that the Defence must show that it is more likely than not that this defendant is unfit to stand trial. It is a lesser burden than that required in the average criminal case where the Prosecution must prove guilt beyond a reasonable doubt so that you feel sure.

Chapter 2 – Fitness to Plead

Example 2 cont'd

The test which you must apply is this: is the defendant capable of understanding these proceedings so that he can:

a. Put forward any proper defence he might have; and
b. Challenge a juror to whom he might have cause to object; and
c. Give instructions to his lawyers. This means that he must be capable of telling his lawyer what his case is and whether he agrees or disagrees with what the witnesses have to say; and
d. Follow the evidence.

Members of the Jury, if the defendant can do all of these things you must find that he is fit to be tried. If you are sure or you find on a balance of probabilities that he cannot, you must find that he is not fit to be tried.

Mr. Foreman and Members of the Jury, you just heard the evidence of Dr. W who as a result of their qualifications and experience is considered to be an expert in the field of forensic psychiatry. Dr. W is a witness of facts and as I told you a while ago, you are the judges of the facts. Members of the Jury, expert evidence is permitted in a criminal trial to provide you with scientific information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. A witness called as an expert is entitled to give an opinion in respect of his findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinion or opinions expressed by the expert or experts when coming to your own conclusions about this aspect of the case. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept the unchallenged evidence of an expert. You don't have to accept what an expert says if you do not believe them. It is for you to decide whose evidence, and whose opinions you accept, if any. But it has been said that if the evidence of an expert has not been challenged, it is foolhardy not to accept it.

Example 2 cont'd

You have heard the evidence of Dr. W, who stated that the defendant has been diagnosed with Cannabis Misuse Disorder and Cannabis Induced Psychosis, which happens as a result of the interactions of the chemicals in marijuana with the chemicals in the brain, causing the brain to malfunction. Persons suffering from such an illness can have disruption in their thoughts and perceptions and may hear voices in their head. Dr. W indicated that such a situation was unlikely to heal on its own, and that the defendant has been prescribed a course of medication which is necessary to treat his symptoms. Dr. W indicated that the defendant has been examined multiple times over the past year, that he interacted with the defendant as recently as Tuesday of last week, and that he was aware of where he was, the charge he faced, that the doctor was in fact a doctor, and that they had met before. Dr. W further testified that the defendant understood the difference between robbery and armed robbery, and that while the defendant had a below average IQ, he had adequate insight and judgement into his situation. He could not say definitively that the defendant was being given his medication, only that the medical staff at BDOCs indicated that the medication was being provided, and the doctor was aware that there had been times in the past when the defendant was not getting or taking his medication, as there was a history of non-compliance.

Dr. W accepted that the defendant had a prior history of mental illness which could exacerbate the cannabis induced psychosis but maintained that while the defendant was not fit to plead when he was initially examined, the symptoms have been improved, and the defendant is fit to plead at this time, in the opinion of the doctor. The doctor also stated that the defendant has a cognitive disability and slow mentation, meaning that it is more difficult for him to think and understand, and he also stated that the defendant's condition might worsen in stressful or frightening situations, and that a trial is a stressful situation.

Dr. P also came and testified that he is employed by the Ministry of Health and stationed at the Bahamas Department of Corrections. Dr. P spoke to the treatment of the defendant, and entered into evidence a letter dated 12th June 2023, in which it was noted that the patient did not wish to return to his medication. Dr. P spoke to the documentation of the provision of medication to the defendant, and you will recall that a total of five medications were prescribed, two of which were by injection and three in pill form which were to be taken every day. Dr. P was only able to state that the injections were provided in January, February, March of this year, and on one occasion in September of last year, and stated that it is not documented when oral medications were provided. There is therefore no documentation showing where those three oral medications which were deemed necessary to treat the defendant were actually provided, but that is a matter for you to determine.

Chapter 2 – Fitness to Plead

Example 2 cont'd

Finally, you heard testimony from the defendant, who at one point said his name was RR, then said Justin Bieber, and that he lives off Wulff Road, and then he said Gambier. When asked where he was right now, he said downtown headquarters, and that they tried to lock him up for armed robbery or something like that, but that the police downstairs told him he was free to go. He said he came to court to speak with his lawyer, but he did not speak with his lawyer that day. He did say that he had been diagnosed as a child with mental illness, and denied telling anyone at the BDOCs that he did not want to take his medication. He was able to say where Sandilands was, and said he remembered going there this year, and that he was seventeen at the time. He then denied going to Sandilands anytime this year. He could not say when he had last been given medication.

In cross examination the defendant denied being guilty of armed robbery and denied being given any medication at the prison. He stated that his mother is SG, but said he could not say the last time he spoke to her. He denied having any problems with his memory, and gave his date of birth as 23rd October 1995, which would make him just under 29 years old. He denied knowing that his mother was present in court.

Now, Members of the Jury, the onus is upon you after considering the evidence to decide whether or not this defendant is fit to plead today. You are to determine whether he has sufficient understanding to comprehend the nature of the trial so as to make a proper defence to the charge.

You will recall that Counsel for the Defence, in addressing you, asked you to find that this defendant is not fit to stand trial because he is unable to understand what is going on or to assist in giving coherent instructions for his defence, and that he is unfit to plead today. That is an opinion expressed by her. You are not bound to accept her opinion. You are the judges of the fact; the responsibility of the verdict is yours. If her opinion does not appeal to your sense of reasoning, you discard it. If, however you accept it and you want to use it, you may do so. It then becomes your opinion. You will bear in mind that you are the judges of the facts.

Members of the Jury, you are to concentrate only on the evidence led within this courtroom and nowhere else. Disregard anything which you might have heard elsewhere and act only on the evidence led in this court. You must not feel sorry for the defendant just by his looks. Neither must you have a feeling of disgust, a desire for revenge or any such attitudes of mind when you are considering the evidence before you. You must approach the evidence with calm; perhaps coldly and dispassionately.

Chapter 2 – Fitness to Plead

Example 2 cont'd

Members of the Jury, as I said to you earlier, the only issue for your determination is whether this defendant is under such a disability that he will not sufficiently comprehend the nature of the trial so as to make a proper defence to the charge, or challenge jurors, or follow the evidence so as to give instructions to his lawyer on whether he agrees or disagrees with that evidence.

All that is now left is for you to retire and consider your verdict. It is always desirable that your verdict be unanimous, but on these charges it need not be. You may arrive at a majority verdict if you are unable to reach a unanimous verdict, either way, provided the division is by not more than two thirds to one third. So, if not unanimous then by a majority of at least six of you; guilty or not guilty, 5 to 4 would not be a verdict. You may now retire and consider those questions and arrive at your verdict.

Chapter 3 – Preliminary Directions of Law

In this Chapter: **Burden and Standard of Proof | Functions of Judge and Jury | Trial in the Absence of the Defendant | Trial of One Defendant in the Absence of Another**

The judge plays an active role during the trial, controlling the way the case is conducted in accordance with relevant law and practice. Once all evidence in the case has been heard, the judge's summing-up takes place. The judge sets out for the jury the relevant law and how it bears on each of the charges made and what the Prosecution must prove and to what standard of proof to secure a conviction. The judge reminds the jury of the key points of the case, highlighting the strengths and weaknesses of each side's argument. The judge also gives directions on matters of law that jurors must consider if a finding of guilt is to be returned, as well as directions about the duties of the jury before they retire to the jury deliberation room to consider their verdict.

Burden and Standard of Proof

A direction on the burden and standard of proof is required in every summation. Article 20 (2)(a) of the **Constitution of The Commonwealth of The Bahamas** states that, "[e]very person who is charged with a criminal offence… shall be presumed to be innocent until he is proved or has pleaded guilty".

Further, Article 20(7) of the **Constitution of The Commonwealth of The Bahamas** provides that, '[n]o person who is tried for a criminal offence shall be compelled to give evidence at the trial'.

Therefore, generally, the burden of proving the case (facts in issue) rests on the Prosecution which, barring a few exceptions, has the onus of proving each and every element of the offence(s) with which the defendant is charged beyond a reasonable doubt. This also includes disproving any defence (again subject to certain exceptions) which may arise.

The direction is usually given early in the summing-up: ***R v* Ching (1976) 63 Cr App Rep 7**. What is required is a clear instruction to the jury that they have to be satisfied so that they are sure of the defendant's guilt before they can convict: ***R v Miah* [2018] EWCA Crim 563, [2018] Crim LR 652**. If they are not sure, they must return a verdict of not guilty. Importantly, having no reasonable doubt is the same as being sure: ***Archbold 2026*** at 4-447; ***Blackstone's Criminal Practice*** (2025) at F3.49.

If a defendant is relying on the defence of insanity, then the burden of proving that they were insane at the time of the alleged commission of the offence(s) rests on the defendant. This must be proved on a balance of probabilities, that is, more likely than not, which is a lesser standard. Whether the defendant raises any other defence, the evidential burden is on the Defence to raise the issue based on evidence. Once this is successfully done, the legal

burden shifts to the Prosecution to disprove that defence and the standard is once again beyond a reasonable doubt.

Useful Cases

Some useful cases are as follows:

a. ***AG v Hutchinson*** **(The Bahamas CA, SCCrApp Nos 26 and 28 of 2008, 25 June 2009)**

b. ***Armrister v R*****;** ***Bonaby v R*** **[2011] 3 BHS J No 50 (The Bahamas CA, SCCrApp Nos 84 and 90 of 2010, 6 September 2011)**

c. ***Pinto v R*** **[2011] 2 BHS J No 77 (The Bahamas CA, SCCrApp No 34 of 2010, 14 April 2011)**

d. ***Humes v R; Meadows v R*** **(The Bahamas CA, SCCrApp Nos 92 and 152 of 2018, 21 May 2020)**

e. ***R v Newbold*** **[1991] BHS J No 162 (The Bahamas CA, SCCrApp No 52 of 1991, 17 October 1991)**

f. ***R v Newry*** **[2002] BHS J No 25 (The Bahamas CA, SCCrApp No 15 of 2001, 4 February 2002)**

g. ***Ferguson v COP*** **(The Bahamas CA, MCCrApp No 79 of 2021, 18 November 2021)**

h. ***Rahming v COP*** **(The Bahamas CA, MCCrApp No 25 of 2024, 5 November 2024)**

i. ***Hamilton v COP*** **(The Bahamas CA, MCCrApp No 163 of 2022, 8 March 2023)**

j. ***Rolle v COP*** **(The Bahamas CA, MCCrApp No 93 of 2024, 10 October 2024)**

k. ***Cabrera v COP*** **(The Bahamas CA, MCCrApp No 94 of 2022, 19 June 2023)**

Chapter 3 – Preliminary Directions of Law

Directions

Example 1: Burden and Standard of Proof

The Court in providing a direction on the burden and standard of proof may also provide directions on the duty of the Prosecution. The standard direction in The Bahamas on this point includes:

"Our Constitution also provides that every person who is charged and brought before the Court is presumed to be innocent. You must never fall into the mistake of assuming that because an individual has been arrested and charged by the police, he or she is guilty. The first and foremost important direction of law I must give you therefore is that the defendant does not have to prove his innocence. He is presumed innocent, and the Prosecution, who brought him to trial, must prove his guilt. This is sometimes referred to as the burden and standard of proof; it is the Prosecution's burden of proof to establish:

a. That the offence with which the defendant is charged was committed, and

b. That the person who committed the offence was the defendant.

This burden of proof can only be satisfied by a certain standard of proof, the standard being that you must be satisfied, on the totality of the evidence, so that you, the jury, feel sure of the guilt of the defendant. Suspicion, even great suspicion, will not suffice. To convict the defendant of the offence for which he is charged, you must be without a reasonable doubt as to his guilt. If the evidence led by the Prosecution is such that you are left with a reasonable doubt in your minds, the Prosecution has not discharged its burden of proof to the required standard of proof, and you must acquit the defendant. Equally, if guilt is established by the Prosecution to that required extent, it is your sworn duty to convict.

Now as a matter of law I have to tell you not only that the burden of proving this case rests upon the Prosecution, but that it does so from the very beginning of these proceedings right up until you return with your verdict, and that burden never shifts. The Prosecution is under the very heavy duty, burden and obligation to prove to you beyond a reasonable doubt that the defendant is guilty of the offence with which he is charged, before you can return a guilty verdict against him for the offence.

It is not for the defendant to satisfy you that he is innocent. The law says that he is presumed to be innocent and that can only be changed if the Prosecution, with the evidence that it has adduced before you, satisfies you to the extent that you feel sure, that each and every element of the offence with which he is charged has been established, and that it was the defendant, who committed the offence.

Chapter 3 – Preliminary Directions of Law

Example 1: Burden and Standard of Proof cont'd

Now the law says that you must have no reasonable doubt. Now that does not mean that the Prosecution has to prove their case beyond all doubt or to disprove fanciful doubts. Were that the law, the Prosecution could never meet that standard, but they must prove it beyond a reasonable doubt, so that you are satisfied, so that you feel sure. So, if on the whole of the evidence that you have heard in this case there is any reasonable doubt created in your mind as to whether the defendant did or did not commit the offence, then the Prosecution has not discharged its responsibility, and the defendant must be acquitted.

You will bear in mind that the defendant has no obligation to prove his innocence or to explain the evidence offered by the Prosecution. You will recall that, at the end of the Prosecution's case, I told the defendant that he had a right to come to the witness box and give evidence upon oath in which case he may be cross-examined by the learned Prosecutor and be asked questions by your good selves or myself or he could remain silent and call witnesses if he so desired. This defendant elected to give evidence and to call one witness. I will address you on that evidence in due course.
The defendant is not to be discredited simply because he is the defendant. The evidence given by the defendant may have one of three effects. It may convince you of the innocence of the defendant whereby he should be acquitted. In this case the defendant denied the allegations of incest. If you accept his testimony in this regard so that you are convinced of his innocence, then you ought to acquit. It may be that a reasonable doubt has been created in your mind given the evidence. Again, if there is a doubt you must acquit. Thirdly, the evidence of the defendant may strengthen the case for the Prosecution. However, if in the end you are left in some doubt as to where the truth lies in this case then your verdict should be one of Not Guilty.

The facts are for you Madam Forewoman and Members of the Jury. A witness' credibility being solely for you. The weight and value you place on his/her evidence in this regard is a matter for you. You can accept subject to the directions that I have given you any part or the whole of the same or likewise reject the whole or any part thereof you deem necessary. The facts are entirely for you.

Again, I say Madam Forewoman and Members of the Jury even if you do not believe a word that the defendant said that does not entitle you to convict him. You must be satisfied on the Prosecution's case that he committed the offence."

Coupled with the Court's direction on burden and standard of proof may be the Court's direction on the duty of the Prosecution.

Example 2: Burden of Proof – Prosecution
A defendant, such as Mr. DF, does not have to prove his innocence. He is presumed to be innocent and the Prosecution who has brought him to trial bears the burden of proving his guilt. It is the Prosecution's burden of proof to establish two things. First, is that the offence with which the defendant is charged was committed. The second thing they must prove is that the person who would have committed the offence was the defendant. This burden of proof that is that the defendant is the person who committed the offence must be proven to a certain standard of proof. The standard is that you must be satisfied on the totality of the evidence so that you feel sure of the guilt of the defendant. What this means is suspicion of guilt is not sufficient. Even great suspicion is not sufficient. To convict the defendant, you must be without reasonable doubt as to his guilt. If the evidence led by the Prosecution is such that you are left with a reasonable doubt in your minds, then that would mean that the Prosecution would not have discharged its burden of proof to the required standard of proof, and it is your sworn duty to acquit. Equally, if the commission of the offence has been established by the Prosecution to the required standard of proof, then it means that the Prosecution would have discharged its burden, and it is your sworn duty to convict. The burden remains for the Prosecution to prove their case from the beginning of this matter until you would have returned with your verdict. Remember it is not for the defendant to satisfy you that he is innocent.

Functions of Judge and Jury

General Scope

a. The jury is to be directed that the judge is the sole authority on the law, and it is from the judge alone that they should take any direction on the law, which they must then follow.

b. The jury is to be directed that they are the sole authority on the facts. Their role is to assess the evidence of the witness(es) and their demeanour as an aide in determining whether they are credible and reliable.

c. In the judge's directions to the jury, the judge has a duty to explain to the jury the legal framework within which the evidence has to be considered, and, in so far as the judge considers it necessary, to put the evidence within that framework in such a way as to make clear to the jury the nature of the issue or issues which they have to decide.

d. The judge is not required to rehash every piece of evidence that was led and has the discretion to remind the jury of the matters connected with the determination of the issues.

e. After drawing a distinction between matters of fact and matters of law, if the judge expresses their views on a particular matter of fact, the judge must remind the jury that they do not have to accept those views.

f. The trial judge also directs the jury on the necessary aspects of the law consistent with the various legal issues that arise in each particular case.

g. While the jury are permitted to draw reasonable inferences from the evidence, they are not permitted to speculate.

h. The jury should be directed to not hold any bias or sympathy for or against the Prosecution or any of its witnesses or for the Defence or any of its witnesses and to base their decisions solely on the evidence led in court.

i. The judge's direction on the verdict should direct the jury of the requirement to consider the verdict on each count separately, as against each defendant separately and where a verdict is reached, that while a unanimous verdict (9-0) is ideal, that it can also be one where at least two thirds agree (8-1, 7-2 or 6-3).

There are no distinct cases in The Bahamas where the court had to set out the functions of judge and jury. However, there have been, from time to time, cases where the court has had to consider whether a judge would have usurped a particular function and/or delegated it to the jury. Some of these cases are as follows:

a. ***Ferguson v COP*** **[2021] 1 BHS J No 125 (The Bahamas CA, MCCrApp No 10 of 2020, 8 September 2021)**

b. ***DPP v Foulkes*** **[2021] 1 BHS J No 249 (The Bahamas CA, SCCrApp No 8 of 2020, 23 February 2021)**

c. ***Cooper v AG*** **[2019] 1 BHS J No 31 (The Bahamas CA, Cri/vbi/93/4/2017, 11 March 2019)**

d. ***Colebrooke v R*** **(The Bahamas CA, SCCrimApp No 151 of 2015, 26 October 2017)**

e. ***Capron v R*** **(The Bahamas CA, SCCrApp No 13 of 2011, 26 March 2013)**

Chapter 3 – Preliminary Directions of Law

Directions

Example 1: Separate Roles of the Judge and Jury
You have heard all of the evidence in this matter from the witnesses and now it is my duty to direct you on the law, sum up the evidence given and thereafter turn it over to you for your deliberation and then your verdict. In respect of the law, you are obliged to get directions on the law from me. You cannot apply any other views of the law other than the directions which I will give to you. In respect of the facts, you are the judges and as the judges of the facts you can collectively decide what evidence you accept, what you will reject, what conclusions from the evidence you will accept and what inferences you can draw. You may accept all, none or some of what a witness says. During the course of the summing-up, I may express my views of the facts in this matter. You would have heard during the course of this case and during the closing addresses, expressed views of the facts from counsel for the Crown and also counsel for the Defence. I direct you that you are not bound by any of the views that I may express or either of the views expressed by counsel for either side. You alone are the judges of the facts, and it is your view and your view alone of the facts which matter. You are to apply the directions of law which I give to you to the facts as you find them. Further, you are not to be swayed in dealing with this case by current events. You are not to allow any sympathy or prejudice against any of the parties in this case to affect your assessment of the evidence. In assessing the evidence, you must be detached, objective, and clinical. I now turn to the more significant portions of the evidence. My failure to mention what a witness has said or if I choose to remind you of something said, neither my mentioning nor failure to mention those things must divert you from your duty as the sole judges of the facts. So, in other words, my summary of the evidence does not mean that that is all of the evidence. If I mention something you don't consider to be relevant, then you can decide what you make of it. If I do not mention something you think is important then you can still consider that evidence because you are the judges of the facts.

Example 2: Reaching a Verdict
As this is a case where the charge is attempted murder, it is not necessary that you reach a unanimous verdict. I can accept a verdict of guilty or not guilty of the majority of you provided that the majority is not less than two-thirds of you. That is a verdict with which at least six of you agree. Anything else will not be a proper verdict.

Chapter 3 – Preliminary Directions of Law

Trial in the Absence of the Defendant

General Scope

A defendant has a right to be present during the course of their trial.

Article 20(2)(g) of the **Constitution of the Commonwealth of The Bahamas** guarantees a defendant, when charged on information in the Supreme Court, the right to have a trial by jury and "except with his own consent the trial shall not take place in his absence unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

Additionally, s 115 of the **Criminal Procedure Code Act, Chapter 91** provides:

> 115. (1) Every person accused of any criminal offence shall be entitled to be present in court during the whole of his trial unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impossible. The court may, however, in its discretion and subject to the provisions of subsection (2) of section 106 of this Code, allow any part of any trial to take place in the absence of the accused with the consent of the accused, and may permit the accused to be absent in such case upon such terms as it thinks proper.
>
> For the purposes of this section, the consent of the accused person to the conduct of the trial in his absence shall be deemed to have been given in a case in which he enters a written plea of guilty under the provisions of section 96A of the Road Traffic Act.
>
> (2) Every person accused of any criminal offence, whether present in person or absent in accordance with the provisions of this section, may be defended before any court by a legal practitioner except in a case in which the provisions of section 96A of the Road Traffic Act apply and a written plea of guilty has been entered.

However, a judge has the discretion to commence a trial in the defendant's absence, though this discretion is to be exercised with great care and caution.

Note: The case of ***R v Jones*** **[2000] UKHL 5, [2003] 1 AC 1** makes the point at para 28 that there is no principled distinction between continuing a trial in the absence of a defendant and commencing a trial in the absence of a defendant:

> In ***R v Jones, Planter and Pengelly*** **[1971] Crim LR 856,** where the defendants were absent from the commencement of the trial, Lord Lane CJ stated (see transcript):

> "It is quite plain in principle that there is a discretion in the judge to order a trial to continue or indeed to start in these circumstances, not only where a person voluntarily absents himself, but also, as the judgement of Griffiths LJ in *R v Howson* 74 Cr App R 172 indicates, where he has involuntarily been absent."

The judge, when exercising their discretionary power, should consider the reason for the absence before determining the way forward. A defendant may be absent from their trial based on their conduct in court, illness or by voluntarily absence/absconding.

The trial judge is required to take reasonable steps to ascertain that the defendant was informed of their trial date and why they were not present at the trial. A further consideration is whether the defendant's absence affected the fairness of the trial. According to para 14 of ***R v Jones***, "The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome."

Conduct

If at their trial, a defendant conducts themselves in such a way that the issue arises as to whether they should be absented and have the trial continue in their absence, the Court should first adjourn the matter to allow the defendant an opportunity to reflect on their behaviour. If on the defendant's return they give an assurance as to their future behaviour, then the trial should resume. However, if no such assurance is given and this behaviour continues, then if for compelling reason the trial must continue, the defendant will usually return to court after time for further reflection.

Illness

In the case of ***Fenleon v COP*** **(The Bahamas CA, MCCrApp No 30 of 2021, 15 March 2022)**, their Lordships found that the learned Magistrate erred, having been presented with a sick slip for the defendant who was present throughout the trial up to the stage when the magistrate was about to deliver their decision, and nevertheless continued with the trial in the defendant's absence. At para 15, it states:

> There is an absolute prohibition against a magistrate proceeding to hear a case in the absence of an accused if that accused has not consented to it going on in his absence or his conduct is so disruptive in the trial that he is debarred from being present. I have often cautioned that magistrates are creatures of statute and are bound by the provisions of the statute under which they purport to act. Yet, I am not convinced that the appellant's trial ought to be vitiated by the Magistrate's error.

Notwithstanding this error on the part of the Magistrate, their Lordships at para 19, in considering the fairness element, applied the proviso and dismissed the appeal having considered, "the cogency of the evidence adduced against the appellant, particularly that of his co-accused to which he did not make a response, the stage of the trial when the appellant was absent and [the presence of his lawyer]".

Absconding

According to Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024) at pgs 3-11 – 3-12, the court in exercising its discretion as to whether or not to proceed/continue with a trial in the defendant's absence, must have regard to:

(1) the nature and circumstances of the defendant's behaviour in absenting themself from the trial or disrupting it as the case may be and, in particular, whether the defendant's behaviour was deliberate, voluntary and such as plainly waived their right to appear;
(2) whether an adjournment might resolve the problem;
(3) the likely length of such an adjournment;
(4) whether the defendant, though absent, is or wishes to be legally represented at the trial or has by their conduct waived their right to representation;
(5) whether an absent defendant's legal representative already have and/or are able to receive instructions from the defendant during the trial and the extent to which they are able to present the defence;
(6) the extent of the disadvantage to the defendant in not being able to give their account of events, having regard to the nature of the evidence against the defendant;
(7) the risk of the jury reaching an improper conclusion about the absence of the defendant;
(8) the general public interest and the particular interest of complainants and witnesses that a trial should take place within a reasonable time;
(9) the effect of further delay on the memories of witnesses;
(10) where there is more than one defendant and not all are absent, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

Useful Cases

Some useful cases are as follows:

a. ***Newry v R*** **[2013] 1 BHS J No 10 (The Bahamas CA, SCCrAp No 75 of 2010, 14 January 2013)**

b. ***Smith v R*** **[2021] 1 BHS J No 222 (The Bahamas CA, SCCrApp No 23 of 2019, 15 December 2021)**

c. ***Butler v COP*** **(The Bahamas CA, MCCrApp No 205 of 2023, 24 July 2024)**

d. ***R v Hanna*** **[2014] 2 BHS J No 67 (The Bahamas CA, CRI/VBI/347/12/2011, 25 August 2014)**

Trial of One Defendant in the Absence of Another

General Scope

Where two or more persons are named in an indictment, a trial may be had in the absence of one or more of them because they either pleaded guilty to the charge(s) or will be tried separately, if the indictment is severed.

Sometimes it is necessary for reference to be made to the absent co-defendant in order for the jury to understand the present case before them. In those circumstances, the jury ought to be warned that they need not speculate as to the absent co-defendant's whereabouts and why they are not there. Additionally, where the absent defendant either has already pleaded guilty or will be tried separately, the jury should be told that they are not required to reach a verdict relative to that person.

Determining whether or not there should be separate trials is a discretionary exercise to be left to the judge, usually once a severance application is made by counsel.

Severance

The discretion to order separate trials is a wide one but must be exercised judicially.

According to s 75 of the **Criminal Procedure Code Act, Chapter 91**:

> 75. (1) The following persons may be joined in one charge or information and may be tried together —
> (a) persons accused of the same offence committed in the course of the same transaction;
> (b) persons accused of an offence and persons accused of abetment or of an attempt to commit such offence;
> (c) persons accused of different offences committed in the course of the same transaction;
> (d) persons accused of different offences all of which are founded on the same facts or form, or are part of a series of offences of the same or a similar character:

> Provided that where before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of his being tried together with another person or other persons or that for any other reason it is desirable to direct that the accused person be tried separately, the court may order a separate trial of such accused person.
>
> (2) Any number of charges involving one or more accused persons may, if the charges consist of offences which are founded on the same facts or which form or are part of a series of offences of the same or a similar character, be heard and determined together unless the court, having regard to any representations made by or on behalf of the prosecution or the accused person, or the court on its own motion, otherwise determines in the interests of justice.

Illustrations

The case of ***Nottage v AG*** **[2014] 2 BHS J No 135 (The Bahamas CA, SCCrApp Nos 149 and 150 of 2014, 17 December 2014)** concerned a trial of two defendants, one of whose out of court statement to the police was admitted into evidence and the contents of which, implicated the co-defendant.

This was the basis of the severance application before the trial judge. However, that application was dismissed and later became the subject matter of an appeal, on the grounds that, inter alia, the trial judge erred in law by refusing to sever the trial. Their Lordships at paras 29 and 30, referred to the case of ***R v Moghal*** **(1977) 65 Cr App Rep 56** at pg 62 stating:

> … we think that only in very exceptional cases is it wise to order separate trials when two or more are jointly charged with participation in one criminal offence…The question is for the judge in the exercise of his discretion, and it is thus that the law has been stated ever since, that the appellate Court will intervene only if satisfied that the judge's decision has caused a miscarriage of justice.

Further, at para 31 of ***Nottage***, and in reliance on ***Pham v R*** **[2006] NSWCCA 3 (NSW CA, 23 January 2006)** at para17, it was stated that, "there is some risk that the evidence against the co-accused will be unfairly used against the accused Pham thereby strengthening the Crown case. However this risk is always present, and can be cured by a direction by the judge."

As the trial judge in the exercise of their discretion not to sever the trial considered a number of safeguards, including other evidence in the case, editing of statements, and the sufficiency of directions to reduce prejudice, the discretion was exercised judicially and therefore no error in law occurred.

Chapter 3 – Preliminary Directions of Law

Useful Cases

Some useful cases as are follows:

a. ***AG v Stubbs*** **[2016] 1 BHS J No 50 (The Bahamas SC, 196/8/2012, 18 April 2016)**

b. ***McPhee v R*** **(The Bahamas CA, SCCrApp No 125 of 2011, 22 November 2012)** (appealed to the Judicial Committee of the Privy Council – ***McPhee v The Queen*** **[2016] UKPC 29, [2016] 4 WLR 166**)

Directions

Example
You would note that the defendant is not present. But the defendant would have pled not guilty on a previous occasion. Mr. A is present and will be representing the defendant in this matter, having previously taken instructions from the defendant. The defendant's absence is to have no bearing on the issues that you are here to decide and therefore you are to draw no adverse inferences from the defendant's absence nor speculate as to why the defendant is not here.

Delay

Article 20(1) of the **Constitution of The Commonwealth of The Bahamas**, "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

A defendant therefore has the right to a fair trial within a reasonable time.

Where the defendant alleges delay, they bear the burden of proof to show that they have been prejudiced in the presentation of their case as a result of the delay: ***Attorney General's Reference (No 1 of 1990)*** **[1992] QB 630, (1992) 95 Cr App Rep 296**.

A prolonged delay between the commission of the alleged offence and the complaint leading to trial, can result in forensic disadvantages. The judge should refer to the fact that the passage of time is bound to affect memory. A witness' inability to recall detail applies equally to Prosecution and Defence witnesses, but it is the Prosecution which bear the burden of proof. The jury may be troubled by the absence of circumstantial detail which, but for the delay, they would expect to be available. Conversely, the jury may be troubled by the witness' claim to recall a degree of detail which is unlikely after such a prolonged passage of time. Whether reference should be made to such possibilities is a matter for the trial judge to assess, having regard to the evidence and the issues which have arisen in the case.

If, as a result of delay, specific lines of inquiry have been closed to the defendant, the disadvantage this presents should be identified and explained by reference to the burden of proof.

The Law on Delay – The Common Law

In ***Peters v The State*** **(Trinidad and Tobago CA, 26 February 2010)**, there was a delay of twenty-four years, twelve years attributable to the State and the other 12 attributable to the appellant, who voluntarily removed herself from the jurisdiction. The appeal was dismissed and the conviction and sentence for attempted murder affirmed. The Court of Appeal set out the law in this jurisdiction on the stay of criminal proceedings for abuse of process as a result of delay.

> 15. At common law, a defendant who wishes to stay a prosecution on the basis that his continued prosecution would amount to an abuse of process, -must show that he would suffer serious prejudice to the extent that no fair trial would be possible owing to the delay, so that the continuation of the prosecution amounted to an abuse of process (*Attorney General's Reference (No. 1 of 1990) [1992] 3 W.L.R.9.*). The right to a fair trial is an absolute right which does not permit the application of any balancing exercise, and the public interest can never be invoked to deny that right to any person under any circumstances (*Dyer v. Watson* (supra). This case although based on the constitutional right to trial within a reasonable time expressed the position that the rights created by the relevant enactment were separate and distinct and that in respect of the fair trial requirement no balancing of the public interest was permitted.).
>
> 16. Where there is an express constitutional right to trial without undue delay or within a reasonable time then complaint, in advance of the trial, by way of constitutional motion is the more appropriate remedy. Where there is no express right to a speedy trial or trial within a reasonable time, (as in the Trinidad and Tobago's Constitution), then common law principles are to be applied in order to determine whether the trial would be a fair one, this being a matter primarily for the trial judge who must decide whether the criminal proceedings should be stayed as a result of unfairness (*DPP v. Tokai (1996) 48 W.I.R. 376 PC; [1996] U.K.P.C. 19*).
>
> 17. A preponderance of authority suggests that the discretion to stay proceedings should be exercised only in exceptional cases, and even in those exceptional circumstances the judge is bound to consider the extent to which a suitable direction to the jury is capable of obviating any prejudice to the accused resulting from the delay. At common law, even where the delay was unjustifiable, a stay in criminal proceedings should only be granted in exceptional circumstances (*Hardeo Sinanan v. Senior Magistrate Ayers-Caesar citing AG's Reference (No. 1 of 1990)* (supra)). The applicant bears an onerous burden of proof to show that he would suffer prejudice so that no fair trial could be held, and, on such an application, the court should take into account

any measures available to the trial judge to mitigate unfairness (*Sookermany v. the DPP (1996) 48 W.I.R. 346*)

…

Presumptive and Actual Prejudice

25. In view of the foregoing, the central issue in this appeal is whether the appellant would have suffered serious prejudice to the extent that no fair trial "as expressly guaranteed by the Constitution of Trinidad and Tobago" was possible owing to the delay and therefore continuation of the prosecution would have amounted and did amount to an abuse of process.

26. Prejudice simpliciter is not sufficient, what is required is prejudice which leads to unfairness that cannot be cured by the trial judge's actions/directions. It is axiomatic that a person charged with having committed a criminal offence should receive a fair trial and if he cannot be tried fairly then he should not be tried at all (*R v. Horseferry Road Magistrates' Court, Ex p Bennet [1994] 1 A.C. 42*). If the apprehended unfairness could be cured by the exercise of the trial judge's discretion within the trial process, then the trial should not be stayed, proceedings must only be stayed in the exceptional circumstance that the prejudice cannot be obviated and a fair trial cannot be had (*Attorney General's Reference (No. 1 of 1990) [1992] Q.B. 630*) …

In ***Tan v Cameron*** **[1992] 2 AC 205, [1993] 2 All ER 493**, the Privy Council fully endorsed the judgement given in ***Attorney General's Reference (No 1 of 1990)***, and highlighted that even where it is established that the Prosecution is at fault, thereby causing prejudice to the defendant, a court is still required to consider whether the situation that was created by the delay was such as to make it unfair for the defendant to be held accountable.

Directions must make clear that the jury should give careful consideration to the circumstances surrounding the delay.

In ***R v H*** **[1998] 2 Cr App Rep 161**, at 164 – 168**,** the Court of Appeal carried out a review of the authorities, as they concerned the judge's obligation to refer to delay in their directions, of which the following is part:

Such directions would surely be called for in a case where not only had there been substantial delay but where it could be seen that witnesses who might have been able to give relevant evidence, and a large number of them, had disappeared during the interval and accordingly there was the clear possibility that the defence was not only prejudiced but seriously prejudiced as a result of not being able to produce that evidence… There is… a difference between the point being made by counsel and the submission which has been made by counsel being endorsed by the judge. It seems to us that this was a case in which it really was incumbent upon the learned judge, having taken the

> decision which he did at the outset of proceedings,…to, at the end of the case, point out to the jury that what was said by the defence about the possible prejudice to the defence as a result of the delay was a matter to which they could, and should properly have regard.
> …
> We consider it is plain upon the state of the authorities to which we have referred that it is desirable in cases of substantial delay that some direction should be given to the jury on possible difficulties with which the defence may have been faced as a result of such delay. Nonetheless, such a direction is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial. Equally, such a direction should be given in any case where it is necessary for the purposes of being even-handed as between complainant and defendant.

Notes

a. Delay in criminal proceedings have become axiomatic not only to The Bahamas but the Commonwealth Caribbean region as a whole. Factors contributing to the delay in criminal proceedings may include but are not limited to:

   i. limited court resources

   ii. limited state resources

   iii. limited counsel at the private criminal bar

   iv. increasing inability for defendants to privately retain counsel of their own choice.

b. In cases where delay has occurred, but no constitutional challenge has been made or there is no risk that the defendant has not or would not be afforded a fair trial, Bahamian Judges usually provide a general direction to the jury regarding witnesses' potential challenge to accurately recount the versions of the events involving the offence. This direction entails the time the offence occurred and the time the witnesses are giving evidence before the Court. Guidance can also be gleaned from the ***Longley Compendium*.**

c. There have been numerous efforts made both at the state and judicial level to help alleviate and/or eliminate the backlog and/or delay in criminal proceedings in The Bahamas. These efforts include but are not limited to:

   i. addition of more criminal courts

   ii. creation of the Office of the Public Defender

iii. enactment of the Supreme Court (Criminal Case Management) (Amendment) Rules, 2024, came into force on 2 January 2025.

Useful Cases

Guidance on the factors the court should consider when assessing whether a delay has infringed on a defendant's right to a fair hearing, are outlined in the following cases:

a. ***Adderley v DPP*** **(The Bahamas CA, SCCrApp No 212 of 2018, 14 June 2021)**

b. ***Bain-Thompson v COP*** **[2017] 2 BHS J No 88 (The Bahamas SC, 2015/PUB/con/00015, 28 September 2017)**

c. ***Ward v AG*** **[2018] 1 BHS J No 135 (The Bahamas CA, SCCrApp No 36 of 2017, 17 September 2018)**

d. ***AG v Rolle*** **(The Bahamas CA, SCCr/ConApp No 161 of 2023, 29 July 2025)**

Chapter 4 – Causation

In this Chapter: **General Scope | Novus Actus Interveniens and Remoteness | Acts of Self Preservation Causing Injury of Death | Death by Dangerous Driving | Medical Intervention | Causation in Specific Offences | Additional Circumstances | Direction | Additional Useful Cases**

Causation refers to the relationship between an act of a defendant and the consequences it produces. It is one of the elements that must be proved before a defendant can be convicted of a crime in which the effect of the act is part of the definition of the crime (e.g. murder). Whatever other causes may have impacted the bringing about of the crime, it needs to be shown that the defendant's behaviour was, in a substantial way, the cause of the crime. Causation is a question of both fact and law and in both cases, it is a question for the jury to decide.

General Scope

The test for causation is whether "but for" the defendant's actions would the offence have been committed. It focuses on whether there is a link between the initial act of the defendant and the prohibited consequence that has occurred.

The defendant's act must be a *sine qua non* of the prohibited consequence. This means that the consequence would not have occurred without the defendant's actions. The defendant's act need not be the sole or the main cause of the result.

The defendant's contribution to the result must have been more than negligible or minimal. This has been affirmed by the UK Supreme Court in ***R v Hughes*** **[2013] UKSC 56, [2013] 4 All ER 613** at para 33 and by the Court of Appeal in ***R v L*** **[2010] EWCA Crim 1249** at para 9 (concerning the UK **Road Traffic Act 1988**, s 2B). See also ***R v Hennigan*** **[1971] 3 All ER 133, [1971] RTR 305**; ***R v Cato*** **[1976] 1 WLR 110, [1976] 1 All ER 260**; ***R v Notman*** **[1994] Crim LR 518**.

The defendant may be held to have caused a result even if their conduct was not the only cause and even if their conduct could not by itself have brought about the result (see contributory causes below). Where there are multiple causes (including where the victim has contributed to the result), the defendant will remain liable if their act is a continuing and operative cause.

Contributory causes from third parties, or victims, will not necessarily absolve the defendant of causal liability unless the contribution from the other party is such as to break the chain of causation. In ***R v Warburton*** **[2006] EWCA Crim 627, [2006] All ER (D) 305 (Mar)** at para 23, Hooper LJ, delivering the judgement of the Court, emphasized, "The test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death."

Chapter 4 – Causation

Novus Actus Interveniens and Remoteness

Most problems of causation concern the application of the principle *novus actus interveniens*, or new and intervening act. A new, intervening act is something occurring after the defendant's act that breaks the chain of causation and relieves the defendant of responsibility for the prohibited consequence (although they may remain liable for an attempt in many cases).

However, not all events that occur after the defendant's act will break the chain of causation (see ***R v Cheshire* [1991] 1 WLR 844, [1991] 3 All ER 670**. Circumstances will only break the chain of causation if they are:

a. an overwhelming cause of death; and

b. an unforeseeable occurrence.

The Court of Appeal of England and Wales has, on more than one occasion, advised against entering into an exposition of the *novus actus interveniens* principle when it is plain that there is more than one cause, and the issue is whether the defendant made a more than minimal contribution to the result (see ***R v Pagett* (1983) 76 Cr App Rep 279, [1983] Crim LR 394**. Notably:

a. An intervening act by the defendant will not break the chain of causation so as to excuse the defendant where the intervening act is part of the same transaction perpetrated by the defendant e.g. the defendant stabs the Victim and then shoots the Victim.

b. If, despite the intervening events, the defendant's conduct remains a 'substantial and operative cause' of the result, the defendant will remain responsible, and if the intervention is by a person, that actor may also become liable in such circumstances.

c. The defendant will not be liable if a natural event which is extraordinary or not reasonably foreseeable supervenes and renders the defendant's contribution merely part of the background.

d. The defendant will not be liable if a third party's intervening act is one of a free, deliberate and informed nature (whether reasonably foreseeable or not), rendering the defendant's contribution merely part of the background. Human intervention in the form of a foreseeable act instinctively done for the purposes of self-preservation, or in the execution of a duty to prevent crime or arrest an offender, will not break the chain of (see ***Pagett***).

e. The defendant will not be liable if a third party's act which is not a free, deliberate, informed act, was not reasonably foreseeable, rendering the defendant's contribution merely part of the background.

f. The defendant will not be liable if a medical professional intervenes to treat injuries inflicted by the defendant and the treatment is so independent of the defendant's conduct and so potent as to render the defendant's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether the defendant remains liable, not whether the medical professional's conduct ought to render the medical professional criminally liable for their part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which the defendant is charged. ***R v Malcherek; R v Steel*** **[1981] 1 WLR 690, [1981] 2 All ER 422** confirms that "switching off" a life support system will not break the chain of causation: such medical intervention will not meet the test of being (1) unforeseeably bad and (2) the sole significant cause of death.

g. The defendant will not be liable if the Victim's subsequent conduct in response to the defendant's act is not within a range of responses that could be regarded as reasonable in the circumstances. Was the Victim's act daft or wholly disproportionate to the defendant's act? If so, it will break the chain.

h. The defendant will be liable if the Victim has a pre-existing condition rendering the Victim unusually vulnerable to physical injury, such as an existing medical condition or old age. The defendant must accept liability for any unusually serious consequences which result (see ***R v Hayward*** **(1908) 21 Cox CC 692** and ***R v Blaue*** **[1975] 1 WLR 1411, [1975] 3 All ER 446**. Caution needs to be exercised with cases of unlawful act manslaughter.

Acts of Self Preservation Causing Injury or Death

In ***R v Pagett*** **(1983) 76 Cr App Rep 279, [1983] Crim LR 394**, the defendant advanced towards armed police officers in the darkness of a stairwell using his girlfriend, whom he had taken hostage, as a shield. He fired a shot from a shotgun, which produced the instinctive and self-defensive response of shots from the police officers. The girlfriend was killed by shots fired by the officers. Robert Goff LJ, recognising the analogy with the "escape" cases, said:

> There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a novus actus interveniens. If authority is needed for this almost self-evident proposition, it is to be found in such cases as *R. v. Pitts (1842) C. & M. 284, and R. v. Curley (1909) 2 Cr. App. R. 96*. In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can

> see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgement, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party. Of course, it does not necessarily follow that the accused will be guilty of the murder, or even of the manslaughter, of the third party; though in the majority of cases he is likely to be guilty at least of manslaughter. Whether he is guilty of murder or manslaughter will depend upon the question whether all the ingredients of the relevant offence have been proved; in particular, on a charge of murder, it will be necessary that the accused had the necessary intent…

Thus, the defendant's unlawful and dangerous acts of (1) the assault upon his girlfriend by forcing her to act as a shield and (2) firing a shot at the police officers, created a foreseeable risk of relevant harm and were a significant cause of the girlfriend's death.

The trial judge had directed the jury that if they found these facts proved, the defendant would in law have caused the death. The judge should have left the issue to the jury. Robert Goff LJ continued:

> The principles which we have stated are principles of law. This is plain from, for example, the case of *Pitts*, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called novus actus interveniens, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, *R. v. Towers (1874) 12 Cox C. C. 530*, the accused struck a woman; she screamed loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from convulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact.

Nevertheless, the verdict was undisturbed because the judge's directions had been somewhat more generous than they need have been.

If the defendant's unlawful act generates in the victim a reaction which results in the victim's injury or death, the question for the jury will be whether the victim's reaction was a foreseeable consequence of the defendant's unlawful act. In ***R v Williams*** **[1992] 1 WLR 380** at 388, **[1992] 2 All ER 183** at 191 Stuart-Smith LJ explained:

> It is plain that in fatal cases there are two requirements. The first, as in non-fatal cases, relates to the deceased's conduct which would be something that a

> reasonable and responsible man in the assailant's shoes would have foreseen. The second, which applies only in fatal cases, relates to the quality of the unlawful act which must be such that all sober and reasonable people would inevitably recognise must subject the other person to some harm resulting therefrom, albeit not serious harm. It should be noted that the headnote is inaccurate and tends to confuse these two limbs.
>
> The harm must be physical harm. Where the unlawful act is a battery, there is no difficulty with the second ingredient. Where, however, the unlawful act is merely a threat unaccompanied and not preceded by any actual violence, the position may be more difficult. In the case of a life-threatening assault, such as pointing a gun or knife at the victim, all sober and reasonable people may well anticipate some physical injury through shock to the victim, as for example in *Reg v Dawson* (1985) 81 Cr App R 150 where the victim died of a heart attack following a robbery in which two of the appellants had been masked, armed with a replica gun and pickaxe handles. But the nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat; that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a novus actus interveniens and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing.

In ***R v Lewis*** **[2010] EWCA Crim 151**, the deceased was chased by the appellant into the path of an oncoming car and suffered fatal injuries. The appellant was convicted of manslaughter. Upon the issue of causation, the judge posed to the jury the question whether the Prosecution had proved, so that they were sure, that (1) by chasing the deceased the appellant had committed an unlawful act, (2) the deceased's flight was the result of the unlawful act, and (3) the deceased's flight into the road was at least one of the responses which might have been expected of the deceased in the circumstances. The directions were upheld. They correctly identified in non-legal terms the need for the Prosecution to prove both that the appellant's unlawful act was the operative cause of the fatal collision and that the unlawful act created a foreseeable risk of relevant harm in the circumstances known to the appellant at the time and was therefore dangerous.

Death by Dangerous Driving

Many of the modern authorities on causation relate to cases of causing death by dangerous driving. In such cases the bad driving of the defendant and that of others may be concurrent causes of death.

In ***R v Hennigan*** **[1971] 3 All ER 133, [1971] RTR 305**, Lord Parker CJ made it clear that the jury is not in such cases concerned with apportionment. It was enough if the dangerous driving of the defendant was a real cause of death which was more than minimal.

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In ***R v Skelton*** **[1995] Crim LR 635**, Sedley J (as he then was), held that the defendant's dangerous driving must have played a part, "not simply in creating the occasion of the fatal accident but in bringing it about."

In ***R v Barnes*** **[2008] EWCA Crim 2726, [2009] RTR 262**, the defendant carried an unsafe load on his truck. A sofa worked loose, became detached and fell into the carriageway. The truck stopped a short distance further along the carriageway. A following motorcyclist managed to avoid the sofa but collided with the rear of the truck. It was held that it was open to the jury to find that the defendant's dangerous driving "played more than a minimal role in bringing about the accident and death." Hallett LJ noted that in some circumstances judges might have to give the jury further assistance in relation to the difference between bringing about the conditions in which death occurred and "causing" the death. Hallett LJ said:

> 13. The jury was entitled to find that the appellant put other road users at risk by driving dangerously. He drove with a load which was insecure. Had he not done so the sofa would not have fallen off, and Mr Wildman would not have been forced to drive round it. He would not have been distracted by it or turned to warn others coming behind him. The appellant's car would not have been stopped in the carriageway and Mr Wildman would not have driven into the back of it. Whatever criticisms, Mr Bridge could properly make of Mr Wildman's driving, in our judgement all those circumstances are such that it was open to the jury to find that his dangerous driving played more than a minimal role in bringing about the accident and the death.
>
> 14. We turn therefore to the further criticisms made of the judge by Mr Bridge. The second ground of appeal is that the judge, it is said, failed adequately to sum up the law in respect of causation. The judge summed up the law in this way:
>
> > "Now the words 'thereby caused the death'. You have to be sure the dangerous driving was a cause of death, not the only cause of death or the main cause of death, but a cause of death which was more than just trivial. This means you must be sure that not only the defendant's dangerous driving created the circumstances of the fatal collision but it was an actual cause in bringing about the death of Mr Wildman. And the defence say here, you might be satisfied the defendant had created the circumstances of the collision but - and they say, and they recognise it is an unattractive argument - and they say it is nonetheless right - the only cause of death was Mr Wildman failing to keep a proper look-out. And if that is so, or may be so, I direct you to acquit."

The Court held that while in some circumstances judges might have to give the jury further assistance upon the difference between bringing about the conditions in which

death occurred and "causing" the death, the direction given by the judge was sufficient on the facts in ***Barnes***.

In ***R v L [*2010] EWCA Crim 1249, [2011] RTR 237** at para 9, Toulson LJ, as he then was, held that ***Hennigan***, ***Skelton*** and ***Barnes*** established the following principles:

> First, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the other later event to have been the cause of it, and should accordingly withdraw the case from the jury.

He concluded, at para 16:

> …[I]t is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury.

The Court of Appeal in ***R v Girdler*** **[2009] EWCA Crim 2666, [2010] RTR 307** addressed how the trial judge might best explain to the jury the concept of foreseeability, where the Defence's case was that a new act had intervened. The defendant in that case had driven into another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction; one did not, and the fatal accident occurred. Hooper LJ held at para 43:

> …We are of the view that the words "reasonably foreseeable" whilst apt to describe for a lawyer the appropriate test, may need to be reworded to ease the task of a jury. We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and was sure that his dangerous driving was more than a slight or trifling link to the deaths then: "the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur". The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it could be made clear that the jury are not concerned with what the defendant foresaw.

Of relevance are also the following:

a. Vehicular Manslaughter by Dangerous Driving – Section 44 of the **Road Traffic (Amendment) (No 2) Act, 2020**. Note as well:

i. ***Bowleg v COP*** **BS 2023 CA 78 (The Bahamas CA, MCCrApp No 84 of 2022, 31 May 2023)** - This case involved the offence of Killing in The Course of Dangerous Driving pursuant to s 44 of the **Road Traffic Act, Chapter 220**. However, the former section was repealed and replaced by s 44 of the **Road Traffic (Amendment) (No 2) Act, 2020**. The new amendment changed the offence to Vehicular Manslaughter by Reckless Driving and provided for a stricter penalty.

ii. ***Rolle v DPP*** **(The Bahamas CA, SCCrApp No 152 of 2023, 27 June 2024)**.

b. Vehicular Manslaughter by dangerous driving – s 44A of the **Road Traffic (Amendment) (No 2) Act, 2020**.

c. Vehicular Manslaughter by careless driving while under the influence of drugs or alcohol – s 44B of the **Road Traffic (Amendment) (No 2) Act, 2020**.

d. Vehicular Manslaughter by driving while committing certain offences against this Act – s 44C of the **Road Traffic (Amendment) (No 2) Act, 2020**.

Medical Intervention

Medical intervention is a foreseeable consequence of injury caused by the defendant's violent, unlawful act; so also is the possibility of ineffective or negligent medical treatment. The defendant will not be liable if a medical professional intervenes to treat injuries inflicted by the defendant and the treatment is so independent of the defendant's conduct (although usually an act, it can be an omission to act: ***R v McKechnie*** **(1991) 94 Cr App Rep 51, [1992] Crim LR 194**) and so potent, as to render the defendant's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether the defendant remains liable, not whether the medical professional's conduct ought to render the medical professional criminally liable for their part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which the defendant is charged.

In ***R v Smith*** **[1959] 2 QB 35, [1959] 2 WLR 623**, the deceased was injured by a bayonet during a fight. While being taken to the medical reception station, the deceased was dropped twice. On arrival, his condition was misdiagnosed, and he was not given a blood transfusion. Nevertheless, the Courts Martial Appeal Court (Lord Parker CJ) held that the deceased's death was caused by his stab wounds. The facts of ***R v Jordan*** **(1956) 40 Cr App Rep 152** were in this regard, exceptional. The victim of a stabbing was taken to hospital where he died. The defendant was convicted of murder. However, the Court of Criminal Appeal admitted fresh medical evidence which came to light after the trial. Hallett J, giving the judgement of the Court said at 156 – 158:

> There were two things other than the wound which were stated by these two medical witnesses to have brought about death. The stab wound had penetrated the intestine in two places, but it was mainly healed at the time of death. With a view to preventing infection it was thought right to administer an antibiotic, terramycin.
>
> It was agreed by the two additional witnesses that that was the proper course to take, and a proper dose was administered. Some people, however, are intolerant to terramycin, and Beaumont was one of those people. After the initial doses he developed diarrhoea, which was only properly attributable, in the opinion of those doctors, to the fact that the patient was intolerant to terramycin. Thereupon the administration of terramycin was stopped, but unfortunately the very next day the resumption of such administration was ordered by another doctor and it was recommenced the following day. The two doctors both take the same view about it. Dr Simpson said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Mr Blackburn agreed.
>
> Other steps were taken which were also regarded by the doctors as wrong—namely, the intravenous introduction of wholly abnormal quantities of liquid far exceeding the output. As a result the lungs became waterlogged and pulmonary oedema was discovered. Mr Blackburn said that he was not surprised to see that condition after the introduction of so much liquid, and that pulmonary oedema leads to bronchopneumonia as an inevitable sequel, and it was from bronchopneumonia that Beaumont died.
>
> We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.

In ***R v Cheshire*** **[1991] 1 WLR 844, [1991] 3 All ER 670**, the deceased had, after emergency treatment, made a substantial recovery from the effect of bullet wounds, when he developed difficulty with his breathing. Doctors failed to appreciate that he had developed a complication of a tracheotomy carried out as a necessary emergency procedure, which restricted his breathing, and he died. Beldam LJ said, at 851 - 852:

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> In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the defendant was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the defendant caused the death of the deceased adding that the defendant's acts need not be the sole cause or even the main cause of death it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the defendant unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.
>
> It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the defendant's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible.

In ***R v Malcherek; R v Steel*** **[1981] 1 WLR 690, [1981] 2 All ER 422**, the Court of Appeal had to consider an application to adduce fresh medical evidence to the effect that death had been caused not by the defendant's act, but the treating physicians' inappropriate decision to withdraw life support. Lord Lane CJ explained the court's decision to refuse the application at 697 as follows:

> The reason is this. Nothing which any of the two or three medical men whose statements are before us could say would alter the fact that in each case the assailant's actions continued to be an operating cause of the death. Nothing the doctors could say would provide any ground for a jury coming to the conclusion that the assailant in either case might not have caused the death. The furthest to which their proposed evidence goes, as already stated, is to suggest, first, that the criteria or the confirmatory tests are not sufficiently stringent and, secondly, that in the present case they were in certain respects inadequately fulfilled or carried out. It is no part of this court's function in the present circumstances to pronounce upon this matter, nor was it a function of either of the juries at these trials. Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist— for example, circulation— are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death.
>
> Although it is unnecessary to go further than that for the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of

> the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient.

Causation in Specific Offences

Stealing by Reason of Employment pursuant to ss 140 (1)(a), 141, and 340(4) of the **Penal Code, Chapter 84**.

See also:

a. ***Ferguson v COP*** **(The Bahamas CA, MCCrApp No 79 of 2021, 18 November 2021)**

b. ***Farrington v COP*** **(The Bahamas CA, MCCrApp No 165 of 2018, 1 October 2020)**

c. ***Gibbs v DPP*** **(The Bahamas CA, SCCrApp No 135 of 2018, 18 July 2019)**

d. ***Lewis v COP; Glinton v COP; Russell v COP*** **(The Bahamas CA, MCCrApp Nos 124, 139, and 164 of 2023, 9 November 2023)**

Additional Circumstances

In ***R v McKechnie*** **(1991) 94 Cr App Rep 51, [1992] Crim LR 194**, the defendant inflicted serious head injuries on the victim which prevented doctors operating on a duodenal ulcer. The victim died when the duodenal ulcer burst. The defendant was held to have caused his death.

In ***Robinson v R*** **(The Bahamas CA, SCCrApp No 93 of 2013, 3 December 2014)**, as summarised at pgs 1 and 2, the deceased and the Appellant were evidenced to be in a sexual relationship. Together they drove to a location through a dirt road where they had sexual intercourse. Subsequently an argument ensued between the two whereby the Appellant grabbed the deceased by her throat and pushed her off and she fell to the ground. The Appellant was charged with murder and convicted of manslaughter. The pathologist said that there were no verified signs of physical harm or injury leading to the deceased's death; that the cause of death was undetermined. The Court quashed the conviction holding that it was not enough for the Prosecution to prove death, but it was necessary for the Prosecution to prove to the relevant standard that the deceased's death was a result of harm by the Appellant.

In ***Barr v R; Sands v R*** **(The Bahamas CA, SCCrApp Nos 286 and 288 of 2016, 7 November 2018)**, a case which features two separate appeals arising out of the same trial, the Appellant, Barr, inflicted a wound on the deceased with a piece of wood. Subsequent

to her blow, the deceased was involved in a fight with a group of persons who also inflicted blows on her. In that case the pathologist was very clear that she could not say that the blow by Barr or anybody else caused the death of the deceased. The Appeals were allowed and convictions quashed.

Directions

According to ***Pagett***, the judge should give careful consideration to:

a. what the Prosecution needs to prove

b. whether it is necessary to provide the jury with an explanation of causation and, if so

c. how to explain the concept of causation in the context of the facts of the case.

No specific direction will be required unless, unusually, a particular issue of causation arises. If it does, it will usually be one of two kinds:

a. **Where the defendant's conduct was not the only cause of the relevant outcome** (e.g. where vehicles were driven by the defendant and another person in such a way as to cause a fatal collision), the jury should be directed that before they can treat the defendant's conduct as having caused the outcome concerned, they must be satisfied that the defendant's conduct contributed to the outcome in a way that was significant, that is more than trivial.

b. **Where the defendant's conduct set in train a sequence of events leading towards the outcome concerned, but a new act intervened and became the immediate cause of the outcome** (e.g. where the defendant's unlawful act caused the Victim to react in a way which caused the Victim's injuries or death), the jury should be directed that before they can treat the defendant's conduct as having caused the outcome concerned, they must be satisfied that:

    i. a reasonable, ordinary, sensible person, in the circumstances which the defendant knew about at the time of their conduct, could sensibly have foreseen that the new event might follow from their conduct; and

    ii. the defendant's conduct contributed to the outcome in a way that was significant, that is, more than trivial.

Additional Useful Cases

a. ***Munnings Jr v R*** **(The Bahamas CA, SCCrApp No 164 of 2019, 2 December 2020)**

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b. ***Rolle v AG*** **(The Bahamas CA, SCCrApp No 182 of 2010, 8 May 2012)**

c. ***Cooper v AG*** **[2019] 1 BHS J No 31 (The Bahamas CA, Cri/vbi/93/4/2017, 11 March 2019)**

Example
You have heard that after the defendant stabbed the Victim, the Victim was taken to the hospital where they were treated negligently. If the Victim had been treated properly, the Victim would have had a 75% chance of survival. You have to decide whether by stabbing the Victim, the defendant caused the Victim's death. This does not need to have been the only cause, but it must have made more than a minimal contribution to the Victim's death. If you are sure that it made more than a minimal contribution, and so was a cause of death, you must go on to decide whether the other elements of the offense of murder have been proved. But if you are not sure that the stabbing made more than a minimal contribution to the Victim's death, your verdict must be "not guilty". The Prosecution say that the contribution made by the stabbing was clearly more than minimal. If the defendant had not stabbed the Victim, the Victim would not have had to go to the hospital, would not have suffered negligent treatment and would not have died. The Defence, on the other hand, say that as the Victim would have had a good chance of survival if the Victim had not been treated negligently, the contribution made by the stabbing should be seen as minimal.

Chapter 5 – Intention

In This Chapter: **General Scope | Directions | Offences that Do Not Require a Specific Intention | Intention in Other Cases | Recklessness**

General Scope

Numerous offences are defined to require proof of "intention" to cause specified results. The definition of intention has generated considerable case law. The "golden rule" when directing a jury upon intent is to "avoid any elaboration or paraphrase of what is meant by intent" (see ***R v Moloney*** **[1985] AC 905, [1985] 2 WLR 648** per Lord Bridge).

'Intention' is a word incapable of further satisfactory analysis. 'Want' or 'desire' are not synonyms for 'intend' since it is open to the jury to infer intention from the defendant's awareness of the virtual certainty of consequences of their conduct, even though they accept that the defendant hoped that the result would not occur. Intention is a state of mind which the jury can resolve only by inference or by the admission of the defendant. It is quite distinct from "motive".

In ***R v Nedrick*** **[1986] 1 WLR 1025, [1986] 3 All ER 1**, the Court noted at 1027, "It may be advisable first of all to explain to the jury that a man may intend to achieve a certain result whilst at the same time **NOT** desiring it to come about" [emphasis added]. Lord Lane CJ further stated at 1028, "When determining whether the defendant had the necessary intent, it may therefore be helpful for a Jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?"

Where some extended explanation is needed, the most basic proposition is that a person "intends" to cause a result if that person acts in order to bring it about. In such circumstances it is immaterial that the defendant's chances of success are small.

Statutory provisions on intention are set out in s 12 of the **Penal Code, Chapter 84**. Section 12(3) provides:

> If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event.

The Privy Council addressed the issue of intent recently in ***Bastian v R*** **[2024] UKPC 14, [2024] 5 LRC 222**, stating at para 32:

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Section 12(3) is a difficult provision which has given rise to complications in other proceedings.(See generally ***Pinto v R* (2011) 2 BHS J No 77**, per Newman JA at para 36; ***Miller v The King* [2023] UKPC 10**, per Lord Turnbull at paras 13-22; ***Watson v The King* [2023] UKPC 32**, per Lord Lloyd-Jones at para 27.) In ***Miller v The King***, at para 14, Lord Turnbull, delivering the judgement of the Board, provided the following explanation of s 12:

> "It is clear that these are evidential provisions. Their aim is to assist a jury in determining whether the Crown has established the necessary level of intention for the commission of the particular crime charged (see *Rahming v R* at para 14). Subsection (1) directs attention towards purpose, explaining that purpose equates to intention. Subsection (2) extends the concept of intention beyond purpose where something is done in the belief that it will probably have a particular outcome, even if that was not the person's purpose. Subsection (3) then sets out to provide a route through which such a belief can be established. In short, section 12 sets out certain statements as to intention and identifies a process through which intention can be established. The provisions of the section do not impose a burden of proof on the defence and the critical question of the defendant's intention remains to be determined by an examination of the whole evidence."

Lord Turnbull then observed that the process of arriving at a conclusion as to intention as set out in this provision is cumbersome and unnecessarily complex and that it would not be straightforward for a judge to convey the import of s 12(3) to a jury with clarity and precision.

In ***Pinto v R* [2011] 2 BHS J No 77 (The Bahamas CA, SCCrApp No 34 of 2010, 14 April 2011),** the defendant was charged with murder, the allegation being that he had either pulled the deceased from a truck or struck the deceased following an altercation between the two, resulting in the deceased falling to the ground and hitting his head. On appeal, a conviction for manslaughter was quashed. The basis for this decision was that there was no clear case before the jury of what actions of the defendant were alleged to have caused the death of the deceased, and no evidence that the defendant intended to cause any serious injury to the deceased, or his death. The case contains an extensive examination of the interplay between the subsections of s 12 of the **Penal Code**, **Chapter 84**.

In ***Rahming v R* [2002] UKPC 23, (2002) 60 WIR 1**, the Appellant in this case was convicted of murder after he confessed to killing a woman during a fight. On appeal to the Privy Council, the conviction for murder was quashed, and a conviction for manslaughter substituted on the basis that there had been a misdirection with respect to the requisite intention. In emphasising two problematic aspects of the trial judge's direction to the jury, their Lordships noted at paras 16 and 17:

> **[16]**... The second aspect is that the judge, in dealing with the effect of s 11(3), refers twice to 'reckless violence which may cause death'. This language and other parts of the passages which their Lordships have quoted would leave the jury with the impression that a reckless killing would suffice in law for the commission of the crime of murder. As was pointed out in *Dean v R*, any murder direction which suggests that a reckless killing suffices is a misdirection. The judge came back to the same point late in his summing-up (at page 461 of the record) and said in relation to murder:
>
> > 'There must be an intention to kill or somebody uses reckless violence which they understand could cause death and knowing that it would [sic] cause death they went ahead and used it'...
>
> This again suggested that the use of reckless violence suffices as an alternative to an intentional killing.
>
> **[17]** In their lordships' opinion these directions on the crime of murder risked a confusion in the minds of the jury between the ingredients of the crime of murder and that of manslaughter and risked the jury returning a verdict of Guilty of Murder when they were only satisfied that the killing must have been reckless and ought to have returned a verdict of Guilty of Manslaughter.

Directions

The following directions may be necessary, depending on the evidence on the issues:

a. The Prosecution does not have to prove that the offence was planned, or that the defendant's intention was formed in advance. It is sufficient if the defendant had the required intention at the time the defendant (committed the act/did what was alleged).

b. The Prosecution must prove that the defendant intended the result concerned; they do not have to prove that the defendant had any particular motive or desire to bring about that result.

c. The fact that the defendant may have regretted afterwards what they had done does not negate any intention that the defendant held at the time to do it.

d. When deciding whether the defendant had the required intention, the jury are entitled to take into account, as appropriate, the defendant's age, any relevant learning difficulty, or any mental or personality disorder referred to in the evidence.

Chapter 5 – Intention

Example 1: Intention [to kill] – Murder
On the question of intention, the law says in those words that I've read to you that if you took a gun and point it at a person's chest and pull the trigger, the bullet comes out of that gun and enters the person's chest, passes through his organs and exits his body. That if you use reasonable question and observation before you did that it would appear to you that the act of pointing and firing that gun at the person's chest would probably cause or contribute to cause death. Then, if that event is caused, in other words, if in fact that bullet does kill that person then you shall be presumed to have intended to kill that person. So, on the issue of intention to kill, you must consider the section of the Penal Code that I directed you on in determining whether or not the Prosecution has satisfied you so that you feel sure that unlawful harm was inflicted with the intent to kill resulting in the death of [X].

Example 2: Causing Grievous Bodily Harm with Intent to Kill
The defendant is charged with unlawfully and maliciously causing the Victim grievous bodily harm with intent to do so. On this charge, the word "maliciously" adds nothing, so I suggest that you cross out the words "and maliciously" in the Particulars of Offense. Grievous bodily harm means really serious injury. It is accepted that the Victim's facial fractures amount to really serious injury, but the Prosecution have to prove that the defendant intended to cause really serious injury at the time that the defendant struck the Victim in the face. They do not have to prove that the defendant had formed that intention in advance. To decide what the defendant's intention was you need to consider what the defendant did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things. So first consider what the defendant did. The defendant's fist only made contact once, but how much force was used? The Victim said that the defendant gave the Victim "a really hard crack" and sent the Victim straight to the floor. Dr. E told you that severe force would have been needed to cause the Victim's injuries. However, the defendant says that he only struck a tame and accidental blow as he was flailing his arms about. You should also consider what the defendant said. The Victim told you that, before hitting the Victim, the defendant said [specify] and that, after the Victim had hit the floor, the defendant said [specify]. The defendant denies saying any of this. When you have considered all this, you must then decide, in the light of your findings, what the defendant's intention was when the defendant caused the Victim's injuries.

Chapter 5 – Intention

Offences that Do Not Require a Specific Intention

Some offences that require no specific intention are contained in the following:

a. **Road Traffic Act, Chapter 220**

b. **Road Traffic (Amendment) Act, 2019**

c. **Road Traffic (Amendment) (No 2) Act, 2022**

d. **Road Traffic (Amendment) Act, 2023**

e. **Road Traffic (Amendment) Act, 2024**

f. **Section 22 of Dangerous Drugs Act, Chapter 228**

g. **Section 9A of the Firearms Act, Chapter 213**

h. **United States of America and The Bahamas Preclearance Agreement Act, Chapter 296**

Useful Cases

Cases on offences that require no specific intention are as follows:

a. ***Feaste v COP*** **(The Bahamas CA, MCCrApp No 174 of 2016, 27 March 2018)**

b. ***Pinder v COP*** **(The Bahamas CA, MCCrApp No 175 of 2016, 27 March 2018)**

c. ***Curling v COP*** **(The Bahamas CA, MCCrApp No 176 of 2016, 27 March 2018)**

Intention in Other Cases

Where the statute creating an offence does not expressly address intention, the following legislation is useful:

a. **Section 12 of the Penal Code, Chapter 84**

b. **Firearms Act, Chapter 213, e.g. s 33**

Chapter 5 – Intention

Useful Cases

Cases on intention in every other case are as follows:

a. ***Stuart v AG*** **(The Bahamas CA, SCCrApp No 173 of 2010, 27 February 2014)**

b. ***Francis v R*** **(The Bahamas CA, SCCrApp No 196 of 2019, 10 June 2021)**

c. ***Tilme v R*** **(The Bahamas CA, SCCrApp No 102 of 2020, 3 February 2022)**

d. ***Leon v R*** **(The Bahamas CA, SCCrApp No 51 of 2016, 10 September 2018)**

e. ***Greene v R*** **(The Bahamas CA, SCCrApp No 73 of 2020, 4 October 2022)**

Recklessness

General Guidelines

Recklessness features as a mens rea element in a wide range of offences. In some, it relates to the circumstances (e.g. whether the property belongs to another); in others, to the consequences (whether damage or injury will result).

Lord Diplock in ***R v Lawrence*** **[1982] AC 510, [1981] 2 WLR 524** set out the parameters in respect of an act done recklessly. He said at 526:

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting "recklessly" if before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

There is a difference in the standard used for some statutory offences as opposed to that used for common law offences such as motor manslaughter, where the activity itself carries some amount of danger. Lord Diplock in ***Lawrence*** further noted at 525 – 526:

> In ordinary usage 'recklessly' as descriptive of a physical act such as driving a motor vehicle which can be performed in a variety of different ways, some of them entailing danger and some of them not, refers not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed. One does not speak of a

> person acting 'recklessly', even though he has given no thought at all to the consequences of his act, unless the act is one that presents a real risk of harmful consequences which anyone acting with reasonable prudence would recognise and give heed to. So the actus reus of [driving recklessly] is not simply driving a motor vehicle on a road, but driving it in a manner which in fact creates a real risk of harmful consequences resulting from it.

In ***R v G* [2003] UKHL 50, [2004] 1 AC 1034**, the House of Lords overruled ***Metropolitan Police Commissioner v Caldwell* [1982] AC 341, [1981] 2 WLR 509** which had held that a defendant was reckless when their act, causing damage, presented an obvious risk of damage and either they took that risk or gave no thought to it) and returned to subjective recklessness as defined in ***R v Cunningham* [1957] 2 QB 396**.

Since ***G***, a person acts recklessly with respect to:

a. a circumstance, when they are aware of a risk that it exists or will exist.

b. a result, when they are aware of a risk that it will occur.

and it is, in the circumstances known to them, unreasonable to take the risk.

It is likely that this subjective definition of recklessness will apply to all statutory offences of recklessness unless Parliament explicitly provides otherwise.

The mens rea of offences requiring malice remains intention or subjective recklessness and is therefore in line with ***G*** (i.e. the defendant was aware of a risk of some harm which they then, unreasonably, went on to take). It is a subjective form of mens rea, focused on the defendant's own perceptions of the existence of the risk. Whether it is reasonable for the defendant to run the risk is a question for the jury dependent on all the facts. In directing a jury, there is no need to qualify the word "risk". If the defendant may have been unaware of the risk of circumstance or result under consideration because they were under the influence of drink or drugs, the jury must assess the defendant's state of awareness as it would have been if they had been sober: ***DPP v Majewski* [1977] AC 443, [1976] 2 WLR 623**.

When deciding whether the defendant was reckless, the first stage is a judgement on whether the defendant was aware of the risk (subjective).

The second stage is a judgement on whether the risk taken was reasonable in the circumstances of which the defendant was aware (objective).

If the defendant's ability to appreciate the risk was or may have been impaired through drink or drugs, the jury should be asked to consider the defendant's awareness as it would have been had the defendant been sober. If the jury are sure the defendant would have been aware of the risk if they had been sober, the first stage is satisfied.

Chapter 6 – Criminal Attempts

In this Chapter: **General Scope | Statutory Regime | Case Law Illustrations | Directions | Examples**

An attempt to commit a crime is itself considered to be a crime even if the attempt fails. Its core elements are a criminal act done with criminal intent, and the offence occurs when a defendant with the requisite intent takes action to complete the crime.

General Scope

"An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted" (see ***R v Linneker*** **[1906] 2 KB 99, [1904-07] All ER 797** at 101; ***Halsbury's Laws*** (5th edn, 2025) vol 25, para 115); ***Stephen's Digest of the Criminal Law*** (5th edn 1894) Art. 50). Therefore, the intention, supported by acts to commit, constitutes an attempt regardless of whether the act was accomplished.

The test used to determine criminal attempt was discovered in common law prior to the enactment of legislation and is seemingly similar in principle to the present test. That is, the act has to be 'more than mere preparation' for the commission of the offence.

The actus reus is twofold: there must be an act (not omission), and it must be more than merely preparatory to the commission of an offence. Movement between these stages will depend on the nature of the substantive offence, as some offences require more planning and preparation than others.

The mens rea required is an intention to commit the substantive offence. It does not matter that the offence which the defendant is intending to commit is impossible by reason of facts unknown to them (see ***R v Shivpuri*** **[1987] AC 1, [1986] 2 All ER 334**.

To constitute an attempt, the act must be accompanied by an intention to commit the full offence even if the full offence is one which requires a lesser degree of mens rea (e.g. attempted wounding requires an intent to wound, attempted murder requires an intent to kill), or is an offence of strict liability. Blackburn J noted at pg 145 of ***R v Cheeseman*** **(1862) Le & Ca 140, (1862) 169 ER 1337**: "There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved do amount to an attempt. As stated in ***DPP v Wilson*** **BS 2021 CA 42 (The Bahamas CA, SCCrApp No 65 of 2019, 11 March 2021)** at para 31, quoting ***Halsbury's Laws of England*****,** "Whether

an act is sufficiently proximate to be capable of amounting to an attempt is a question of law; whether the act amounts in the circumstances to an attempt is a matter of fact for the jury."

Statutory Regime

The **Penal Code, Chapter 84** provides that attempts to commit an offence are considered a crime punishable under the Act. Sections 83 – 85 state:

> 83. (1) A person who attempts to commit an offence by any means shall not be acquitted on the ground that, by reason of the imperfection or other condition of the means, or by reason of the circumstances under which they are used, or by reason of any circumstances affecting the person against whom, or the thing in respect of which, the offence is intended to be committed, or by reason of the absence of such person or thing, the offence could not be committed according to his intent.
>
> (2) Whoever attempts to commit an offence shall, if the attempt is frustrated by reason only of accident or of circumstances or events independent of his will, be deemed guilty of an attempt in the first degree, and shall, except as in this Code otherwise expressly provided, be punishable in the same manner as if the offence had been completed.
>
> (3) Whoever is guilty of an attempt other than an attempt in the first degree, shall, except as in this Code otherwise expressly provided, be liable to any kind of punishment to which he would have been liable if the offence had been completed; but the court shall mitigate the punishment according to the circumstances of the case.
>
> (4) Where any act amounts to a complete offence, as defined by any provisions of this Code, and is also an attempt to commit some other crime, a person who is guilty of it shall be liable to be convicted and punished either under such provision or under this section.
>
> (5) Any provision of this Code with respect to intent, exemption, justification or extenuation, or any other matter in the case of any act, shall apply with the necessary modifications, to the case of an attempt to do that act.
>
> (6) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit, is a question of law.
>
> 84. Where the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of this attempt, and punished accordingly:

> Provided that after a conviction for the attempt, the person so convicted shall not be liable to be tried again for the offence which he was charged with committing.
>
> 85. Where an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be discharged, but he may be convicted of the attempt, and punished accordingly:
>
> Provided that after a conviction for the attempt, the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit.

Note: Other parts of the **Penal Code,** as well as other legislation, make specific provision for the attempt of a substantive offence. E.g. s 292 creates the offence of attempted murder and s 6(b) of the **Sexual Offences Act, Chapter 99** creates the offence of attempted rape.

While s 6(b) of the **Sexual Offences Act** creates the specific offence of attempted rape, that offence is treated with similarly as an attempted offence under the **Penal Code**, Chapter 84. However, the act should be sufficient to constitute the commission of the substantive offence of rape save and except that it was interrupted, thwarted, and/or not accomplished: see ***R v Fowler*** **[2014] 2 BHS J No 57 (The Bahamas SC, CRI/VBI/190/9/2011, 7 February 2014)** and ***DE v DPP*** **(The Bahamas CA, SCCrApp No 215 of 2023, 16 October 2024).**

Case Law Illustrations

In the case of ***R v Gullefer*** **[1990] 1 WLR 1063, [1990] 3 All ER 882**, the appellant was charged with and convicted of attempted theft. The facts are that Gullefer jumped onto the track at the stadium during a greyhound race in an effort to distract the dogs. His aim was attaining a 'no race' because he placed a bet on a dog whom he believed was losing the race. On appeal, the Court found that the appellant was not guilty of attempted theft because, as stated at pg 885, attempt **"**begins when the merely preparatory acts come to an end and the defendant embarks on the crime proper. When that is will depend of course on the facts in any particular case."

In ***Gullefer***, the Court mainly referenced two cases: ***R v Eagleton*** **[1843–60] All ER Rep 363** and ***DPP v Stonehouse*** **[1978] AC 55, [1977] 2 All ER 909**. Although ***R v Eagleton*** was decided prior to the commencement of the **Criminal Attempts Act 1981** (UK), the principle is maintained, and the case is considered the locus classicus for determining criminal attempts. In delivering the judgement, Parke B said in ***Eagleton*** at 367:

> The mere intention to commit a misdemeanour is not criminal, some act is required; and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are

> not to be considered as attempts to commit it, but acts immediately connected with it are…

In the case of ***Davey v Lee*** **[1968] 1 QB 366, [1967] 2 All ER 423**, Lord Parker CJ at pg 369 cited the test from Stephen's Digest but observed that it did not reference the point of time at which the series of events begin to even constitute attempt. Referencing ***Archbold's Pleading, Evidence and Practice*** (36th edn), he stated at 371:

> It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

In his opinion, some acts that are merely preparatory could also form part of such series of acts.

The test was also affirmed by Potter LJ in the case of ***R v Qadir*** **(England and Wales CA, 25 July 1997)**. The Lord Justice noted that his understanding of s 1 of the **Criminal Attempts Act, 1981** is that "attempt begins at the moment when the defendant embarks upon the crime proper, as opposed to taking steps rightly regarded as merely preparatory."

Similarly, the Court in the case of ***R v Gullefer*** stated at 1066:

> It seems to us that the words of the 1981 Act seek to steer a midway course. They do not provide, as they might have done, that the *R v Eagleton* test is to be followed, or that, as Lord Diplock suggested, the defendant must have reached a point from which it was impossible for him to retreat before the actus reus of an attempt is proved. On the other hand the words give perhaps as clear a guidance as is possible in the circumstances on the point of time at which *Stephen's* "series of acts" begins. It begins when the merely preparatory acts have come to an end and the defendant embarks on the crime proper. When that is will depend of course on the facts in any particular case.

The Court in ***R v Jones*** **[1990] 1 WLR 1057, [1990] 3 All ER 886**, referred to the 'last act' test derived from ***Eagleton*** and highlighted that the words 'more than merely preparatory' do not mean the 'last act'.

The Court in ***DPP v Wilson*** **BS 2021 CA 42 (The Bahamas CA, SCCrApp No 65 of 2019, 11 March 2021)** considered an appeal against a decision to uphold a no case to answer submission on a charge of attempted murder, where the respondent had turned and aimed a firearm at a police officer during a chase. The court had to determine whether the acts of the respondent were sufficiently proximate to amount to attempted murder, and if the appellate court should remit the case back to the Supreme Court for retrial. The court also addressed the potential for finding a lesser included offence that may support a

conviction. The appeal was allowed. The Court of Appeal's reasoning and conclusion, set out at paras 34 - 43, are summarised in the headnote to the case as follows:

> [t]he Judge fell into error when he found as a matter of law, that the offence of attempted murder had not been made out on the Prosecution's evidence. The Judge was influenced by the fact that the respondent did not fire the handgun after he pointed it at the officer. The Judge ought to have found that as a matter of law, the acts of the respondent were sufficiently proximate to amount to an attempt to [commit murder]; and then to have called upon the respondent to lead a defence.
>
> Additionally, the Judge was satisfied that because he determined that the offence of attempted murder had not been made out, and because the firearms offences had not been charged initially, that it was not competent for the alternative firearm offences to be put to the respondent. However, Section 114 of the **[Criminal Procedure Code Act, Chapter 91]** makes provision for such a case. There are no words limiting the generous ambit of sub-section 3 of section 114. As such, the judge should have considered that any lesser offence disclosed on the facts of the case may support a conviction on that lesser offence notwithstanding that the defendant had not been charged with that offence.

Directions

The jury should be directed to consider the following:

a. The definition/elements of the substantive offence.

b. Whether the D intended to commit the offence.

c. With that intention, did D do an act or acts which went beyond mere preparation to commit the offence?

d. Whether the act which is more than merely preparatory to the commission of the offence requires any more than the act the defendant intended to commit.

e. Where impossibility has featured in the evidence, the jury should be told that they must be sure of an attempt to commit the offence intended.

Chapter 6 – Criminal Attempts

Example

The Prosecution's case is that D saw V withdraw some money from a cash machine and put it into his inside jacket pocket. They say that D then followed V along a crowded street and deliberately bumped into V a number of times. This was seen by Police Constable (PC) X, who thought that D was trying to distract V in order to steal the cash. PC X then arrested D.

D says that he had not seen V get any money and was not aware of bumping into him but that if it happened then it was by accident.

There is a distinction between attempting to commit a crime and doing something which is no more than mere preparation in order to commit it; and if you think that what D did was, or may have been, no more than mere preparation in order to steal the money you must find D "not guilty". But if you are sure that what PC X observed was D actually trying to steal from V then you will find D "guilty".

Route to verdict

Question 1

Are you sure that D deliberately bumped into V at least once?

a. If no, your verdict will be "not guilty".
b. If yes, go to question 2.

Question 2

Are you sure that when D deliberately bumped into V, D was trying to steal the money?

a. If yes, your verdict will be "guilty".
b. If no, your verdict will be "not guilty".

Chapter 7 – Conspiracy

In this Chapter: **General Scope | Statutory Regime | Elements of a Conspiracy | Notes | Directions | Useful Cases**

Under the common law, conspiracy is usually described as an agreement between two or more persons to commit an unlawful act, or to accomplish a lawful end by unlawful means, with an intent to achieve the agreement's goal. Conspiracy is an inchoate crime because it does not require that the illegal act must be completed. A person can be charged with both conspiracy to commit a crime and the crime itself if the crime is completed.

General Scope

Ferdando JA in the case of ***Dugasse v Republic*** **[2013] SCCA 6, (2013) SLR 67** stated at para 32:

> The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself. Nothing need be done in pursuit of the agreement; repentance, lack of opportunity and failure are all immaterial. Proof of the existence of a conspiracy is generally:
>
> > a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them……Overt acts which are proved against some defendants may be looked at as against all of them. (See Archbold (2012) 33-14).

The mens rea for conspiracy is the intention to be a party to an agreement to do an unlawful act. It is an essential element: ***R v Anderson*** **[1986] AC 27, [1985] 2 All ER 961** and ***Yip Chiu-Cheung v R*** **[1995] 1 AC 111, [1994] 2 All ER 924**.

It may be necessary to analyse the evidence in order to identify whether what is revealed is one, or more than one conspiracy. The issues raised may, and usually will, make it necessary to explain the structure and evolution of the conspiracy as contended by the Prosecution. The fact that the defendants are all charged with conspiracy does not necessarily imply that each is as deeply involved as the other.

In ***DPP v Doot*** **[1973] AC 807, [1973] 1 All ER 940**, the Court noted at 827:

> A conspiracy involves an agreement expressed or implied. A conspiratorial agreement is not a contract, not legally binding, because it is unlawful. But as an agreement it has its three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is

> complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place: *R v Aspinall* ((1876) 6 QBD 48 at 58, 59) *per* Brett JA. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.

Conspiracy is a continuing offence, and other persons may join in an existing conspiracy and become parties to it. It is not necessary for all the parties to a conspiracy to be in contact with each other. Conspirators can join and leave a conspiracy while the conspiracy lives on. They need not all be known to one another. They need not know all the details. As such, directions to the jury regarding proof of the conspiracy and the defendant's participation in it should be tailored to the particular facts of the case. The directions will usually depend upon the issues raised by the Defence. The Prosecution will generally rely on inferences from conduct and circumstantial evidence.

For conspiracy to be proved, the Prosecution must show:

a. An agreement has been made between two or more parties to do an unlawful act.

b. The defendant intended to be a part of the agreement to commit an unlawful act.

The Court of Appeal of England and Wales has noted in ***R v Shillam*** **[2013] EWCA Crim 160, [2013] Crim LR 592** at para 25, that "the prosecution should always think carefully, before making use of the law of conspiracy, how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate."

Statutory Regime

Sections 89 – 90 of the **Penal Code, Chapter 84** state:

> 89. (1) If two or more persons agree or act together with a common purpose in committing or abetting an offence whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that offence as the case may be.
>
> (2) A person within the jurisdiction of the courts can be guilty of conspiracy by agreeing with another person who is beyond the jurisdiction for the commission or abetment of any offence to be committed by them or either of them, or by any other person, either within or beyond the jurisdiction; and for the purposes of this subsection as to an offence to be committed beyond the

jurisdiction, "offence" means any act which, if done within the jurisdiction, would be an offence under this Code or an offence punishable on conviction under any other law.

90. (1) If two or more persons are guilty of conspiracy for the commission or abetment of any offence, each of them shall, in case the offence is committed, be punished as for that offence according to the provisions of this Code, or shall, in case the offence is not committed, be punished as if he had abetted the offence.

(2) Any court having jurisdiction to try a person for an offence shall have jurisdiction to try a person or persons charged with conspiracy to commit or abet that offence.

The **Firearms Act, Chapter 213** states at s 37A:

37A. (1) Where two or more persons agree or act together with a common purpose in committing or abetting an offence under this Act whether with or without any previous concert or deliberation, each of them commits conspiracy to commit or abet that offence as the case may be, and shall be liable —

(a) on conviction on information to a term of imprisonment in the range of fifteen years to twenty years;

(b) on summary conviction to a term of imprisonment in the range of twelve months to ten years.

(2) A person in the jurisdiction of the courts may be found guilty of conspiracy by agreeing with another person who is beyond the jurisdiction for the commission or abetment of any offence under this Act to be committed by them together or by either of them or by any other person, either within or beyond the jurisdiction.

(3) For the purposes of subsection (2), with regard to the offence to be committed beyond the jurisdiction, "offence" means any act which, if done within the jurisdiction would be an offence under this Act.

(4) Where any person commits an offence under this Act, or solicits or incites another person to commit such an offence, he shall, without prejudice to any other liability, be liable —

(a) on conviction on information to a term of imprisonment in the range of ten years to twenty years;

(b) on summary conviction to a term of imprisonment in the range of twelve months to ten years.

(5) A person who in The Bahamas aids, abets, counsels or procures the commission in any place outside of The Bahamas of any offence punishable

under the provisions of any corresponding law in force in that place or does any act preparatory to, or in furtherance of any act which, if committed in The Bahamas, would constitute an offence under this Act is liable —

(a) on conviction on information to a term of imprisonment in the range of ten years to twenty years;

(b) on summary conviction to a term of imprisonment in the range of twelve months to ten years.

Section 30 of the **Dangerous Drugs Act, Chapter 228** states:

30. (1) If two or more persons agree or act together with a common purpose in committing or abetting an offence against this Act whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that offence as the case may be, and shall be liable on conviction to the same punishment and forfeiture as if he had committed an offence under this Act.

(2) A person within the jurisdiction of the courts can be guilty of conspiracy by agreeing with another person who is beyond the jurisdiction for the commission or abetment of any offence under this Act to be committed by them or either of them, or by any other person, either within or beyond the jurisdiction; and for the purposes of this subsection as to an offence to be committed beyond the jurisdiction, "offence" means any act which, if done within the jurisdiction, would be an offence under this Act.

Elements of Conspiracy

1. **Agreement**

   a. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself (***Mulcahy v R* (1868) LR 3 HL 306**).

   b. The offence requires a "meeting of the minds" (***Collins v R* (The Bahamas CA, SCCrApp No 77 of 2012, 14 December 2017)**).

   c. Nothing need be done in pursuit of the agreement (***DPP v Doot* [1973] AC 807; [1973] 1 All ER 940**).

   d. The course of conduct agreed upon is critical. If the course involves an act by someone who does not form a part of the agreement and that person fails to do something which in turn prevents the criminal act from occurring, the parties can still be found to be guilty of conspiracy.

   e. So far as proof goes, conspiracy is generally "…a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent

criminal purpose in common between them…" (***R v Brisac*** **(1803) 4 East 164** at 171, **(1803) 102 ER 792** at 795).

2. **Intent To Be a Part of The Agreement**

   a. The essence of a criminal conspiracy is the agreement to commit the substantive offence or to defraud.

   b. The parties to a conspiracy must intend that the agreement be carried out. See ***Yip Chiu-Cheung v R*** **[1995] 1 AC 111, [1994] 2 All ER 924** at 118: "The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence."

      The intention to commit the offence constitutes the necessary intent so that an undercover agent who has no intention of committing the crime lacks the necessary intent to be a conspirator. However, in ***Yip-Chiu Cheung***, the undercover agent intended to commit the offence of drug trafficking. The fact that authorities did not prosecute him for that offence does not mean that he did not commit the crime.

   c. All conspirators must intend to play a role in the agreed conduct. A conspirator need not intend to play an active part in the agreed course of criminal conduct, they can intend to participate passively e.g. an organizer of a crime who does not actually participate in the commission of the crime (***R v Siracusa*** **(1990) 90 Cr App Rep 340, [1989] Crim LR 712**).

   d. Knowledge of the law on the part of the defendant is immaterial unless what the defendant agreed to do was lawful, on the facts known to them (see ***Churchill v Walton*** **[1967] 2 AC 224** at 237**, [1967] 1 All ER 497** at 503).

3. **Intent to Commit an Offence**

   a. The Prosecution must prove that the defendant knew that the course of conduct agreed upon involved the commission of an offence prohibited by law and the parties must intend every element of the underlying offence.

   b. The Prosecution must prove the intent of the conspirator e.g. a conspiracy to steal cannot be proved by a conspiracy to rob, nor can a conspiracy to import heroin be established by proving an agreement to import cannabis. However, the indictment can be worded in a way that covers the commission of more than one offence, and it is important to carefully analyse the evidence to determine whether that evidence reveals the existence of more than one conspiracy.

Chapter 7 – Conspiracy

Notes

a. Defendants may have different roles, and each defendant may not be as deeply involved in the conspiracy as the other.

b. Each party of the conspiracy need not know each other or each element of the conspiracy. Conspiracy may take the form of a 'chain' (A agrees with B who agrees with C) or a 'wheel' (X agrees with A, X agrees with B, X agrees with C), or a combination of the two.

c. Admissible evidence against one defendant may not be admissible against others.

d. Defendant can use as a defence that they did not know that the purpose was criminal. ***R v Saik*** **[2006] UKHL 18, [2007] 1 AC 18** notes at para 81:

> He cannot be said to be guilty of the conspiracy to commit the substantive offence under section 93C(2) because he did not know, and therefore did not intend, that the money which he agreed to convert would be the proceeds of crime when at some future date he came to perform his part of the agreement.

e. Where co-conspirators are tried jointly, both must be either acquitted or convicted together to avoid an apparent inconsistency of verdict (***Moss v DPP*** **(The Bahamas CA, SCCrApp Nos 230 and 238 of 2018, 9 May 2019)**). However, a single conspirator may be tried alone, applying the Privy Council decision in ***Dharmasena v R*** **[1951] AC 1**.

f. The Privy Council left open the question of whether a defence of duress is available in the Commonwealth of The Bahamas as a matter of law, and determined instead that, assuming but not deciding that the defence is available, it did not arise on the particular facts of the case (***Moss v R*** **[2023] UKPC 28, [2023] All ER (D) 159 (Jul)**).

Directions

Directions to the jury should be tailored to the particular facts of the case and usually depend on the issues raised by the Defence. The conspiracy may be proved by inference from conduct, including words spoken in furtherance of the common design, or by direct evidence of the agreement.

The jury should be directed as follows:

a. In deciding whether there was a criminal conspiracy and if so whether the defendant whose case you are considering is party to it, look at all the evidence as to what occurred during the relevant period, including the behaviour of each of the alleged conspirators. If having done that you are sure that there was a conspiracy and the

defendant whose case you are considering was a party to it, you must convict. If you are not sure, you must acquit.

b. When criminal conspiracies are formed, it may well happen that one or more of the conspirators is more deeply involved and has a greater knowledge of the overall plan than the others.

c. Also, a person may agree to join in the conspiracy after it has been formed, or they may drop out of it before the crime is fully carried out. Providing you are sure in the case of the defendant whose case you are considering, that they did at some stage agree with one or other of the defendants that the crime in question should be committed and that at the time intended that it should be carried out, it does not matter precisely where their involvement appears, the scale of seriousness, or precisely when they became involved; they are guilty of the offence.

Useful Cases

Some useful cases which provide further guidance are as follows:

a. ***AG v Mackey; Sargent v DPP; Mackey v DPP; Tinker v DPP;*** **(The Bahamas CA, SCCrApp Nos 125 of 2018, and 76, 77, and 84 of 2019, 22 December 2021)**

b. ***Knowles v R*** **(The Bahamas CA, SCCrApp No 254 of 2016, 15 April 2019)**

c. ***Collie v R*** **(The Bahamas CA, SCCrApp No 16 of 2015, 26 September 2018)**

Example
In this case, D is charged with entering into a conspiracy with X, Y and Z (who are named in the indictment) to steal a car. Just as it is a criminal offence for an individual to steal something, so it is a criminal offence for two or more people to agree to steal something. An agreement to steal a car is called a conspiracy to steal which is itself a crime. The Prosecution says that there was an agreement to steal a car. The Prosecution also says that D joined in the agreement with one, or more of X, Y and Z and that when he did so, D intended that a car should be stolen by one or more of X, Y and Z. In contrast, D disputes that there was an agreement to steal a car. Even if you were sure that there was such an agreement, D says that he was not part of that agreement and did not intend that a car should be stolen by one or more of those people. The issues for you are first, whether there was an agreement to steal a car and second, was D part of that agreement to steal a car.

Chapter 7 – Conspiracy

Example cont'd

Before you could convict D of the charge he faces, you must be sure that D joined the agreement to steal a car, as alleged by the Prosecution. In deciding whether D joined the agreement to steal a car you must be sure that:

a. It was the common purpose of each of those involved in the agreement that a car was to be stolen;

b. When D joined the agreement D did so knowing that he was agreeing that a car would be stolen; and

c. When D joined in that agreement, D intended that the offence of stealing a car should be carried out by one, or more, of X, Y and Z.

There is no direct evidence of this criminal agreement. This is not unusual: you would not expect people who are planning a crime to put their agreement into writing or to tell other people about it. So, you should consider the evidence of what happened and of what D, X, Y and Z did and said and ask yourselves whether that makes you sure that there was a conspiracy, and that D was part of it and intended that it would be put into effect.

The Prosecution does not have to prove that:

a. D was part of the agreement from the beginning. People may join and leave an agreement at different times;

b. D had been in contact with all of the other people in the agreement;

c. D played an active part in putting the agreement into effect;

d. the agreement was successful in the sense of a car or cars actually being stolen; the offence is agreement. What was agreed to be done does not have to be carried out in order for the Prosecution to succeed.

Chapter 7 – Conspiracy

Example cont'd

Route to verdict

Question 1

Are you sure that there was an agreement to steal a car?

a. If yes, go to question two.
b. If no, your verdict will be "not guilty".

Question 2

Are you sure that the defendant joined the agreement to steal a car?

a. If yes, go to question 3.
b. If no, your verdict will be "not guilty".

Question 3

Are you sure that when the defendant joined that agreement, he intended that a car or cars would be stolen by at least one other person who was party to the agreement?

a. If yes, your verdict will be "guilty".
b. If no, your verdict will be not guilty.

Chapter 8 – Joint Enterprise

In this Chapter: **General Scope | Joint Principals | Accessory/Secondary Liability | Manslaughter | Withdrawal from Joint Criminal Activity**

Criminal law is not limited to the actions of isolated individuals. When two or more persons are alleged to have committed an offence together, this gives rise to the common law principle of joint enterprise/joint liability. In a joint enterprise, the participants commit the offending as either principal offender/s or secondary party/parties. Each will be liable for acts committed in pursuance of that joint enterprise with the necessary intent, unless the principal offender/s go beyond the scope of what was agreed.

Perpetrators are said to act in concert when, along with the necessary action, there is proven to be an intention to encourage or assist the commission of the offence along with an intention that the principal should act with the requisite mental element for the offence. This is a complex area of law that is continuing to be developed. A contending development in the law is that a member of a group cannot be found guilty of an offence unless there is proof that they positively intended that the offence should be committed; mere foresight of what someone else might do is not enough.

General Scope

Legal liability for a criminal offence may arise in the following circumstances in which a defendant (D1) is involved with another (D2) or others:

a. by D2's own conduct and with the necessary fault, D2 committed the offence with another, D1 (*joint principals*).

b. by D2's own conduct and with intent, D2 assisted D1 to commit the offence (*assisting*).

c. by D2's conduct and with intent, D2 encouraged D1 to commit the offence (*encouraging*).

d. D2 'commanded or commissioned' (i.e. ordered or suggested) the offence committed by D1, and D1 committed it with the necessary fault (*procuring*).

It is sufficient to prove that a defendant was either the principal or accessory (***R v Fitzgerald* [1992] Crim LR 660**).

It is not necessary to specify what role a defendant is alleged to have played (***R v Giannetto* [1997] 1 Cr App Rep 1, [1996] Crim LR 722**).

Chapter 8 – Joint Enterprise

The Prosecution should draw the particulars of the offence "in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer" (***DPP for Northern Ireland v Maxwell*** **[1978] NI 42, [1978] 1 WLR 1350** per Lord Hailsham of St Marylebone at 1357D).

If all that can be proved is that the principal offence was committed either by D2 or by D1, both must be acquitted (***R v Abbott*** **[1955] 2 QB 497, [1955] 3 WLR 369** ; ***R v Banfield*** **[2013] EWCA Crim 1394, [2014] Crim LR 147**).

Only if it can be proved that the one who did not commit the crime as principal (D2) must have aided, abetted, counselled or procured the other (D1) to commit it, can both be convicted (***R v Lane*** **(1985) 82 Cr App Rep 5, [1985] Crim LR 789**).

The Court of Appeal of The Bahamas, in ***Johnson v R*** **(2017) 91 WIR 23, [2018] 3 LRC 190** at paras 91, 96, and 100 – 104, confirmed the state of the law in The Bahamas regarding joint enterprise and the responsibility of secondary parties. This is helpfully summarised in the headnote as follows:

> It was clear from *Farquharson v R* [1973] AC 786 that the common law principles relevant to the liability of secondary parties involved with one or more persons in a joint enterprise to commit a crime applied in the Bahamas. In essence, those principles were that knowledge that one's associates had a weapon and foresight that the common plan entailed the use of whatever force was necessary to achieve the object of that plan, and if fatal results ensued from the use of such force in executing that plan, that was evidence from which it could be inferred that the secondary party intended those results in common with the shooter. That had always been the position in the Bahamas since that decision. That was essentially the position returned to in England in *R v Jogee*, *R v Ruddock*, following a departure from that position in *Chan Wing-Siu v R* [1984] 3 All ER 877. The doctrine in *Chan Wing-Siu*, which extended liability for murder to a secondary party on the basis of foresight only of the possibility that the principal could commit murder, without there being any need for any evidence of an intention to kill, was never a part of Bahamian law. *Farquharson* remained good law in the Bahamas, and *R v Jogee*, *R v Ruddock* made no change to the law of common design in the jurisdiction. The instant case involved the rule of extended common purpose grounded in common embarkation on the crime of armed robbery and extended by circumstances to the crime of murder where the appellant did not inflict the fatal blow. In such circumstances, the question for the jury would always be whether there was evidence that the accused shared the common intention of the principal to do whatever was required to accomplish the common purpose extending to killing. The judge's summing up as to the law on common design was impeccable and faithfully followed the principles in *Farquharson*. There was therefore no misdirection on joint enterprise by the judge, and the appeal on that ground would be dismissed.

Chapter 8 – Joint Enterprise

In the recent decision of ***Bastian v R*** **[2024] UKPC 14, [2024] 5 LRC 222**, the Judicial Committee of the Privy Council noted the law on joint enterprise in The Bahamas as:

> 22. *Farquharson v The Queen* [1973] AC 786, an appeal to the Privy Council from the Court of Appeal of the Bahama Islands in 1973, applied entirely orthodox principles of joint enterprise. There the appellant broke into a house with intention to steal, in company with two accomplices who were to his prior knowledge armed with a cutlass (Darling) and a pistol (Pinder) respectively. The occupants were disturbed and the husband was shot dead and the wife injured by Pinder. The trial judge directed the jury that if the defendants' common design or plan as they each understood it included the use of whatever force was necessary to achieve the object of breaking and entering, including their escape if resisted, even if this force involved killing or doing grievous harm, then if one of them in pursuance of this common design uses such force with fatal results they are each and all responsible for the consequences (p 792 F-G). He also directed the jury that if the shooter fired in panic or for some other purpose of his own, unconnected with the common purpose previously agreed between the three to rob with whatever force was necessary, in those circumstances he would alone bear responsibility for the consequences of the fatal shot (p 793E). The appellant was convicted and the Court of Appeal of the Bahama Islands dismissed his appeal. On further appeal, the Privy Council dismissed the appeal. Lord Kilbrandon, delivering the judgement of the Board, expressly approved the judge's direction on joint enterprise, observing:
>
> > "This is one of the class of cases in which several persons have joined together in a criminal enterprise, one or more of the persons being armed with a lethal weapon, in circumstances in which it may be inferred that there was an intention common to all the participants that a lethal weapon would be used, if necessary, in furtherance of the common purpose for which the persons were associated." (at p 792 C- D)
>
> 23. *Rodney Johnson v The Queen* SCCrApp No 100 of 2012 concerned an armed robbery by a number of men during which one victim was shot twice and killed. Three defendants were indicted. One issue at trial was whether the shooter went outside the agreed plan. Following the conviction of the appellant for offences of murder and attempted armed robbery, he contended on appeal that the summing up had failed to give effect to the principles stated by the Supreme Court and Privy Council in *Jogee*. Dame Anita Allen P, delivering the judgement of the Court of Appeal of The Bahamas, considered (at para 91) that *Farquharson* established that knowledge that one's associates had a weapon and foresight that the common plan entailed the use of whatever force was necessary to achieve the object of that plan was evidence, in the event that fatal results ensued from the use of such force

in executing that plan, from which it might be inferred that the appellant intended those results in common with the shooter. She concluded (at para 96):

> "The requirement of intent in cases of common design and extended common purpose, to which their Lordships returned in *Jogee* and *Ruddock* and which was the position in England prior to *Chan Wing-Siu*, has always been the position in The Bahamas, at least since *Philip Farquharson*."

As a result, she considered, *Jogee* and *Ruddock* did not affect the law of The Bahamas relating to common design which always had been that to be guilty the secondary party must share the intention of the shooter where the common purpose is extended to murder or another offence requiring specific intent (para 101). She considered that the judge's directions to the jury on common design in cases of murder and attempted armed robbery were impeccable and faithfully followed the principles of *Farquharson*.

24. The Board's attention was drawn to the following further decisions of the Court of Appeal of The Bahamas in which the principles stated in *Rodney Johnson* or in *Jogee* have been applied: *Leon v R* SC CrApp No 51 of 2016 (10 September 2018); *Gibson v* SCCrApp No 204 of 2016 (15 October 2018); *Robinson v COP* MCCrApp No 124 of 2019 (31 March 2021); *Edwards and Burrows v DPP* SCCrApp No 96 of 2021 (7 July 2022).

Example: Joint Enterprise (General) Direction
The Prosecution is saying that each one of these defendants were (sic) concerned with others. That they were acting in concert. There is a joint enterprise. That is the Crown's allegation against the three men. Now they are saying that the defendants committed these two offences of armed robbery and murder together. Where a criminal offence is committed by two or more persons, each of them may play a different part. But if they are in it together as part of a joint plan or agreement to commit it, they are each guilty of the offence. The words "plan or agreement" do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod or a wink or a knowing look. An agreement may be inferred from the behaviour of the parties.

Chapter 8 – Joint Enterprise

Example: Joint Enterprise (General) Direction cont'd

Now your approach to the case madam foreman and members of the jury, should be as follows: If in looking at the case of any defendant, you are sure that with the intention I have mentioned, he committed the offence on his own or that he took some part in committing it, with one or other of his co-defendants, he is guilty. Remember the intention I was referring to is … to commit the offence of murder, that is, the intention to kill. So, in looking at the case of each defendant, if you are sure that with that intention, he committed the offence on his own or that he took some part in committing it, with one or other of his co-defendants, then he is guilty. Now, if you come to the conclusion in this case that the death of V was caused unlawfully and intentionally, as I have tried to explain, so as to disclose the offence of murder by one of the men at Domingo Heights that night, then the question arises as to the responsibility of the others for that offence. Only one of them may have fired the shots that proved fatal. And you recall the evidence of Dr W is that the wounds she observed were not shotgun injuries. But you will recall at the scene, there is some damage to a partition in the photographs. The statement allegedly made by each of the defendants … the record of interview of each defendant suggests there were those amongst the group, who were armed with a shotgun and a 9 mm pistol. This knowledge was known before they set off to rob the phone vendor. And with that knowledge, they went, they walked to where he was, they saw him, then they went and secreted themselves in a position where they could see him approach, and on seeing him approach, they went and attacked him, and according to the evidence of D3, the man was struggling with D2 for the shotgun, he fired two or three shots, the man fell to the ground and they ran.

On that evidence you may find … that only one person fired the fatal shots, but you have to determine whether the others were there actively participating in this event.

Now as I said, only one of them may have actually fired the shots which proved fatal, but in law if two or more persons, and this is why I'm talking about joint responsibility, combined to effect a common object, as for instance in this case, the robbery of V, and if their common design or plan as they each understood it, included the use of whatever force was necessary to achieve that object, including their escape, if resisted, even if this force involved killing or doing dangerous harm, that is harm endangering life, then if one of them in pursuance of this common design, uses such force with fatal results they are all responsible for that consequence. And I put it this way, where two or more persons agree or act together, in other words there did not even have to be a previous agreement, if they acted together at the time ,then our law says that will be evidence of joint design …

Chapter 8 – Joint Enterprise

Example: Joint Enterprise (General) Direction cont'd

So, in this case, you must firstly consider whether one or other of the defendants fired the fatal shot that night. If on the evidence you are satisfied as I have previously tried to explain and that act amounts to the offence of murder on his part, you may convict him. But as regards the others, you should not convict them even if you are satisfied they were present that night, unless you are also satisfied that they were all acting with a common purpose, that that common purpose or the furtherance of that common purpose, involved the use of force, if necessary of extreme force to effect it, and that the firing of shots, force in this case, was an act in pursuance or furtherance of that common purpose. In other words, that there was in their mind at the time, an intention to use whatever force, however extreme, to secure their object or their safety. When you are asked in due course to find a verdict in the case of each, you will bear in mind what I told you about the onus of proof, that each one must be proved to be guilty before you return a verdict against him. Again, you will bear in mind the absolute necessity of considering the case of each one separately. And to ask yourself whether you find it proved for sure that each was participating in a common design in committing this crime. As I have already directed you in the earlier part of the summing-up, if that common design is not proved, then that person only, whoever it was, who fired the shot will be guilty of murder. If you are satisfied that his act constitutes murder … you should acquit the others.

Joint Principals

Where there are several participants in the crime, a defendant will be a principal offender if their conduct fulfils the actus reus element of the crime and at the time of performing the actus reus, the defendant had the relevant mens rea (***R v Macklin and Murphy*** **(1838) 2 Lew CC 225, (1838) 168 ER 1136**).

The crucial question in deciding whether D2 is a joint principal or an accessory, is whether D2 by D2's own act (as distinct from anything done by D1 with D2's advice or assistance) performed the actus reus. There is no need for D2 and D1 to act with a common purpose to commit the crime together although in cases of joint principals they usually will: they may for example both independently engage in attacking the victim (V), each intentionally causing grievous harm by their blows. If each has by their own acts caused grievous harm, then each is liable as a principal.

Directions

a. If the Prosecution puts their case on the sole basis that each of two or more defendants was a principal offender (i.e. that each carried out the actus reus of the offence concerned with the necessary mens rea) the jury should be directed to consider each defendant separately, that their verdict(s) on each may or may not be the same, and that they should convict the defendant whose case they are considering only if they are sure that all the elements of the offence have been proved against him. See Example 1 below.

b. However, in almost all cases involving multiple defendants, it will be necessary to give a direction as to the secondary liability of one or more of them.

c. In almost all cases, the Prosecution will allege that one or more defendants are guilty because they must have been either a principal offender or an accessory/ secondary party. In such cases it is not necessary for the jury to be satisfied whether any one defendant was a principal or an accessory, provided that they are satisfied that the defendant participated with relevant mens rea. An example would be where V suffered injuries in an attack in which several defendants took a physical part, but it is not known which defendant caused which injuries, if any.

Example: In a case of robbery where two defendants are alleged to have acted as joint principals

NOTE: This is a simple "joint principal" example, but in reality, there will be few cases in which it will not be open to the jury to find that of two Ds, one acted as a principal and one as a secondary party: directions will need to be crafted accordingly.

It is alleged that D1 and D2, having planned to commit a robbery, followed V into an alley and then both Ds took hold of him, and both demanded his cell phone. When he refused, both Ds searched his pockets. During the search, D1 found and removed V's cell phone. Both Ds then ran away.

Both Ds admit that they were present, but both deny using any force on V or searching him. D1 admits that he asked V for his cell phone but claims that he only wanted to borrow it to make an urgent phone call and V gave it to him voluntarily. D2 says that he was with D1 but played no part in what happened.

Before you could convict either D of this offence the Prosecution must have proved in relation to each separate D, so that you are sure of it, that he took part in the robbery of V by using force on V in order to steal from him and then by stealing V's cell phone.

You must consider the case of each D separately and you will return a separate verdict in respect of each D. Your verdicts may, or may not, be the same in each case. You may only convict either D if you are sure that that D used force on V, that he did so in order to steal from V and that that D took part in removing the phone from V's pocket.

Accessory/Secondary Liability

Following the decision in ***R v Jogee; R v Ruddock*** **[2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, (2016) 87 WIR 439** the Supreme Court and the Judicial Committee of the Privy Council sitting jointly provided an authoritative restatement of the law of joint enterprise. In particular, in their joint judgement Lord Hughes and Lord Toulson demonstrated that the law in England and Wales and in certain other common law jurisdictions had taken a wrong turn in the decisions in ***Chan Wing-Siu v R*** **[1985] AC 168, [1984] 3 WLR 677** (a Hong Kong appeal to the Judicial Committee of the Privy

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Council) and ***R v Powell; R v English*** **[1999] 1 AC 1, [1997] 3 WLR 959** (appeals to the House of Lords) which had established a principle that later became known as parasitic accessory liability (Sir John Smith ***"Criminal Liability of Accessories: Law and Law Reform"*** **(1997) 113 LQR 453**).

The principles are:

a. D2's liability for criminal offences committed by D1 is to be based on ordinary principles of secondary liability **(*Jogee* at para 76).**

b. D2 is liable as an accessory (and not as a principal) if D2 assists or encourages or procures another person, D1 to commit the offence and D2 does not, by D2's own conduct, perform the actus reus **(*R v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 AC 269).**

c. The offence occurs where and when the principal offence occurs **(*R v JF Alford Transport Ltd* [1999] RTR 51, [1997] 2 Cr App Rep 326).**

d. It is not necessary that D2's act of assistance or encouragement was contemporaneous with the commission of the offence by D1 **(*Stringer v R* [2011] EWCA Crim 1396, [2012] QB 160).**

e. D2's acts must have been performed before D1's crime is completed. There is no requirement that D2 and D1 shared a common purpose or intent **(*Attorney-General's Reference* (No 1 of 1975) [1975] QB 773, [1975] 3 WLR 11).** It is immaterial that D2 joined in the offence without any prior agreement (see Privy Council decision in ***Mohan v R*** **[1967] 2 AC 187, [1967] 2 WLR 676**, an appeal from Trinidad and Tobago).

f. It is important to focus on the scope of the enterprise D2 and D1 have embarked upon and whether D2 has the relevant intention as to D1's crime. Where D2 and D1 are targeting a particular victim (X), and D1 murders V, D2 may still be liable for murder:

    i. by virtue of transferred intent where D1 killed V intending to kill X,

    ii. D1 has killed V in the course of the enterprise to kill X.

    In the latter case, the focus will be on whether D2 had a 'conditional intention' that should the need arise D1 would kill or cause grievous bodily harm to someone other than X (***Jogee*** at paras 92-94).

g. By contrast, there is an argument that D2 should not be held liable where the enterprise with D1 was to kill X, and D1, acting on a frolic of his own, intentionally selected a different target, V, and murdered him.

h. Where there is an issue as to whether D1's targeting of V may have fallen outside the scope of the alleged joint scheme this is quintessentially a matter for the jury (***R v BHV*** **[2022] EWCA Crim 1690;** ***Jogee*** at para 94).

i. D2's liability for assisting or encouraging an offence will depend on proof that the offence was committed even if the principal offender (D1) cannot be identified and that D2's conduct (which can, subject to D2's mens rea, include an omission when D2was under a duty to act, see ***Webster v R*** **[2006] EWCA Crim 415, [2006] 2 Cr App Rep 103)**, assisted the offender, D1, in the commission of the offence. Following ***Jogee*** **para 12**, read literally, the Prosecution may not even have to establish this:

> Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome: R v Calhaem [1985] 2 All ER 266, [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.

j. D2's liability for assisting an offence will also depend on proof that:

   i. D2 intended that their conduct would assist D1 **(*R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App R 592; *National Coal Board v Gamble* [1959] 1 QB 11, [1958] 3 WLR 434; *Jogee*).** There need not be a meeting of minds between D2 and D1.

   ii. D2 intended that their act would assist D1 in the commission of either a type of crime, without knowing the precise details, or one of a limited range of crimes that were within D2's contemplation.

   iii. D2 had not withdrawn at the time of D1's offence.

k. D2's liability for encouraging an offence will depend on proof that the offence was committed, even if the offender cannot be identified and:

i. D2's conduct amounting to encouragement came to the attention of D1 (but see ***Jogee***, para 12). It does not matter that D1 would have committed the offence anyway since there is no requirement that D2's conduct has caused D1's conduct **(*AG v Able* [1984] QB 795; *R v Calhaem* [1985] QB 808, [1985] 2 WLR 826; *R v Luffman* [2008] EWCA Crim 1379).** Non-accidental presence may suffice if D2's presence did encourage and D2 intended it to (note ***R v Clarkson*** **[1971] 1 WLR 1402, [1971] 3 All ER 344** which emphasizes that care is needed where D2 is drunk and might not realize that they were giving encouragement).

ii. D2 intended, by their conduct, to encourage D1's actions. This is not restricted, purposive intent per ***Bryce***. The Prosecution does not need to establish that D2 desired that the offence be committed (***Jogee*** at para 90). D1 must have been aware that he had D2's encouragement or approval.

iii. D2 knew, or if the act is preparatory to D1's offence, intended the essential elements of D1's crime, albeit not of the precise crime or the details of its commission (see ***R v ABC*** **[2015] EWCA Crim 539, [2015] QB 883;** ***Jogee*** at para 14).

iv. where it is alleged that D2 counselled D1 to commit the offence, that offence must have been within the scope of D1's authority i.e. was one which D1 knew they had been encouraged to commit **(*Calhaem*).**

v. D2 had not withdrawn at the time of the offence.

l. D2's liability for procuring will depend on proof that D2's conduct caused D1 to commit the offence, and that D2 acted with intent to 'produce by endeavour' the commission of the offence.

It is not necessary to prove that there existed any agreement between D2 and D1 to commit the offence (***Jogee*** at para 17).

D2's mens rea is satisfied by proof that:

a. D2 intended to assist or encourage D1.

b. D2 had done so with knowledge of "any existing facts necessary" for D1's conduct/ intended conduct to be criminal (***Jogee*** at paras 9 and 16); i.e. D2 must intend/ know that D1 will act with the mens rea for the offence.

c. Intention is what is required. As elsewhere in the criminal law, that is not limited to cases where D2 "desires" or has as their "purpose" that D1 commits the offence. **(*Jogee*** at para 91). Most importantly, intention is not to be equated with foresight: "Foresight may be good evidence of intention, but it is not synonymous with it" (***Jogee*** at para 73).

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Jogee, at paras 26 and 98, states: "Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

In addition, where the D1's offence requires proof that they acted with intent (e.g. murder) D2 must intend to assist/encourage D1 to act with that intent (see ***Jogee*** at para 10). It is sufficient that the D2 intended to assist or encourage D1 to commit grievous bodily harm (see ***Jogee*** at paras 95 and 98). It is not necessary for the D2 to intend to encourage or assist D1 in killing.

Where there was a prior joint criminal venture, it might be easier for the jury to infer the intent. It will "often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional" (***Jogee*** at para 92). At para 94, ***Jogee*** also states:

> If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

An intention may also be inferred where there was no prior criminal venture. At para 95 of ***Jogee***, it was noted that where:

> ...D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.

D2 may claim that D1's act is an overwhelming supervening event (OSE) and that any assistance or encouragement that D2 may have given has been superseded. The Court in ***Jogee*** at paras 97 and 98 recognised this:

> 97. The qualification to this (recognised in *Wesley Smith, Anderson and Morris and Reid*) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> 98. This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *English*. What matters is

> whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in ***Chan Wing-Siu*** *to* focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.

This approach replaces the pre-***Jogee*** position in which the defendant (D2) could plead a "fundamental difference". The law concerning OSE has recently been subject to review in ***R v Grant*** **[2021] EWCA Crim 1243, [2022] QB 857** and what follows should be read in the light of that judgement.

The Court in ***Grant,*** echoing ***R v Tas*** **[2018] EWCA Crim 2603, [2019] 4 WLR 14**, emphasised the limited circumstances in which it envisaged a successful claim of OSE arising in practice. There are four things to bear in mind:

a. The court will need to carefully consider whether a claim of an overwhelming supervening event is something that should be left to the jury. It is perfectly proper for a judge to withdraw the issue if there is not sufficient evidence on which a jury could reach the conclusion that there was an overwhelming supervening event. In Tas the President of the Queen's Bench Division noted that:

> 40…It is important not to abbreviate the test articulated above which postulates an act that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". In the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.

> 41 We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgement, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency.

b. If the matter is left to the jury, the test is a narrow one and not to be diluted: an act that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history."

c. In a case of murder by the principal (D1), if D1's act is a supervening overwhelming event, consideration needs to be given to whether D2 is liable for a lesser offence and, if so, what (see ***Tas*****).**

d. Finally, in deciding whether to leave the issue to the jury, and if doing so, deciding on how to direct them, care must also be taken to avoid the issue of knowledge of a weapon, which following ***Jogee*** is no longer necessarily a central issue, being reintroduced as a matter of overwhelming supervening event. As the President of the Queen's Bench Division stated in ***Tas*** at paras 37 and 38:

> …one of the effects of *R v Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *R v Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.
>
> The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in para 96 of *R v Jogee*, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based on principle and the correct application of *R v Church* (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death

> resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self defence.

That point was reiterated in ***R v Harper*** **[2019] EWCA Crim 343, [2019] 4 WLR 39**, where the Court rejected the argument that a failure to leave OSE to the jury undermined the safety of the conviction, when that argument was based on the lack of evidence that the defendant knew that D1 had a knife when they both attacked the victim. As the President of the Queen's Bench Division stated at para 28:

> This submission ignores the thrust of *R v Jogee*. First, intention to assist in a crime of violence is not determined only by whether D2 knows what kind of weapon D1 has in his possession: see *R v Jogee* at para 98 which goes on: "Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.

For examples in this area, see pgs 7-13 to 7-18 of Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024).

Manslaughter

1. **D2's Liability for Manslaughter If D2 Did Not Intend That D1 Should Commit Murder**

If D1 murdered V in the course of a criminal venture with D2, but D2 did not intend that D1 might **intentionally** kill, D2 can be found guilty of manslaughter if the jury are sure that D2 intentionally participated in an offence in the course of which V's death was caused and a reasonable person would have realised that, in the course of that offence, some physical harm might be caused to some person (***R v Church*** **[1966] 1 QB 59, [1965] 2 WLR 1220**).

This was confirmed in the recent Privy Council decision of ***Bastian v R*** **[2024] UKPC 14, [2024] 5 LRC 222**. At para 33, the Court noted:

> It is concerned with the foreseeability of the consequences of a particular act that was intended by an accused person and whether those consequences were intended. In this ground of appeal we are concerned with the prior question whether such an act was intended by the accused person. As Mr Rule put it in his written case on behalf of the appellant, s 12(3) cannot convert an act that one accused did not intend a co-accused to commit (ie one not within an agreed common purpose) into one the accused did intend. In the case of murder the relevant mental element for a secondary party remains an intention that the principal act with an intention to kill. While s 12(3) might enlarge the circumstances in which such an intention can properly be identified, it

> does not elevate anything short of an intention that the principal act with an intention to kill to the status of sufficient alternative mens rea. In other words, before s 12(3) can have any application to a secondary party, that secondary party must be shown to have intended that the principal should act in that particular way. If it is shown that the conduct falls within the scope of the joint enterprise in this way, s 12(3) may then be relevant to the question whether the secondary party intended the consequences of that conduct. However, s 12(3) cannot fix a secondary party with liability for an act by a principal which the secondary party did not intend. It is consistent with this analysis that the reliance placed upon s 12(3) in *Farquharson* (at p 796 B-H) and in *Leon v R* (at para 31) was in relation to the intention of the principal, the shooter.

2. **D2's Liability for Manslaughter If D1 is Convicted of Manslaughter**

Where D2 and D1 participate in a crime and in the course or furtherance of that crime D1 kills V without intentionally doing so, D1 will be liable to be convicted of manslaughter if:

a. D1 intentionally performed the unlawful act.

b. The unlawful act caused V's death.

c. A reasonable person sharing D1's knowledge of the circumstances would have realized that D1's unlawful act might cause a risk of some physical harm, albeit not necessarily serious harm to V.

If there was a finding of manslaughter by D1, D2 will be guilty of it if:

a. D2 participated in the unlawful act (as a joint principal or accessory).

b. D2 was aware of the circumstances in which the unlawful act would be committed.

c. A reasonable person sharing D2's knowledge of the circumstances would have realized that D1's unlawful act might cause a risk of some physical harm to V.

D2 can also be guilty of manslaughter, irrespective of D1's liability, if D2 intentionally committed an offence that caused V's death, and a reasonable person would realize that that act might cause a risk of some physical harm to some person albeit not necessarily serious harm (***Church***).

D2 will not be liable for D1's offence if D2 and D1 have agreed on a particular victim and D1 deliberately commits the offence against a different victim.

Directions

The jury must be directed as follows:

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a. D2 is guilty of a crime committed by another person (D1), if D2 intentionally assists/ encourages/causes D1 to commit the crime (***Jogee*** at paras 8, 9, and 99).

b. If D1's crime requires a particular intention on their part, e.g. murder, this means that D2 must intentionally assist/encourage/cause D1 to commit the actus reus with the required intent.

c. Though the Prosecution must prove that D2 intended to assist/encourage/cause D1 to commit the crime concerned, they do not need to prove that D2 had any particular wish/ desire/ motive for the offence to be committed (***Jogee*** at para 91).

d. The Prosecution must prove that D2 knew about the facts that made D1's conduct criminal (J***ogee*** at para 9).

e. Where D2 does not know which particular crime D1 will commit, D2 will be guilty if they intentionally assist/encourage/cause D1 to commit one of a range of offences which D2 has in mind as possibilities, and D1 commits an offence within that range. For example, where D2 supplies D1 with a weapon to be used for a criminal purpose, D2 need not know the particular crime which D1 is going to commit (***Jogee*** at paras 10, 14, and 90).

f. It does not matter whether D1 commits the crime alone or with others.

g. D2 need not assist/encourage/cause D1 to commit the crime in any particular way e.g. by using a weapon of a particular kind (***Jogee*** at para 98).

h. It is not necessary that D2 should have met or communicated with D1 before the crime is committed.

i. D2's conduct in assisting, encouraging, or causing D1 to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with D1being present at the scene of D1's crime will not be enough. But if D2 intended by associating with D1being present at the scene to assist/ encourage/cause D1 to commit the crime e.g. by contributing to the force of numbers in a hostile confrontation, or letting people know that D2 was there to provide backup if needed, then D2 would be guilty (***Jogee*** at paras 11, 78, and 89).

j. The Prosecution does not have to prove that what D2 did actually influenced D1's conduct or the outcome (***Jogee*** at para 12).

k. The Prosecution does not have to prove that there was any agreement between D2 and D1 that D1 should commit the offence concerned (***Jogee*** at paras 17, 78, and 95).

l. Where the Prosecution alleges an agreement between D2 and D1, the agreement that D1 should commit the crime need not be formal or made in advance. It may

be spoken or made by a look or a gesture. The way in which people behave, e.g. by acting as part of a team, may indicate that they had made an agreement to commit a crime. Any such agreement would be a form of encouragement to D1to commit the crime (***Jogee*** at para 78).

m. Where the Prosecution alleges that there was an agreement between D2 and D1 to commit crime A, and in the course of doing crime A D1 went on to commit crime B, with which D2 is also charged, a direction based on the following will be appropriate:

   If D2 agrees with D1 to commit crime A, which in the course of doing D1 also commits crime B, D2 will also be guilty of crime B if D2 shared with D1 an intention to encourage or assist the commission of crime B coupled with an intention that D1 should act with the requisite mental element of crime B. For example, in the case of murder committed during the course of an armed robbery, they must be directed that nothing would suffice short of a shared intention that D1 should act intending to kill, which would include a conditional intention that D1 should act in that way if necessary if there was resistance to commit the crime of an armed robbery.

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Example 1: Dwellinghouse burglary; 1 accessory/secondary party providing assistance beforehand, the other doing so at the scene

D2 and D3 are charged with the burglary of a dwelling house with intent to steal. Neither entered the house. This was done by D1 who has pleaded guilty. The Prosecution says that D2 provided D1 with tools (jemmy, wire cutter, glass cutter and a torch), which D1 used when breaking into the house; and that D3 went to the house with D1 but stood outside as a lookout. D2 denies providing the tools used by D1. D3 says that he arrived at the house by coincidence and knew nothing of the burglary.

The law states that a person may be guilty of a crime even if the crime is actually carried out by another person. If a person intends that a crime should be committed and assists/ encourages/ causes it to be committed, that person is guilty of the crime, even if somebody else actually carries it out.

The Prosecution says that D2, D3, and D1 all played their different parts in committing this burglary and that D2 and D3 are therefore guilty even though D1 actually carried it out.

D2 will therefore be guilty of this burglary, even though D2 did not carry it out personally, if:

a. D2 provided the tools to D1, and

b. D2 intended to assist D1 (or anyone else) to carry out a burglary of some kind, and

c. D1 used the tools when breaking into the house.

The Prosecution does not have to prove that D2 knew where, when or by whom the burglary was to be committed, or that D2 had any wish/ desire that any burglary should be committed.

For the same reasons, D3 will be guilty of the burglary, even though D3 did not carry it out, if D3 intentionally helped D1 to carry out the burglary by keeping a lookout while D1 was in the house.

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Example 1: Dwellinghouse burglary; 1 accessory/secondary party providing assistance beforehand, the other doing so at the scene cont'd

Route to verdict

D2

Question 1

Are you sure that D2 provided the tools used by D1 to commit the burglary?

a. If yes, go to question 2.
b. If no, return a verdict of "not guilty" and do not consider questions 2 and 3.

Question 2

Are you sure that when D2 provided D1 with the tools, D2 intended that they would be used by D1 to commit the burglary?

a. If no, your verdict will be "not guilty".
b. If yes, your verdict will be "guilty".

D3

Question 1

Are you sure that D3 knew that D1 had entered the house as a trespasser and that when D1 did so he intended to steal property?

a. If no, your verdict will be "not guilty".
b. If yes, go to question 2.

Question 2

Are you sure that D3 intended to help D1 to commit the burglary by keeping a lookout?

a. If no, your verdict will be "not guilty".
b. If yes, your verdict will be "guilty".

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Example 2: Assault occasioning actual bodily harm - attack by three defendants - Prosecution alleged that each D was either a principal offender or an accessory/ secondary party

The Prosecution alleges that the three D's pushed V to the ground and surrounded him. V was then kicked by one or more of the Ds, but the Prosecution cannot say by which one(s). V suffered bruising to his body. Each D accepts that V was assaulted and injured, but says that, though present at the scene, he took no part in the assault.

Although the Prosecution is not able to prove which of the D's kicked and injured V, there are two ways in which one or more of them could be guilty of this charge. First, a D would be guilty if he deliberately kicked and injured V. Secondly, a D would be guilty if he deliberately helped or encouraged either or both of the other defendants to assault V.

The Prosecution says that each D is guilty either because D joined in the attack on V and must therefore either have intentionally kicked and injured V personally, or because each D deliberately helped or encouraged either or both of the others to do so.

Each says that although he was present at the scene of the attack on V, he played no part in it. Merely being present at the scene of a crime is not enough to make a defendant guilty of that crime. But if a D intends by his presence to help or encourage another to commit the crime and/ or by contributing to the force of numbers, then D may be guilty, just as those who actually carry it out are.

Route to verdict

To reach your verdicts you should answer this question separately in respect of each defendant.

Are you sure that the defendant whose case you are considering did one or both of the following two things (even if you can't be sure which it was):

a. deliberately assaulted V by kicking V; or
b. deliberately helped or encouraged one or both of the other Ds to assault V?

If the answer is "Yes, we are sure that D did do one of those things", your verdict will be "guilty".

If the answer is "no, we are not sure that D did either of these things", your verdict will be "not guilty".

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Example 3: Householder assaulted during a burglary, D being an accessory/ secondary party

D2 is charged in count 1 with a dwelling house burglary with intent to steal, and in count 2 with assaulting V, the householder, causing V actual bodily harm. D2 did not enter the house or assault V himself. This was done by D1 who punched and injured V when V discovered and challenged D1 inside the house. It is agreed that D2 was outside keeping watch when D1 assaulted V. D1 has pleaded guilty to both counts. D2 has pleaded guilty to count 1 (burglary) and not guilty to count 2 (causing harm).

The Prosecution alleged that when D2 and D1 arrived at the property the lights were on and it would have been obvious that the property was occupied and that those inside would react if someone broke in and that violence would be used by D1. D2, on the other hand, said in evidence that they parked around the corner from the house and D2 believed the property they planned to burgle had no one home. D2 denied that the idea D1 might assault someone in the house had even occurred to him.

It is possible for a person to be guilty of a crime even if it is carried out by someone else. If D2 intended that D1 would, if D1 thought it necessary, use force on the householder to carry out the burglary, then D2 would also be guilty of that charge even though he was outside the building when the assault happened. The Prosecution invites you to draw that inference from the facts of this case. D2 denies that he intended that D1 should assault anyone in the house that might discover D1 committing the burglary. If that is right, or if it might be right, then D2 has no criminal responsibility for D1's action in assaulting V.

Route to verdict

Are you sure D2 intended that D1 should, if D1 thought it necessary, use unlawful force against any of the occupants of the house they agreed to burgle should D1 be discovered in the act of burglary?

a. If yes, your verdict will be "guilty".
b. If no, your verdict will be "not guilty".

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Example 4: Murder/Manslaughter

D2 accepts that he and D1 took part in a joint attack on V, punching and kicking V. V fought back, whereupon D1 produced a knife, stabbed V once in the chest, and killed V. D1 has pleaded guilty to murder (count 1). D2 has pleaded not guilty to murder (count 1) and manslaughter (count 2), but guilty to assault occasioning actual bodily harm (count 3). D2 denies that he intended to kill. D2 further denies knowing that D1 had any such intention. D2 also contends that he did not know that D1 had a knife.

In law, it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else, if he participates by assisting in the commission of that crime.

D2 accepts taking part in an attack which caused V some injury. D2 would be guilty of murder if D2 personally took part in the attack with the intention of killing V. D2 would also be guilty of murder if he intentionally assisted or encouraged D1 to attack V intending that D1 should kill V.

In considering whether the Prosecution has made you sure D2 had the necessary intention you should consider all the circumstances, including the level of violence in which D2 took part, whether D2 knew that D1 had a knife, and what if anything they had agreed about their attack on V. D2's knowledge or ignorance of whether D1 was carrying a knife will be evidence going to what D2's intention was and it may be strong evidence one way or the other, but it is not necessarily conclusive in deciding whether D2 was guilty. For D2 to be liable for murder the Prosecution has to have made you sure that D2 intended that V should be killed, or D2 intended that D1 would intentionally kill V.

You would only go on to consider the alternative charge of manslaughter if you found D2 not guilty of murder.

D2 would be guilty of manslaughter if the Prosecution made you sure that D2 participated in the attack on V by intentionally doing acts to assist D1 in that attack; and that a reasonable person would realize the attack carried the risk of some harm to V which was not necessarily serious, and death in fact results from that.

The Defence's case is that the sole cause of V's death was the act of D1 in stabbing V, which was no part of D2's admitted assault upon V which caused the injury. As with the charge of murder, D2's knowledge or ignorance about whether D1 was carrying a knife may be an important factor that you will want to consider but it is not the deciding factor. You will take account of your conclusions about the knife in the context of all the evidence in this case.

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Example 4: Murder/Manslaughter cont'd

Route to verdict

Question 1

Are you sure that D2 did acts to assist and intended to assist D1 to attack V?

a. If no, then return a verdict of "not guilty" on count 1 [murder] and count 2 [manslaughter].
b. If yes, go to question 2.

Question 2

Are you sure that D1's act of stabbing V was **not** an overwhelming supervening act that nobody in D2's shoes could have contemplated might happen?

a. If no, then return a verdict of "not guilty" on count 1 [murder] and count 2 [manslaughter].
b. If yes, go to question 3

NOTE: this direction will not arise in every case, and its potential significance will be fact specific and should be discussed with the parties. If the issue of some potential supervening act arises in a case, there will need to be some further explanation provided to the jury in order to put the route to verdict in context.

Question 3

Are you sure that D2 intended that V would be killed or that D1 would intentionally kill V?

a. If yes, return a verdict of "guilty" on count 1 [murder] and you need not consider count 2 [manslaughter].
b. If no, then return a verdict of "not guilty" on count 1 and go on to question 4.

Question 4

Are you sure that D2 participated in the attack on V by intentionally doing acts to assist D1 in the attack upon V and that a sober and reasonable person would realize the attack carried the risk of some harm to V which was not necessarily serious, and V's death resulted from that attack?

a. If yes, return a verdict of "guilty" on count 2 [manslaughter].
b. If no, return a verdict of "not guilty".

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Withdrawal from Joint Criminal Activity

A secondary party may, exceptionally, rely on the fact that they have withdrawn from the criminal venture prior to D1's acts (***R v Mitchell* (1998) 163 JP 75, [1999] Crim LR 496**).

What constitutes effective withdrawal depends on the circumstances of the case, particularly the extent of D2's involvement and proximity to the commission of the offence by D1. See ***R v Grundy* [1977] Crim LR 543** (effective withdrawal weeks before burglary) and ***R v Becarra* (1975) 62 Cr App Rep 212** (nothing less than physical intervention to stop people committing the violent crime they were engaged in).

It is certainly not sufficient that D2 merely changed their mind about the venture. D2's conduct must demonstrate unequivocally (***R v O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App Rep 315** at para 58) D2's voluntary disengagement from the criminal enterprise (***R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592**).

In addition, D2 must communicate to D1 (or by communication with the law enforcement agency) their withdrawal and do so in unequivocal terms unless physically impossible in the circumstances (***R v Robinson* [2000] EWCA Crim 8**). This requirement for timely, effective, unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal (***Robinson***; ***Mitchell and King***)

In a case in which the participants have engaged in spontaneous violence, in practice, the issue is not whether there had been communication of withdrawal, but whether a particular defendant clearly disengaged before the relevant injury or injuries forming the allegation were caused. In some instances, D2 throwing down their weapon and walking away **may** be enough. Whether D2 is still a party to a crime is a question of fact and degree for the jury to determine. Where D2 is one of the instigators of the attack, more may be needed to demonstrate withdrawal (***R v Gallant* [2008] EWCA Crim 1111**).

A judge need not direct on withdrawal in every case e.g. it is unnecessary where D denies playing any part in the criminal venture (***Gallant***).

It is not necessary for D to have taken all reasonable steps to prevent the crime, although clearly it should be a sufficient basis for the defence.

Directions

a. Any direction on withdrawal from assisting or encouraging is likely to be highly fact specific. The need for and form of any such direction should therefore be discussed with Counsel in the absence of the jury before closing speeches.

b. Subject to this, it will usually be appropriate to direct the jury as follows:

i. The law provides that a person can withdraw from involvement in a crime only if strict conditions are met.

ii. The person must, before the crime has been committed:

- conduct themselves in such a way as to make it completely clear that they had withdrawn, and
- if there is a reasonable opportunity to do so, inform one or more of the others involved in the enterprise/ a law enforcement agency (as appropriate) in clear terms that they have withdrawn.

c. Against that backdrop, it is for the jury to decide whether, in the circumstances of the case, D2 did (and said) enough and in sufficient time to make an effective withdrawal from the enterprise. If D2 did or may have done so, the verdict will be "not guilty". If D2 did not, the verdict will be "guilty" if all the elements of the offence were proved against D2.

d. Circumstances to be taken into account would include (as appropriate):

i. The nature of the proposed joint crime

ii. D2's anticipated role in the proposed crime

iii. What, if anything, D2 had already done to further the proposed crime

iv. The time at which D2 sought to withdraw

v. What D2 did to indicate withdrawal

vi. Whether D2 had any reasonable opportunity to inform anyone else that they were withdrawing; and, if so

vii. how and when D2 took that opportunity

Briefly summarize the parties' cases on these issues.

Useful Cases

Some useful cases which provide further guidance are as follows:

a. ***Gibson v R*** **(The Bahamas CA, SCCrApp No 204 of 2016, 15 October 2018)**

b. ***Forbes v R; Stubbs v R*** **(The Bahamas CA, SCCrApp Nos 272 of 2018 and 73 of 2019, 14 September 2021)**

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c. ***Edwards v DPP; Burrows v DPP*** **(The Bahamas CA, SCCrApp Nos 144 of 2020 and 96 of 2021, 7 July 2022)**

d. ***Davis v R*** **(The Bahamas CA, SCCrApp No 42 of 2017, 7 August 2018)**

e. ***Brown v R*** **(The Bahamas CA, SCCrApp No 99 of 2012, 29 July 2015)**

Example: Withdrawal from Joint Attack

NOTE: In this example the only substantial issue was whether or not D3 had withdrawn from the attack on V.

D1, D2 and D3 are all charged with causing grievous bodily harm, which means really serious injury to V, with intent to do so. Witnesses called by the Prosecution have said that all three defendants punched and kicked V and then ran away together, leaving V seriously injured on the ground.

You know that D1 and D2 have pleaded guilty. D3 has pleaded not guilty. D3 admits that he had been part of a plan, with D1 and D2, to cause really serious injury to V, but D3 says that he withdrew/backed out before the crime was committed. D3 says that just as the attack was about to begin, he shouted "leave it" to the others and then stood back while they attacked V.

If you are sure that the Prosecution witnesses are telling the truth, you would be bound to conclude that D3 was as guilty as D1 and D2. But what if you thought that D3's account was or might be true?

The law provides that a person who joins a plan to commit a crime can withdraw/ back out of it, but only if, before the crime has been committed, he does or says something to make it clear that he has backed out.

So, if you decide that D3 did do or say something to suggest that he had withdrawn/ backed out, or may have done so, you will have to consider when this happened.

If D3 did not do or say anything until V had already suffered really serious injury that would be too late. The crime would already have been committed and D3 would be guilty of it.

But if you decide that D3 did do or say something, or may have done so, before V had suffered really serious injury, you will have to decide whether what D3 did or said was enough to make it clear that he had backed out. If you think it was, or may have been, your verdict would be "not guilty". Otherwise, it would be "guilty" (assuming of course that you were sure that D3 had, with the others and intentionally, caused V really serious injury).

Chapter 8 – Joint Enterprise

Example: Withdrawal from Joint Attack cont'd

On the question of withdrawing or backing out:

a. the Prosecution says [specify];
b. the Defence says [specify].

Route to verdict

Because D3 admits that he had planned with D1 and D2 to cause really serious injury to V and that V suffered really serious injury when V was attacked, the questions for you to answer are as follows:

Question 1

Are you sure that:

a. D3 took part in the attack on V; **and**
b. D3 intended that V should suffer really serious injury?

If yes, your verdict will be "guilty" and do not answer questions 2 to 4.

If no, go to question 2.

Question 2

At any time did D3 do or say, or may have done or said, anything to suggest that he had withdrawn from the plan to cause really serious injury to V?

a. If yes, go to question 3.
b. If no, your verdict will be "guilty" and do not answer questions 3 and 4.

Question 3

Did D3 do or say this, or may have done or said this, before V had suffered really serious injury?

a. If yes, go to question 4.
b. If no, your verdict will be "guilty" and do not answer question 4.

Chapter 8 – Joint Enterprise

Example: Withdrawal from Joint Attack cont'd

Question 4

Did D3 do or say enough, or may have done or said enough, to make it clear that he had withdrawn from the plan to cause really serious injury to V?

a. If yes, your verdict will be "not guilty".
b. If no, your verdict will

Chapter 9 – Identification Evidence

In this Chapter: **General Scope | Visual Identification | Identification Parade | Identification by Finger and Other Prints | Identification by Voice | Identification by DNA**

Identification evidence is central to a criminal trial. It is used to identify the person who is alleged to have committed a crime and can be integral to the Prosecution's case. It includes evidence given by a victim or a witness and covers other ways of identifying suspects. There are several different types of identification evidence, and the following are discussed in this chapter: visual identification, identification parades, identification from CCTV and other visual images, identification by finger and other prints, identification by voice, and identification by DNA. The reliability of identification evidence is critical and certain types of evidence may generally be considered more reliable than others, e.g. fingerprint and DNA evidence, which nevertheless must also meet certain legal standards.

General Scope

The Royal Bahamas Police Force Standing Orders of 2004, Section F12 at para 5 set out five possible identification procedures:

a. Identification Parades

b. Street Identification

c. Identification by Fingerprints

d. Identification by photographs; and

e. Identification by body samples, swabs and impressions

Visual Identification

The basic principle is the special need for caution when the issue turns on evidence of visual identification. The risk of honest but mistaken visual identification of suspects is well established and requires investigators to comply with the Judges' Rules and the guidelines set out in ***R v Turnbull*** **[1977] QB 224, [1976] 3 WLR 445**. It has therefore been said that ***Turnbull*** is intended primarily to deal with the "ghastly risk" in cases of fleeting encounters (Lord Widgery CJ in ***R v Oakwell*** **[1978] 1 WLR 32, [1978] 1 All ER 1223** and also ***R v Pattinson*** **(1996) 1 Cr App Rep 51** . The rule is equally applicable to police witnesses: ***R v Reid*** **[1990] 1 AC 363, (1989) 37 WIR 346**.

Chapter 9 – Identification Evidence

The summing-up in such cases must not only contain a warning, but must also expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.

As the Jamaican Court of Appeal indicated, "Trial judges are not bound to any form of words, but they have a duty to recount the evidence with accuracy, to present the defence fully and fairly, and to have regard to the decisions of [the Court of Appeal]." Further, in directing the jury on the issue of visual identification, "the significance of the strengths and weakness" of that evidence must be pointed out: ***R v Thompson*** **(1986) 23 JLR 223** (Jamaica CA, 3 June 1986) at 226.

The requirements of a ***Turnbull*** direction are as follows:

a. There is a special need for caution when the case against the defendant depends wholly or substantially upon the correctness of a visual identification.

b. The reason for caution is experience that a witness who is genuinely convinced of the correctness of their identification, may be impressive but mistaken. This may be so even when a number of witnesses make the same identification.

c. The jury should examine the circumstances in which the identification (by each witness) came to be made. There are two elements to these circumstances, both of which go to the reliability of the identification:

    i. The opportunity to register and record the features of the suspect:

        - How long was the suspect under observation?
        - At what distance?
        - In what light?
        - Was the observation impeded in any way and, if so, what way?
        - Had the witness seen the defendant before (i.e. was this recognition?) and, if so, how often and in what circumstances? (e.g. how often? If occasionally, whether there was any special reason for remembering the defendant).

    ii. The reliable recall of those features when making the identification:

        - What period elapsed between the original observation and the subsequent identification?

- Was there any material difference between the description given by the witness at the time of identification and the suspect's actual appearance?

- Are there any other circumstances emerging from the evidence which might have affected the reliability of the identification (e.g. press photographs, conversations with others)?

Weaknesses

a. Any specific weaknesses in the identification should be identified (e.g. fleeting opportunity, bad light, speed of incident, photographs inadvertently viewed).

b. Evidence capable (and, when necessary, not capable) of supporting the identification should be identified.

c. If the defence is alibi, the jury should be directed that if the alibi is rejected it does not (or may not) follow that the defendant committed the offence, because a false alibi may be constructed for reasons other than guilt (e.g. because an alibi is easier to present than the true defence).

d. The treatment of visual identification evidence where there is a failure to hold an identification parade has been discussed in the context of the United Kingdom's **Police and Criminal Evidence Act 1984 (PACE),** specifically Code D (Codes of Practice promulgated by the Secretary of State under s 66 of the Act. In the case of ***R v Forbes*** **[2001] 1 AC 473, [2001] 1 All ER 686** the Court noted that if the judge admits the evidence notwithstanding a breach of Code D), they should explain how the breach may affect the jury's consideration of the evidence. In ***Forbes,*** V recognised his assailant in the street. No identification parade was held. The Appellate Committee said at para 27:

> In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The Court of Appeal has so ruled on many occasions, and we approve those rulings: see, for example *R v Quinn* [1995] 1 Cr App R 480, 490F. The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required....., the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has

> been an identification parade with the consent of the suspect, and the eye-witness has identified the suspect, in circumstances involving no breach of the code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also wish to alert the jury to the possible risk that the eye-witness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.

Identification from Visual Images by a Witness who knows D and so is able to Recognise Them

a. When the Prosecution relies both upon the evidence of a witness who recognizes D and the jury's own ability to compare the photographic evidence with D in person, the jury may be directed that the evidence and their own examination can be mutually supportive **(*Bullard v DPP* (The Bahamas CA, SCCrAPP No 123 of 2021, 30 November 2022))**.

b. Moreover, CCTV or surveillance footage has the advantage of allowing a person to view it multiple times and from multiple angles, such that it can effectively make a fleeting glance more akin to a case of recognition (***Bullard v DPP*** at para16).

c. However, the jury should be reminded of the danger that nevertheless, several witnesses can make the same mistake. In ***R v Ali*** **[2008] EWCA Crim 1522, [2009] Crim LR 40** at paras 34 and 35: (1) the Court of Appeal doubted that the image from which a police officer purported to recognize the suspect was of sufficient quality to permit recognition (the face was partially obscured), (2) doubted that the police officer's recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition.

Chapter 9 – Identification Evidence

Example: Identification from Visual Images
You do not have any evidence from a witness who was at the scene at the time of this incident. However, you have heard from officer Deveaux that he downloaded surveillance footage from a DVR system at Rockers Bar. As it was played in court, it depicts the events of that evening leading up to the shooting of V. It is from this footage that W, the owner of Rockers Bar who knows D and who has watched the footage taken from his business, is saying that he saw the footage and he immediately recognized the person shown on it as D. The Prosecution's case is that the person who shot V is the defendant, D. You have been able to observe D in court over the past two weeks. You are invited by the Prosecution to make a comparison between all of these images from the video, the 12-man photo lineup and D in person and to conclude that they are one and the same person. This is an exercise in identification for which there is a special need for caution. The reason is that it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several persons can make the same mistake in identification, even of somebody known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out that you are misled by the similarity in appearance between two completely different persons. Here you are not being asked if you recognize someone you know. You are being asked by the Prosecution to make a comparison between images from a video and the physical features of a person who was, until this trial, a total stranger to you. I must tell you then, the reliability of the comparison will depend first on the quality of the images. From the evidence, they are all captured at night with night vision cameras. The lighting from the building and streetlights were quite good, and the images were reasonably clear. They are not, however, as clear as they would have been if they were daylight views of the persons, and two-dimensional. The first question you have to consider is whether these images are of sufficient quality to make any comparison with the defendant, D. If you are not sure they are, then you should abandon the exercise altogether. If on the other hand, they are of sufficient quality, then you have the further advantage of being able to make your comparison in your own time, and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter. As you consider the quality of the footage you should take account of these points [specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour/monochrome, constant/ intermittent, lighting, obstruction(s)]

Chapter 9 – Identification Evidence

Example: Identification from Visual Images cont'd
Finally, you have D in person, giving you a three-dimensional view of the contours of his head and face. You will need to consider whether his features, both of build and facially, common to the assailant on the video and D on the other hand, are sufficiently unusual in combination to remove the possibility of coincidence. What you have is the ability to search for any features of the assailant on the video which you do not find in D and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both. If having considered all the evidence you are sure that the person shown in the video footage of 1st of February 2019 retrieved from Roker's Bar is D, you can move on to consider whether he committed the offence of murder charged in this indictment.

Identification of Strangers and Recognition

Where the substantial issue in a case is the credibility of an identifying witness, a general warning must be given by the trial judge to the jury concerning the danger of relying on identification evidence; such warning is as important where the case is one concerning recognition, as it is in cases concerning the identification of a stranger. The failure to give any such warning will nearly always by itself be fatal to a conviction based on identification evidence: ***Beckford v R* (1993) 42 WIR 291, [1993] 1 LRC 879**; ***Pop v R* [2003] UKPC 40**, **(2003) 62 WIR 18**.

The need to give the general warning, even in recognition cases where the main challenge is to the truthfulness of the witness, should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is 'Yes', the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, are they right or could they be mistaken? Of course, no rule is absolutely universal: ***Beckford***.

Identification Parade

The normal function of an identification parade is to test the ability of the witness to identify the person seen on a previous occasion and to provide safeguards against mistaken identification.

Unlike a confrontation or a dock identification, a parade can confirm the witness' ability to pick out the person identified (***Watt v R* (1993) 42 WIR 273, [1993] 1 LRC 860**). Failure to hold a parade does not necessarily result in a serious miscarriage of justice, provided that the trial judge adequately directs the jury (***Goldson v R* (2000) 56 WIR 444, [2000] 4 LRC 460**). However, there ought to be an identification parade where it would serve a useful purpose: ***R v Popat* [1998] 2 Cr App Rep 208, [1998] Crim LR 825**. In ***R v Fergus* [1992] Crim LR 363**, the witness claimed only to have seen the defendant once

and to have heard his name from someone else. An identification parade should have been held.

However, where it is not practicable to hold one, or where it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, an identification procedure need not be held: ***Archbold 2011*** at paras 14 – 29, 14 – 33.

The Trinidad and Tobago ***Criminal Bench Book 2015***, at pgs 92 – 93, provides a useful summary of authorities as follows:

> In **Marlon G John v The State CA Crim No 39 of 2007** Weekes JA stated:
> **Guidance to Trial Judges on Appropriate Directions with respect to Identification Parades**:
>
> 42. **After giving the appropriate directions from *R v Turnbull* with assistance on the relevant evidence, the judge was required to deal with the issue of the challenged identification parade, first explaining the reason for an identification parade and pointing out to the jury that it was for them to decide whether it had been fair. The jury would have to be alerted to the consequences of each finding. If they found that it was fair, they could find that it supported and strengthened the identification of the appellant by the witnesses. However, if they were unsure whether it was fair or found that it was unfair, the appellant would have lost the benefit of the safeguard provided by a fair parade and they must take that into account in assessing the whole case and give it such weight as they think fit. Additionally, they had to be told that in the circumstances, the identification of the accused in the dock was of no value whatsoever for the purposes of supporting the identification of the accused. They must be told in the clearest of terms that their assessment of the correctness of the identification rests solely on the observations made by the witnesses on the scene since the ability of the eye witnesses to recognise their assailant had not been tested**.
>
> 43. **The judge then had to go on to put the issue into the context of the whole history of the matter and would have been obliged to then point out the evidence, other than that of identification, which was capable of proving/supporting the State's case against the appellant**.
>
> 44. While the jury was not adequately assisted on the issues pertinent to the identification parade, when we consider the totality of the State's case against the appellant, we are satisfied that even if an adequate direction had been given, the jury would have indubitably come to the same conclusion. The evidence against the appellant was, to put it mildly, overwhelming. The

> circumstances of observation on the scene gave the witnesses, in particularly, M, an excellent opportunity to see the accused, in particular his face, in favourable lighting conditions for an extended period of time and in close proximity. In fact, it could be said in respect of M, that there had been "a full and complete identification at the scene". There was also the circumstantial evidence of the items recovered by the police during the execution of the search warrant which linked the accused to the events of the offences and further, there was the evidence of the oral and written admissions. When looked at in the context of all of the evidence against the appellant, the judge's error is not fatal to the convictions.

In **Dwayne Vialva v The State CA Crim No 33 of 2008** the Court of Appeal summarised the guidelines for the holding of an identification parade as stated in the Judges' Rules: 'In a case which involves disputed identification evidence, a parade shall be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers it would be useful.'

In **John v The State [2009] UKPC 12** the Privy Council enumerated three situations in which an identification parade would be useful, namely:

i. where the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw them commit the crime (or saw them in circumstances relevant to the likelihood of their having done so);

ii. where the suspect and the witness are not well known to each other and neither of them disputes this;

iii. when the witness claims to know the suspect but the suspect denies this.

Where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade: See **Pipersburgh [2008] UKPC 11** (Belize).

The Trinidad and Tobago ***Criminal Bench Book 2015*** also provides useful guidelines on the application of the Judges' Rules at 94 – 95 and the Illustration at 96 – 100.

Notes

a. An identification parade is the preferred procedure and must be held if the suspect asks for one and it is practicable to hold one (The Royal Bahamas Police Force Standing Orders of 2004, Section F12 at para 6). If the suspect refuses or, having agreed, fails to attend an identification parade, or if the holding of a parade is

impracticable, arrangements must, if practicable, be made to allow the witness an opportunity of seeing the suspect in a group of people (s F12 at para 9).

b. If neither a parade nor a group identification procedure is arranged, the suspect may be confronted by the witness. Such a confrontation does not require the suspect's consent, but may not take place unless neither a parade nor a group identification is practicable, whether because the suspect has withheld their consent to them or their cooperation, or for some other reason (s F12 at para 10).

c. A witness must not be shown photographs or similar pictures for identification purposes, if there is a suspect already available to be asked to stand on a parade, or participate in a group identification.

d. A police officer may take a witness to a particular neighbourhood or place to observe the persons there, to see whether the witness can identify the person whom the witness said they saw on the relevant occasion. While this procedure refers to a witness being taken to a particular location in order to identify a suspect, on no account will a suspect be taken to a witness or group of witnesses to be identified in this way (s F12 at para 35).

e. Breach of the procedures provided by the rules does not automatically render a subsequent identification inadmissible. However, an application may be made pursuant to s 178 of the Bahamas Evidence Act, **Chapter 65** to have evidence excluded on the basis of having been unfairly obtained having regard to all of the circumstances of the case **(see *Johnson v R* (The Bahamas CA, SCCrApp Nos 125 of 2016 and 3 of 2018, 6 December 2019))**.

f. Where the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification **(*R v Turnbull* [1977] QB 224, [1976] 3 WLR 445; *R v Fergus* [1994] 98 Cr App Rep 313, (1993) 158 JP 49)**. The identification evidence can be poor, even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance, or a longer observation made in difficult conditions **(*R v Brown* (2001) 62 WIR 234)**. Where, however, the quality is such that the jury can safely be left to assess its value, even though there is no other evidence to support it, the trial judge is entitled (if so minded) to direct the jury that an identification by one witness can constitute support for the identification by another, provided that the judge warns them in clear terms that even a number of honest witnesses can all be mistaken: see ***R v Weeder* (1980) 71 Cr App Rep 228** and ***R v Breslin* (1984) 80 Cr App Rep 226**. The judge should identify the evidence they regard as capable of supporting the evidence of identification.

g. In ***Charlton v COP* (The Bahamas CA, MCCrApp No 109 of 2022, 10 November 2022)**, three people were stopped by the police. One of the individuals exited the vehicle and threw an object which was discovered to be a firearm. The officer

didn't catch the person, but an individual subsequently arrested was identified by the officer as the Appellant. The Court noted the evidence at the close of the Prosecution's case, that the Appellant was said to have looked back for 2-3 seconds and according to the officer, this was not the first time that the officer would have seen the Appellant. However, no identification parade was done (nor any other form of independent identification) and the Appellant was merely identified in the dock during the course of the trial. The Court noted the ***Turnbull*** requirements and highlighted what would be considered identification evidence of good quality, quoting ***Turnbull*** at pg 229:

> …In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it…

And further noted what would be considered identification evidence of bad quality, quoting ***Turnbull*** at pgs 229 - 230:

> When, in the judgement of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification...

h. Their Lordships in ***Charlton*** at para 17 opined that, "the fact that the identification witness was a police officer did not negate the need for an identification parade. The magistrate's observation in his judgement that the failure to hold an identification parade did 'no real damage to the identification' is, in our judgement, simply wrong."

i. Similarly, in ***R v Etienne*** **(1990) The Times, 16 February**, the Court was not at all sure that previous sightings of the suspect could render the identification more reliable if the identification was, on any view, an identification amounting to no more than a fleeting glimpse recognition. The Court was left with a lurking doubt as to the safety of the conviction.

j. In a case involving identification by recognition, the judge should remind the jury that mistakes in recognition, even of close friends and relatives, are sometimes made. In a recognition case, the risk is not that the witness will pick out the wrong person on a parade, but rather that at the time of the offence they mistakenly think they recognize the offender.

Chapter 9 – Identification Evidence

Directions

a. When the case turns wholly or substantially on visual identification, i.e. when it turns substantially on the correctness of one or more identifications of the defendant which the Defence alleges to be mistaken, the judge should warn the jury of the special need for caution.

b. In addition, the judge should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

c. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made, which include:

   i. How long did the witness have the defendant under observation?

   ii. At what distance?

   iii. In what light?

   iv. Was the observation impeded in any way, as for example by passing traffic or a press of people?

   v. Had the witness ever seen the defendant before?

   vi. How often?

   vii. If only occasionally, had the witness any special reason for remembering the defendant?

   viii. How long elapsed between the original observation and the subsequent identification to the police?

   ix. Was there any material discrepancy between the description of the defendant given to the police by the witness when first seen by them and the defendant's actual appearance?

   x. Finally, the judge should remind the jury of any specific weaknesses which had appeared in the identification evidence. E.g.:

      - The fact that an incident was unexpected/ fast moving/ shocking or involved a (large) number of people so that the identifying witness was not observing a single person.

      - Anything said or done at the identification procedure including any breach of the Judges' Rules.

xi. Particular care is needed if the defendant's case involves an alibi

d. When a factor is identified, all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly, but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in Turnbull's case and at a later time, to read to them the evidence of the witnesses (see ***Fuller v The State*** **(1995) 52 WIR 424** at para 24).

e. Where more than one witness gives evidence of identification, the jury should be told that they must consider the quality of each witness' evidence of identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as the jury are alive to this risk, they are entitled to use one witness' evidence of identification, if they are sure that that witness is honest and independent, as some support for evidence of identification given by another witness.

f. In every case, the direction must not only be tailored to the evidence but also to the arguments raised by the parties in respect of that evidence.

Example
I must warn you of the special need for caution before convicting D. There is a special need for caution before convicting the defendant on the identification evidence alone. The need for warning you is because it is possible for an honest witness to make a mistake on identification. There have been wrongful convictions in the past on mistaken identity; even an apparent honest witness can be mistaken. And as I have said W's is the only evidence as to the identification of the person who was seen in the attack which led to the injuries that resulted in the death of V. Now, even though identification involves recognition by W of D, as someone he knows, mistakes in recognition even by family and friends sometimes are made. Even though W says that he knows D you must examine very carefully the circumstances in which the identification is made and in considering whether you can rely on that evidence, you must ask yourself the following questions: Firstly, how long did W have D under his observation? W stated that they observed D on top of V for about 5 minutes or more. So, you may very well find the evidence that it is an observation of several minutes. How long did W have D in their observation? The totality of the observation and then the portion relative to the attack itself? W talked about seeing D that night inside the bar for about an hour before observing D in the attack in which V was killed, which lasted for 5 minutes. At what distance was the observation?

Chapter 9 – Identification Evidence

Example cont'd

Again, the critical issue for you is what was his proximity at the time of the incident? So, let us go to the evidence of W. He talked about observing D in the parking lot with others, from his balcony while D was in the parking lot. He pointed out on the photographs where D was and where he was standing when he observed D attack V. If you accept that evidence, you may find from it that he was a short distance away, but that is a matter for you. However, the Defence highlights that W was on the third-floor balcony when he purportedly made certain observations and says that therefore his evidence is unreliable because perhaps, he was too far away to see D and what was really going on.

In what lighting conditions was this observation made? Counsel asks you to look at all of the evidence of the witnesses with the parking lot at night. It was sometime after 10:00 pm so that's nighttime and any lighting would be artificial lights. W indicated that light was coming from the balcony and the streetlights, and he also pointed out on the photos the lighting apparatus on the balcony. Did anything impede W's observation? Now, again W says he was in close proximity to D and that nothing obstructed his view. The next question to consider is, has W ever seen D before? Again, from W's evidence, he said he had seen D on numerous occasions at the bar before the night this incident occurred.

The next question is how long was it between the observation and the identification to the police? The evidence of W was that he attended CDU and identified D in a photo lineup the following evening.

So, you consider all of those questions because these questions go to the quality of the identification. If you consider that the quality of the identification is good and remains good throughout then you may convict upon it, even if there is no other evidence to support it. Consider whether the identification evidence from W is such that you can be satisfied, so that you are sure that it was D who stabbed and unlawfully killed V. If you have any reasonable doubt on the evidence of W then you are obliged to acquit D.

Identification by Finger and Other Prints

A match by an expert of fingerprint impressions left at the scene of the crime with the defendant's fingerprint impressions, has been admissible in evidence for at least one hundred years. In ***R v Buckley*** **(1999) 163 JP 561**, the Vice-President, Rose LJ, described the history of fingerprint standards and gave guidance on current minimum requirements:

> It has long been known that fingerprint patterns vary from person to person and that such patterns are unique and unchanging throughout life. As early as 1910 in *R v Castleton* 3 Cr App R 74, a conviction was upheld which depended solely on identification by fingerprints. At that time there were no set criteria or standards. But, gradually, a numerical standard evolved and it

became accepted that once 12 similar ridge characteristics could be identified, a match was proved beyond all doubt.

In 1924, the standard was altered by New Scotland Yard, but not by all other police forces, so as to require 16 similar ridge characteristics. That alteration was made because, in 1912, a paper had been published in France by a man called Alphonse Bertillon. It was on the basis of his paper that the 16 similar ridge characteristics standard was adopted. However, in recent times, the originals of the prints used by Bertillon have been examined and revealed conclusively to be forgeries. It is therefore apparent that the 16 point standard was adopted on a false basis.

Meanwhile, in 1953, there was a meeting between the then Deputy Director of Public Prosecutions, officials from the Home Office and officers from several police forces, with a view to agreeing on a common approach. As a result, the National Fingerprint Standard was created, which required 16 separate similar ridge characteristics.

It is apparent that the committee were not seeking to identify the minimum number of ridge characteristics which would lead to a conclusive match, but what they were seeking to do was to set a standard which was so high that no one would seek to challenge the evidence and thereby, to raise fingerprint evidence to a point of unique reliability.

At the same time, a National Conference of Fingerprint Experts was established to monitor the application of the standard. Shortly afterwards, there was an amendment to the standard, to provide that, where at any scene there was one set of marks from which 16 ridge characteristics could be identified, any other mark at the same scene could be matched if ten ridge characteristics were identified. Logical or otherwise, that system operated for many years.

During the passage of time, there have, of course, in this area, as in the realms of much other expert evidence, been developments in knowledge and expertise. Of course, in practice, many marks left at the scene of a crime are not by any means perfect; they may be only partial prints; they may be smudged or smeared or contaminated. However, a consensus developed between experts that considerably fewer than 16 ridge characteristics would establish a match beyond any doubt. Some experts suggested that eight would provide a complete safeguard. Others maintained that there should be no numerical standard at all. We are told, and accept, that other countries admit identifications of 12, 10, or eight similar ridge characteristics and, in some other countries, the numerical system has been abandoned altogether.

In 1983, there was a conference which recognised that all fingerprint experts accepted that a fingerprint identification is certain with less than the current

standard of 16 points of agreement. It was also recognised that all experts agreed that there should be a nationally accepted standard, which should be adhered to in all but the most exceptional cases. The Conference recognised that there would be rare occasions where an identification fell below the standard, but the print was of such crucial importance in the case that the evidence about it should be placed before the Court. Therefore the conference advised that, in such extremely rare cases, the evidence of comparison should be given only by an expert of long experience and high standing.
It was this approach which led to the trial judge in R v Charles (unreported, Court of Appeal (Criminal Division) transcript of 17th December 1998) admitting evidence of 12 similar ridge characteristics. That was a decision, in the exercise of his discretion, which was upheld in the face of challenge in this Court. In the course of giving the judgement of the Court on that occasion, the Lord Chief Justice, Lord Bingham of Cornhill, said this at 9E of the transcript, by reference to the evidence of factual match with the defendant's print:

> 'It was not suggested that there were differences between the two prints being compared; nor was it suggested that the similarities on which he relied did not exist. It was not, in other words, any part of the appellant's case that the prints did not match. Nor was any contradictory evidence of any kind adduced at the trial. The appellant did not call a fingerprint expert who disagreed with anything that Mr Powell said'.

The learned Lord Chief Justice went on to refer to the expert's opinion evidence that the relevant print was made by the defendant. The expert:

> '...relied on the comparison between them, on the similarities and absence of dissimilarities, on his professional experience during a long career, and on his expert knowledge of the experience of other experts as reported in the literature. He concluded that the possibility of the disputed print and the control prints being made by different people could in his judgement be effectively ruled out. In cross-examination... he agreed that he was expressing a professional opinion and not a scientific conclusion'.

It is further to be noted that in *R v Giles*, (unreported, Court of Appeal (Criminal Division) transcript, dated 13th February 1988) a differently constituted division of this Court over which Otton LJ presided, refused a renewed application for leave to appeal against conviction. The trial judge's exercise of discretion, in admitting evidence of one print of which there were 14 similar characteristics and of one with only eight similar characteristics, was not regarded as being the subject of effective challenge.

Chapter 9 – Identification Evidence

It is pertinent against that background to refer to current developments so far as fingerprint experts are concerned. It was recognised that, in view of the 1983 concessions to which we have referred, the 1953 standard was logically indefensible. In 1988, the Home Office and ACPO (The Association of Chief Police Officers) commissioned a study by Drs Evett and Williams into fingerprint standards. They recommended that there was no scientific, logical or statistical basis for the retention of any numerical standard, let alone one that required as many as 16 points of similarity.

In consequence, ACPO set up a series of committees to consider regularising the position and to ensure that, if fingerprint identifications based on less than 16 points were to be relied upon, there would be clear procedures and protocols in place to establish a nationwide system for the training of experts to an appropriate level of competence, establishment of management procedures for the supervision, recording and monitoring of their work and the introduction of an independent and external audit to ensure the quality of the work done. In 1994 an ACPO report produced under the chairmanship of the Deputy Chief Constable of Thames Valley Police recommended changing to a non numerical system and the Chief Constable's Council endorsed that recommendation in 1996. Further discussions followed between the heads of all the Fingerprint Bureau in this country and ACPO. In consequence, a Fingerprint Evidence Project Board was established with a view to studying exhaustively the systems needed before moving nationally to a non numerical system. The first report of that body was presented on 25th March 1998 and recommended that the national standard be changed entirely to a non numerical system: a target date of April 2000 was hoped for, by which the necessary protocols and procedures would be in place. If and when that occurs, it may be that fingerprint experts will be able to give their opinions unfettered by any arbitrary numerical thresholds. The courts will then be able to draw such conclusions as they think fit from the evidence of fingerprint experts.

It is to be noted that none of this excellent work by the police and by fingerprint experts can be regarded as either usurping the function of a trial judge in determining admissibility or changing the law as to the admissibility of evidence.

That said, we turn to the legal position as it seems to us. Fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. It may so tend, even if there are only a few similar ridge characteristics but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value. When the prosecution seek to rely on fingerprint evidence, it will usually be necessary to consider two questions: the first, a question of fact, is whether the control print from the accused has ridge characteristics, and if so how many, similar to those of the print on the item relied on. The

second, a question of expert opinion, is whether the print on the item relied on was made by the accused. This opinion will usually be based on the number of similar ridge characteristics in the context of other findings made on comparison of the two prints.

That is as matters presently stand. It may be that in the future, when sufficient new protocols have been established to maintain the integrity of fingerprint evidence, it will be properly receivable as a matter of discretion, without reference to any particular number of similar ridge characteristics. But, in the present state of knowledge of and expertise in relation to fingerprints, we venture to proffer the following guidance, which we hope will be of assistance to judges and to those involved in criminal Prosecutions.

If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular:

(i) the experience and expertise of the witness;
(ii) the number of similar ridge characteristics;
(iii) whether there are dissimilar characteristics;
(iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and
(v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination.

In every case where fingerprint evidence is admitted, it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence of opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in the light of all the evidence. [emphasis added]

Since this advice was given, the police fingerprint bureaux in England and Wales have adopted a non-numerical standard. It is suggested that the guidance provided in ***Buckley*** remains valid, but admissibility will depend primarily on the quality of the opinion and the matching characteristics which support it. Notably:

a. Once the evidence is admitted, the jury's conclusion upon the cogency of the evidence of match will also depend on the factors listed by the Vice-President.

b. Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that a dissimilar characteristic exists, it will exonerate the defendant.

c. The second question is the significance of the match. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses their conclusion and the experience on which it is based will be critical.

Notes

a. Expert evidence as to the likely match of fingerprint impressions left on the scene of a crime and the defendant's fingerprint impressions may be admissible in evidence. Once admitted, it is for the jury to assess its weight (Reed [2009] EWCA Crim 2698 at para 111).

b. A police officer, authorized by the commissioner, may take and record for the purposes of identification, the measurements, photographs, finger and palm prints of a person who is in lawful custody (Section 38 of the Police Act 1965).

c. If the person in lawful custody refuses to have this done, they may be taken before a magistrate who may make an order directing that it shall be done. If the person is subsequently acquitted or the case dismissed, then the fingerprint and palm prints must be destroyed (Section 38 of the Police Act 1965). This should, if possible, be done in the presence of the defendant.

d. As in the case of all expert evidence being relied on, the judge must warn the jury that it is evidence of opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in light of all the evidence **(*Buckley*).**

e. Notwithstanding the decision in ***Buckley*** where it was stated that it would be highly unlikely that a judge would exercise their discretion where there were fewer than eight similar ridge characteristics, in some jurisdictions such as England and Wales, a non-numerical standard has been adopted and a subjective evaluation in the comparison of prints encouraged.

f. Consequently, as there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses their conclusion, and the experience on which it is based, will be critical.

g. In ***Nairn v DPP*** **(The Bahamas CA, SCCrApp No 56 of 2021, 1 September 2022)**, an armed robbery occurred of a web shop in which a masked gunman took, inter alia, the cash register's tray and retrieved a sum of money from it. A latent

print discovered on the tray matched the fingerprint of the appellant, resulting in his conviction. The Court of Appeal upheld the same, given the location of the print, the limited access to that area that contained the cash register, and the absence of an explanation proffered as to how his print got there.

Directions

a. The jury should be directed that the expert is giving evidence of opinion.

b. The following points should be reviewed:

   i. the experience and expertise of E

   ii. the number of ridge characteristics said to be similar

   iii. whether there are any dissimilar characteristics

   iv. the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of a print (i.e. in a smaller area) than in an entire print

   v. the quality and clarity of one print (e.g. whether there has been any possibility of contamination, any smearing, or any damage to the finger which left the print)

   vi. if there is a realistic possibility that a dissimilar characteristic (as between the known print of D and the print from the scene) exists, this will exonerate D.

c. If E expresses conclusions in relative terms (e.g. 'no support, limited support, moderate support, support, strong support, powerful support') it should be explained to the jury that these terms are no more than labels which E applied to their opinion of the significance of their findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

d. Any attempts to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing-up.

e. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular, their relative levels of qualification and experience, the steps which each took to compare the fingerprints, their findings and their

opinions should be identified in such a way that their differences are made clear to the jury.

Example

E is an expert in the field of identification by fingerprints (summarize relevant qualifications and experience)

[Give a direction about expert evidence]

E explained that each person's fingerprint is unique. E described - using the term 'ridge characteristics' - how E compared D's fingerprints with the fingerprint(s) found at the scene. E pointed out similarities (and differences) between D's fingerprints and the fingerprint(s) found at the scene and gave E's opinion on the significance of E's findings.

To compare the fingerprint(s), E [summarize the steps taken to compare the fingerprints].

E's findings were that: [summarize the evidence of the size and quality of the print(s) found at the scene and the similarity (and any differences) found in the/each comparison] e.g. E found a single print whichE said was incomplete in that it had not been made by the whole width of a finger and part of the print had been smudged. E said that:

- the characteristics of 13 ridges could be made out;
- of these, 12 were common to both D's known fingerprint and the fingerprint found at the scene;
- the 13th may, or may not, be common to both D's known fingerprint and the print found at the scene: E could not rule out the possibility that it was different.

E expressed their opinion in terms of E's findings providing (e.g. strong support) for the contention that D was the person involved in the incident, this being on a scale of 'no support, limited support, moderate support, strong support and powerful support'. It is important to recognize that this is not a numerical scale or a percentage of probability, nor are either such measures possible. It is a relatively imprecise way of expressing E's subjective opinion about the strength which E attaches to his findings.

E could not say when the print was left or in what circumstances.

You must also bear in mind that E's evidence is only part of the evidence in the case. [Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E].

Chapter 9 – Identification Evidence

Identification by Voice

Evidence of identification by voice can take a number of forms, such as evidence from a lay witness who may or may not have known the defendant before hearing the questioned speech; evidence of voice identification procedures, at which a lay witness has identified the defendant's voice from a number of others; and, as a supplement or alternative to the above, the evidence of experts who may report conclusions based on analysis of questioned and reference speech, especially where the speech is accessible in electronic form. In certain circumstances, the jury may be asked to make their own comparison between questioned and reference speech recordings.

Gage LJ noted in ***R v Flynn*** **[2008] EWCA Crim 970, [2008] 2 Cr App Rep 266**, that "…in all cases in which the Prosecution relies on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases."

In ***R v Osbourne*** **[1992] JLR 452**, the evidence of voice identification was challenged. The learned trial judge had reminded the jury of the basis on which the recognition was made. He pointed to the period both men were acquainted, the nature of their relationship, the particular speech pattern of the appellant, and the opportunities for such knowledge. Carey P (Ag), said:

> …Common-sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attributable or feature of his speech capable of identifying him as a participant, forms part of the Prosecution case.

A year later, in ***R v Taylor*** **(1993) 30 JLR 100**, Gordon JA said, "We would add that the directions given must depend on the particular circumstances of the case…"

After reviewing the relevant authorities, the learned judge continued:

> In order for the evidence of a witness that he recognised an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there

> is for more spoken words to render recognition possible and therefore safe on which to act.

In ***R v O'Doherty*** **[2002] NI 263, [2003] 1 Cr App Rep 77**, the Northern Ireland Court of Appeal considered an appeal against conviction for aggravated burglary. A significant part of the evidence for the Prosecution comprised a tape-recorded telephone call between the suspect and the emergency services. The trial judge directed the jury that they could consider the following evidence as to the identity of the caller:

a. Recognition of the voice by a police officer who knew the defendant.

b. Opinion evidence of a voice expert.

c. The jury's own comparison of the suspect's speech with the defendant's speech.

Voices and speech can be compared by the expert listener (auditory phonetic analysis) and by acoustic recording and measurement (quantitative acoustic analysis). The Court considered evidence that it was generally accepted among experts, that the inexpert listener could not alone make a reliable comparison of voice and should only attempt it with the assistance of an expert. An expert's evidence would enable the jury to identify relevant similarities in accent or dialect but that is not generally enough to make an identification. All that auditory phonetic analysis can achieve is a judgement that the defendant is among those who could have used the disputed speech. The reason for this is, as stated in ***O'Doherty*** at 269g – h:

> Phonetic analysis does not purport to be a tool for describing the difference between one speaker and another, the differences which arise from the vocal mechanisms. The way in which we hear will fail to distinguish quite a number of the features which are important in deciding whether samples came from two speakers or one.

Accordingly, it was generally accepted that quantitative acoustic analysis was an essential requirement of professional analysis of voices.

The Court reached conclusions, at 276 a – c, as to the use of voice identification evidence in general as follows:

> ... in the present state of scientific knowledge, no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis such as is used by Dr Nolan, Dr French and all but a small percentage of experts in the United Kingdom and by all experts in the rest of Europe, which includes formant analysis.

> We make three exceptions to this general statement. Where the voices of a known group are being listened to and the issue is, 'which voice has spoken which words' or where there are rare characteristics which render a speaker identifiable- but this may beg the question- or the issue relates to the accent or dialect of the speaker (see *R. v Mullan* [1983] 12 NIJB) acoustic analysis is not necessary...

Evidence of voice recognition was admissible and, if admitted (as stated at 276g):

> It seems to us that... the jury should be allowed to listen to a tape-recording on which the recognition is based, assuming that the jury have heard the accused giving evidence. It also seems to us that the jury may listen to a tape-recording of the voice of the suspect in order to assist them in evaluating expert evidence and in making up their own minds as to whether the voice on the tapes is the voice of the defendant.

Of the practice of inviting juries to make their own voice comparison for the purpose of assessing an identification by recognition, or by an expert, the Court said, at 282b-e:

> We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on the tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasise the need to give a specific warning to the jurors themselves.

In ***Flynn***, the Court of Appeal of England and Wales considered evidence of voice recognition by police officers. It was the Prosecution's case that the defendants were to be heard in a covertly recorded conversation. The officers were permitted to give evidence identifying what each defendant said to the other during the conversation, which implicated them in a conspiracy to rob. The defendants denied that their voices were to be heard. The Court heard expert evidence and described its effect as follows:

> 16. In general terms the expert evidence before us demonstrates the following:
> (1) Identification of a suspect by voice recognition is more difficult than visual identification.

(2) Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification.

(3) The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:

(i) the quality of the recording of the disputed voice or voices;
(ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
(iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person.
(iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.
(v) the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong. One study used telephone speech and involved fourteen people representing three generations of the same family being presented with speech recorded over both mobile and land line telephones. The results showed that some listeners produced mis-identifications, failing to identify family members or asserting some recordings did not represent any member of the family. The study used clear recordings of people speaking directly into the telephone.

(4) Dr Holmes states that the crucial difference between a lay listener and expert speech analysis is that the expert is able to draw up an overall profile of the individual's speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. In contrast, the lay listener's response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the speaker's speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener's voice recognitions will make it more difficult to challenge the accuracy of their evidence.

The Court held that the evidence should not have been admitted on the principal ground that the covert recording was not of sufficient quality for voice recognition to be made by the witnesses. Furthermore, the evidence should have been excluded because inadequate steps had been taken to ensure the integrity of the recognition process:

> 53…First, in our opinion, when the process of obtaining such evidence is embarked on by police officers it is vital that the process is properly recorded by those officers. The amount of time spent in contact with the defendant will be very relevant to the issue of familiarity. Secondly, the date and time spent by the police officer compiling a transcript of a covert recording must be recorded. If the police officer annotates the transcript with his views as to which person is speaking, that must be noted. Thirdly, before attempting the voice recognition exercise the police officer should not be supplied with a copy of a transcript bearing another officer's annotations of whom he believes is speaking. Any annotated transcript clearly compromises the ability of a subsequent listener to reach an independent opinion. Fourthly, for obvious reasons, it is highly desirable that such a voice recognition exercise should be carried out by someone other than an officer investigating the offence. It is all too easy for an investigating officer wittingly or unwittingly to be affected by knowledge already obtained in the course of the investigation.

Gage LJ added general observations. The Court would not follow the Court of Appeal in Northern Ireland in its view that voice recognition should never be admitted without expert acoustic analysis. Such a finding appeared to be out of step with the judgement of the Court in ***Attorney General's Reference (No 2 of 2002)*** **[2002] EWCA Crim 2373, [2003] 1 Cr App Rep 321**, (see Visual Identification above) concerning visual recognition from films or photographs, but the Court had a warning to give about the use of such evidence and the need for an explicit modified ***Turnbull*** direction to the jury:

> 62. As appears from the above we have been dealing in these appeals with issues arising out of voice recognition evidence. Nothing in this judgement should be taken as casting doubt on the admissibility of evidence given by properly qualified experts in this field. On the material before us we think it neither possible nor desirable to go as far as the Northern Ireland Court of Criminal Appeal in O'Doherty which ruled that auditory analysis evidence given by experts in this field was inadmissible unless supported by expert evidence of acoustic analysis. So far as lay listener evidence is concerned, in our opinion, the key to admissibility is the degree of familiarity of the witness with the suspect's voice. Even then the dangers of a mis-identification remain; the more so where the recording of the voice to be identified is poor.
>
> **63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, as outlined above,**

> **great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.**

There are two separate areas of concern.

The first is voice recognition by someone familiar with the voice of the defendant. In ***R v Hersey*** **[1998] Crim LR 281**, the defendant was charged with robbery. The victim (V) thought he recognised the voice of one of the robbers as one of his customers, H. The police carried out a voice comparison exercise in which H and eleven volunteers read the same text. V identified the defendant. The Court approved the procedure and encouraged the use of safeguards and warnings to the jury as near to those employed following Turnbull as the adaptation would permit. The possible dangers and precautions which may minimise them were described by Gage LJ in ***Flynn*** (see paras 16, 63, and 64). He did not refer to the desirability of a voice comparison exercise such as that performed in ***Hersey***. However, the absence of such a procedure would be a matter for comment by the trial judge.

The second area of concern is the use of expert evidence based solely upon auditory analysis without recourse to acoustic analysis. While, unlike the practice in Northern Ireland, the courts of England and Wales are prepared to receive such evidence, its limitations were described in ***O'Doherty*** (see above) as being unable to distinguish between the vocal mechanisms of voices. It is likely to be the subject of criticism by an expert called on behalf of the Defence and directions will need to be tailored to the evidence in the case.

See also ***Blackstone's Criminal Practice 2026***, F19, particularly F19.25 – F19.26.

Notes

a. The inherent risks of mistake in voice identification/recognition are broadly similar to those in visual identification or recognition, and such evidence must be approached with even greater caution.

b. The judge must accordingly warn the jury of the need for such caution before convicting in reliance on the accuracy of such evidence, especially if this comes from a witness who has no training in making voice identifications.

c. Where voice recordings are available, expert evidence may be admissible as to the identity of the speaker. The members of the jury must then be allowed to hear the recordings for themselves but should be warned of the dangers of relying on their own untrained ears.

d. As with visual identification, evidence of voice identification or recognition may be admissible alongside other evidence, even if it would not of itself be sufficient to prove guilt.

e. Voice identification is sometimes used in a confirmatory manner. In ***R v Beckford* (Jamaica CA, SCCA No 88 of 2001, 20 March 2003)**, the trial judge did not form the view that the reliance was more on the voice than on the visual situation. Indeed, the judge was of the view that the voice was merely confirmatory of the person whom the complainant had seen as the attack had taken place in broad daylight. In addition, the complainant and her attacker were at close range for approximately 20 minutes and the identification parade was less than a month after the incident.

Evidence of a Lay Witness

a. In all cases of witness identification or recognition by voice, a modified ***Turnbull*** direction is required emphasizing the dangers of assuming that recognition or identification of voice is reliable: ***R v Hersey* [1997] EWCA Crim 3106**; ***R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543**. Identification by voice is even less reliable than eyewitness identification or recognition; even a confident recognition of a familiar voice by a lay listener may nevertheless be wrong: ***Flynn***. The direction need not follow a "precise form of words… so long as the essential elements of the warning are given to the jury": ***Phipps v DPP* [2012] UKPC 24, [2013] 1 LRC 639**.

b. The potential weaknesses of such identification or recognition include the following factors, some of which are not found in a ***Turnbull*** warning:

   i. Audibility of speech heard.

   ii. Environmental factors affecting hearing of speech.

   iii. Duration for which speech is heard.

   iv. Number of voices heard.

   v. Whether it was heard directly or by electronic means such as phone or Skype (or similar technology), in which case the sound quality of what was transmitted will also come into play.

   vi. Whether there was an identified attempt to disguise the voice.

   vii. Hearer's hearing disability or any other impediment (if any).

   viii. Variety of speech heard.

ix. Degree of familiarity with speaker.

x. Distinctiveness or accent of speaker.

xi. Whether the speaker spoke in their own native tongue, and whether the speech was heard in the hearer's native tongue.

xii. The fact that in contrast to visual identification, there are likely to be fewer reference points for a layperson / investigator to use to record a contemporaneous description - and accordingly, it is therefore more difficult to use first description to challenge a subsequent description or identification.

xiii. Lapse of time between the occasion(s) on which the hearer became familiar with the defendant's speech, the occasion on which the questioned speech was heard and any subsequent identification process.

xiv. Specific weaknesses in the design or execution of the identification procedure.

Expert Opinion Evidence

The principal methods by which voice comparisons are conducted by experts are:

a. Auditory analysis (where the expert compares recordings by listening repeatedly); and

b. Acoustic analysis (involving computerized comparisons of the voice samples).

This expert evidence can be highly complex evidence of a kind which is not easy for a jury to evaluate. A jury needs the assistance of the judge: ***R v Yam*** **[2010] EWCA Crim 2072**. Particular care may be needed when translators are also involved in the exercise: ***R v Tamiz*** **[2010] EWCA Crim 2638**.

Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

Directions

a. If an expert witness has given evidence, a direction about such evidence should be given if it has not already been given.

Chapter 9 – Identification Evidence

b. Below is a non-exhaustive list of possible considerations:

   i. Identification by voice recognition is more difficult than visual identification.

   ii. As with visual identification, a genuine, honest and convincing witness who purports to identify a voice may be mistaken and a number of such witnesses may all be mistaken. This is so even when the witness/ witnesses are very familiar with the known voice i.e. the basis for recognition is strong.

   iii. Voice recognition evidence of a witness who is not an expert may be admitted, but the ability of a lay listener correctly to identify voices is subject to a number of variables, which require such evidence to be treated with great caution and great care having regard to, inter alia, these factors:

      - the quality of the recording of the disputed voice.
      - the length of time between the listener hearing the known voice and the listener's attempt to recognize the disputed voice.
      - the extent of the listener's familiarity with the known voice.
      - the nature, duration and amount of speech which is sought to be identified.
      - the nature and integrity of the process by which the purported identification was made, in particular whether or not a voice comparison exercise in which the disputed voice is put with the voices of several others (similar to an identification procedure) was used.

c. Voice identification is likely to be more reliable when carried out by (i) an expert listener using auditory phonetic analysis and/ or (ii) an expert in voice analysis using acoustic recording and measurement (quantitative acoustic analysis).

Chapter 9 – Identification Evidence

Example 1: Non-expert Witness

W gave evidence that at (specify time) on (specify date) he received a phone call from D, in the course of which D told W (specify details). It is not in dispute that W received such a phone call but D denies that it was made by him. D says that W is mistaken in thinking that the voice was D's.

When considering this evidence you need to be especially cautious because experience has shown that any witness who gives evidence of identification can be mistaken and this is so even when the witness is honest and convinced that he is right. Such a witness may well seem convincing, but this does not mean that the witness cannot be wrong. This is so even when a witness knows a person well and says that he has recognized that person.

In this case, where the evidence is that W recognized the voice but did not see the caller, the danger of such recognition being wrong is even greater.

So before you could decide that it was D who made this phone call you would have to be sure that W's evidence that he recognized D's voice is accurate and reliable. You need to look carefully at all the circumstances in which W heard the voice.
You must ask yourselves:

- what was the content and the context of the call?
- How long was W listening to the voice of the person W says was D?
- How clear was the telephone?
- You don't have any recording of the conversation so the only way you can judge this is by the description that W gave when W was questioned about it.
- Did anything distract W during the phone call?
- How well does W know D's voice?
- Is there anything distinctive about D's voice or the way D speaks which might make it any easier to identify?
- How long was it between the time that W became familiar with D's voice and the time of the phone call; and between the time that W told the police that the voice was D's and the time that W picked out the voice on the voice parade?
- Is there any marked difference between W's description of the voice and speech that W heard during the phone call and D's voice and the way in which D speaks?

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Example 1: Non-expert Witness cont'd

When you consider whether there are any weaknesses in W's evidence you should bear in mind:

- that whilst W knows D well, W does not have any training or experience in voice recognition.
- W was speaking and listening to the caller on a phone, which does not provide the same quality and definition as a face-to-face conversation.

You should also consider (specify any other matter).

- The following evidence is capable of providing support for/ undermining W's evidence (specify). I should point out that the evidence that (specify) is not capable of supporting W's is (specify).

Example 2: Expert Witness (with auditory but not acoustic analysis)

There is a recording of a 2-minute conversation between a person alleged to be D and another person which, it is not disputed, implicates D in the offence with which D is charged. The conversation was recorded using a microphone inserted into a hole in a party wall between terraced houses. The wall had been drilled but the voices are muffled: some but not all words can be made out. There is also some "over -talking". The questioned speech has been compared with D's known speech as heard on D's 37-minute tape recorded interview.

E is an expert in analysing sound, including sound made by the human voice (summarize qualifications and experience).

[If not already given, an expert evidence direction should be given at this point]

When you are deciding whether or not to accept E's evidence you must be cautious for the following reasons:

- the quality of the original recordings of the conversation (e.g. recorded through the wall at the house is compromised because of the muffling effect of the wall, as was apparent when the enhanced versions were played, and as E accepted in his evidence, only certain words are sufficiently clear to be understood as individual words).
- The amount of speech in question (e.g. is small: the total amount of time during which the person said to be D was speaking is 49 seconds; and on 3 occasions, for a total duration of 17 seconds, both people were speaking at the same time).

Example 2: Expert Witness (with auditory but not acoustic analysis) cont'd

- Although E compared a recording of D's voice with the recording of the conversation, E does not know D personally and is not as familiar as a close relative or friend would be.

- E did not test his comparison by comparing the recordings of D's voice and the speech in question with either recordings of other voices which are similar in pitch, tone, accent and speed or with the voices of any of the other defendants.

- Nor did E carry out any acoustic analysis by using a computer to compare the recorded conversation on the recording of D's voice. Although you have heard the recording of the conversation in question for yourselves, the only reason for that was so that you know (a) what was said and (b) the material on which E has based his opinion. But you are not experts in voice recognition and you must not base any conclusion on your own inexpert and untrained comparison between the recorded conversation and the recording of D's voice. The following evidence is capable of providing support for/undermining W's evidence [specify]. I should point out that the evidence that [specify] is not capable of supporting what W's is [specify].

Identification by DNA

Glossary*

Term	Definition
Allele	One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.
Allele "drop in"	An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. A potentially spurious contribution to the mathematical analysis is known as a "stochastic effect" of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).
Allele "drop out"	An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a "stochastic effect" of LCN as above.
DNA	Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.
DNA profile	Made up of target regions of DNA codified by the number of STR (see below) repeats at each locus
Electrophoresis	The method by which the DNA fragments produced in STR are separated and detected.

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Term	Definition
Electrophoretogram	The result of electrophoresis produced in graph form.
Locus/loci	Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.
Low template DNA/ Low copy numbering	By increasing the number of PCR cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample
Masking	When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair "masks" the other.
Mixed profile	Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.
NDNAD	National DNA Database.
PCR	Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.
SGM Plus	Second Generation Multiplex Test: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.
Stochastic threshold	Above which the profile is unlikely to suffer from stochastic effects (i.e. potentially spurious effects), such as allelic drop out.
STR	Short tandem repeat, where a part of the DNA molecule repeats. Comparison of the pattern or blocks produced is the modern form of DNA profiling, in use since the 1990s.
Stutter	The PCR amplification of tetranucleotide short tandem repeat (STR) loci typically produces a minor product band shorter than the corresponding main allele band; this is referred to as the stutter band or shadow band. They are well known and identified by analysts
Voids	A locus at which no alleles are found in the crime specimen probably through degradation of the material. The defendant may say that the alleles which should have been there might have excluded them.

*Adopted from the Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024), 15-42 – 15-43.

Chapter 9 – Identification Evidence

General Scope

Where the Prosecution seeks to rely on DNA evidence to identify the defendant, it is essential that its provenance is established by admissible evidence. It is also essential that the statistical significance of any match between DNA profiles is properly explained to the jury (***R v Doheny and Adams*** **(1997) 1 Cr App Rep 369** at 375, per Phillips LJ).

DNA evidence is usually presented to the court in the form of statements. Careful directions should be given to the jury in respect of any issues of expert evidence and the judge must explain to the jury not only the statistical significance but also any limitations of the DNA findings.

Before a body sample is taken, a person must be informed of the grounds on which the required authority has been given, including the nature of the suspected offence. The body samples may be taken with the consent of the defendant or if they do not so consent, in order to further the investigation, the police must obtain the authorization of a Magistrate to have a medical practitioner take an intimate sample from the defendant without their consent (s 34 of the UK **Police Force Act, Chapter 205**).

Profiling DNA Material

Different regions or 'loci' in the DNA chain contain repeated blocks of 'alleles'. Modern analysis concentrates on 10 loci in the chain, which are known to contain alleles that vary widely between individuals, one contributed by each parent. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis. Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci.

Low template DNA is the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis. Both the lack of validation for the technique and the danger of contamination were criticised by Weir J in the Omagh bombing case of ***R v Hoey*** **[2007] NICC 49**, leading to the exclusion of the evidence. As a result, the Forensic Science Regulator commissioned a review by a team of experts which, in April 2008, while making recommendations, reached favourable conclusions both as to method and as to precautions taken in UK laboratories against contamination. The state of the science was thoroughly reviewed by the Court of Appeal in England and Wales in ***Reed v R*** **[2009] EWCA Crim 2698, [2010] 1 Cr App Rep 310**. Thomas LJ expressed the conclusion of the Court as follows:

> 74. On the evidence before us, we consider we can express our opinion that it is clear that, on the present state of scientific development:
>
> (i) Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer

from stochastic effects (such as allelic drop out mentioned at paragraph 48) which prevent proper interpretation of the alleles.

(ii) There is no agreement among scientists as to the precise line where the stochastic threshold should be drawn, but it is between 100 and 200 picograms.

(iii) Above that range, the LCN process used by the FSS can produce electrophoretograms which are capable of reliable interpretation. There may, of course, be differences between the experts on the interpretation, for example as to whether the greater number of amplifications used in this process has in the particular circumstances produced artefacts and the effect of such artefacts on the interpretation. Care may also be needed in interpretation where the LCN process is used on larger quantities than that for which it is normally used. However a challenge to the validity of the method of analysing Low Template DNA by the LCN process should no longer be permitted at trials where the quantity of DNA analysed is above the stochastic threshold of 100-200 picograms in the absence of new scientific evidence. A challenge should only be permitted where new scientific evidence is properly put before the trial court at a Plea and Case Management Hearing (PCMH) or other pre-trial hearing for detailed consideration by the judge in the way described at paragraphs 129 and following below.

(iv) As we have mentioned, it is now the practice of the FSS to quantify the amount of DNA before testing. There should be no difficulty therefore in ascertaining the quantity and thus whether it is above the range where it is accepted that stochastic effects should not prevent proper interpretation of a profile.

(v) There may be cases where reliance is placed on a profile obtained where the quantity of DNA analysed is within the range of 100-200 picograms where there is disagreement on the stochastic threshold on the present state of the science. We would anticipate that such cases would be rare and that, in any event, the scientific disagreement will be resolved as the science of DNA profiling develops. If such a case arises, expert evidence must be given as to whether in the particular case, a reliable interpretation can be made. We would anticipate that such evidence would be given by persons who are expert in the science of DNA and supported by the latest research on the subject. We would not anticipate there being any attack on the good faith of those who sought to adduce such evidence.

The judgement in ***Reed***, while discussing Part 33 of the UK **Criminal Procedure Rules** and the Court's extensive power under Part 3, is a valuable source of information in the following areas:

a. The technique of conventional DNA analysis (paras 30 – 43).

b. The technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects (paras 44 – 49).

c. Match probability (paras 52 – 55).

d. Expert evidence of the manner and time of transfer of cellular material (paras 59 – 61; [81] –103; 111 – 127).

e. The procedural requirements of CPR 33 for the admission of expert evidence (paras 128 – 134).

f. Analysis of mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing-up (paras 178 – 215).

The material below, from Mixed and Partial Profiles to The Need for Independent Evidence Linking the defendant and the Crime, has been adapted from the Supreme Court of Judicature of Jamaica, ***Criminal Bench Book 2017*** at pgs 236 – 239.

Mixed and Partial Profiles

Each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is a matter for expert examination and analysis. The presence of mixed profiles allows the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graph profile, may mask an allele from a minor contributor.

There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called "voids". The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group who could have left the specimen at the scene. In statistical terms, a matching but partial profile will increase the number of people who could have left their DNA at the scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in ***Bates v R* [2006] EWCA Crim 1395**. The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and admissible in evidence provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the "voids".

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Interpreting Results

Interpretation is a matter of expertise. The analyst compares the blocks of alleles at each locus as identified from the crime specimen with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database of 400 profiles. If a match is obtained at each of the 10 loci a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison, the less discriminating the match probability will be.

When the expert testifies, the expert should not overstep the line separating their province from that of the jury. As held in ***R v Doheny; R v Adams*** **(1997) 1 Cr App Rep 369**, the expert's role is to explain the nature of the match between the DNA and the crime stain and the defendant's DNA and give the jury the random occurrence ratio. The expert should not be asked their opinion as to the likelihood that it was the defendant who left the crime stain and should be careful to avoid terminology which could lead the jury to believe that the expert was expressing an opinion.

The Court in ***R v Reed; R v Garmson*** **[2009] EWCA Crim 2698** emphasized the importance of the expert to identify areas in the report in relation to which there is a range of opinion. The scope of opinion should be summarized and reasons for the expert's own opinion be given. Any qualifications to the opinion should be made clear (see ***Doheny*** at para 131).

Match Probability

If a person's DNA profile matches that of a crime sample, it is the expert's role to evaluate the significance of the match using statistical means. The "random occurrence ratio" (or "match probability") is the statistical frequency with which the matching profile between the crime scene sample and someone unrelated to the defendant will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than the defendant was the donor of the crime scene sample is effectively eliminated. This significantly reduces the risk that the "prosecutor's fallacy" will creep into the evidence or have any evidence upon the outcome of the trial (***R v Gray*** **[2005] EWCA Crim 3564** at paras 21 and 22).

In ***Ingraham v R*** **(The Bahamas CA, SCCrApp No 309 of 2016, 27 July 2017)**, a case from this jurisdiction, the Court of Appeal considered the evidential effect of the Y-STR DNA test in the absence of the random match probability and found at paras 51 and 52:

> 51. In relation however to any statistical evaluation of a random match probability of the haplotype occurring, the analyst gave none, simply saying that it had not previously occurred in the data base of 1,932 African American haplotypes she searched. She gave no other evaluation concerning the significance of her findings, and in that regard the Court was left adrift.

> 52. As no evidence of any statistical evaluation of a random match probability of this haplotype was given by the analyst, and no other opinion proffered by the analyst, the question arises as to whether the DNA results as given, were sufficient for the jury to assess their significance, and whether they could properly conclude, that the appellant was the male contributor to the DNA on the complainant's panty, and was guilty of these offences.

This, in the absence of any other evidence, was fatal to the subsequent conviction.

The 'Prosecutor's Fallacy'

The 'Prosecutor's Fallacy' confuses the random occurrence ratio with the probability that the defendant committed the offence. In ***R v Doheny; R v Adams*** **(1997) 1 Cr App Rep 369**, Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.

Stated differently, it may be that only one person in 1000 where's size 14 shoes, but even if D and the offender each wears size 14 shoes that does not mean there is only one chance in 1000 of D being innocent. There may indeed be other suspects, each of whom wears size 14 shoe.

See ***Blackstone's Criminal Practice 2026***, F19.31.

The Need for a Sufficiently Reliable Scientific Basis

In ***R v Dlugosz; R v Pickering; R v MDS*** **[2013] EWCA Crim 2, [2013] 1 Cr App Rep 425**, three conjoined appeals which each raised issues as to the evaluation of low template and mixed DNA evidence, it was argued that unless statistical evidence of the relevant DNA match probability could be given, an evaluative opinion should not be admitted either. The Court rejected the argument that the jury in such cases lacked a firm basis on which to evaluate the significance of the evidence given. Although in determining the admissibility of any expert evidence the court must be satisfied that there is a sufficiently reliable scientific basis for it:

> … provided the conclusions from the analysis of a mixed profile are supported by detailed evidence in the form of a report of the experience relied on and the particular features of the mixed profile which make it possible to give an evaluative opinion in the circumstances of the particular case, such an opinion is, in principle, admissible, even though there is presently no statistical basis to provide a random match probability and the sliding scale cannot be used.

The substance and basis for an expert witness' opinion were challenged in ***R v Thomas*** **[2011] EWCA Crim 1295** in circumstances where the expert, who relied on unpublished simulation experiments, seemed to know very little about the experiments except for a "bare statement" in the Forensic Science Service manual. The Court found that expert in the case was entitled to base her opinion on the simulation experiments and on her lengthy experience as a forensic scientist, her experience having supported the findings of the experiments and the conclusion drawn from them. The Court determined that it was more helpful for the jury to have this evidence and so the proper course was to have it adduced and then tested in cross examination so that the jury could assess its limitations and weight.

In ***R v Doheny; R v Adams*** **(1997) 1 Cr App Rep 369** at pg 375, Phillips LJ gave the following guidance on summing-up in a DNA case:

> The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance; and that which conflicts with the conclusion that the defendant was responsible for the crime stain. Insofar as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case:
>
> > "Members of the Jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five white males in The United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."

The Need for Independent Evidence Linking the Defendant and the Crime

Generally, some independent evidence beyond a matching DNA profile is required in order to establish a nexus between the defendant and the crime: ***R v Ogden*** **[2013] EWCA Crim 1294**. However, the Court of Appeal in England and Wales in ***R v Tsekiri*** **[2017] EWCA Crim 40, [2017] 1 WLR 2879** determined at para 12 that Ogden is to be treated as having turned on its particular facts and "did not give rise to any principle of general application...". The Court went on to say that, "there is no evidential or legal principle which prevents a case solely dependent on the presence of the defendant's DNA profile on an article left at the scene of a crime being considered by a jury" (see para 21; see also Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 239).

While the Court in ***Tsekiri*** reiterated that each case will turn on its own facts, it set out useful guidance at paras 15 - 21 on the relevant factors that a court may consider in

determining whether a case relying on DNA evidence, without more, can safely be left to the jury. The list is non-exhaustive.

In ***R v Reed; R v Garmson*** **[2009] EWCA Crim 2698** at para 211, the Court of Appeal approved the trial judge's approach of explaining to the jury at the outset of his consideration of the DNA significance:

> The important thing is this. No-one suggests that this evidence on its own conclusively proves the guilt of the Defendant on any count or goes anywhere near doing that. If all you had was the DNA evidence you could not begin to find [the Defendant] guilty on any of these counts because all the DNA evidence does (at the most) is show that he is one of the men who may have committed these offences and that is perhaps to put it at its highest.

In ***Ingraham v R*** **(The Bahamas CA, SCCrApp No 309 of 2016, 27 July 2017)**, the Court of Appeal also commented on the impact of the failure to provide other evidence to give meaning to the DNA evidence. Dame Anita Allen said at para 92:

> …[T]here is no other evidence such as motive or perhaps opportunity on the part of the appellant to commit these crimes or any evidence which would give the DNA evidence its significance. In the premises, I am satisfied that the DNA evidence in this case ought not to have been left for the consideration of the jury.

In ***Ingraham v R*** **(The Bahamas CA, SCCrApp No 159 of 2017, 17 February 2020),** the Court of Appeal (in taking a similar approach to the Court in ***Ingraham v R*** **(The Bahamas CA, SCCrApp No 309 of 2016, 27 July 2017)**), stated at para 23:

> As it was then, and it is now, this Court was also left adrift as to the random match probability and the other evidence required to give the DNA evidence its significance. In our judgement, the trial judge should have upheld the submission of no case to answer made by the appellant at the end of the Prosecution's case and directed an acquittal. The failure to direct an acquittal was a misdirection in law that affected the safety of the conviction.

Directions

DNA evidence, if disputed, is always intricate both in terms of the scientific process and the factual detail. In most cases the existence of DNA is unlikely to be an issue; the main issue is likely to be the interpretation of the scientific findings in terms of match probability, which is usually expressed in terms of the probability of a match between people of the same gender who are unrelated, being in the order of one in so many (often expressed in millions or even one billion). The summing-up must focus on the real issues in relation to such evidence.

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A direction about expert evidence will be necessary. The direction is likely to be complex and should be discussed with counsel in the absence of the jury before closing speeches.

Depending on the issues in the case, the following matters may need to be considered when reviewing such evidence for the jury:

a. A brief summary of the evidence which has been given to explain what DNA is and how evidence of its presence may be relevant in the trial process. This may include evidence of full and/ or partial profiles.

b. A summary of the DNA findings.

c. Where there is evidence of a partial DNA profile the jury must be made aware of its inherent limitations.

d. Where there is evidence of a mixed sample (DNA from more than one person) care must be taken to remind the jury of the detail of the findings and any opinion(s) expressed in relation to those findings.

e. Avoiding the "prosecutor's fallacy", the random occurrence ratio or, if used, the likelihood ratio, should be explained. The direction should be expressed in terms of probability, for example: "… if you accept the scientific evidence called by the crown there are probably [insert evidence or probability] from whom the semen stain could have come. You must look at that scientific evidence and all other evidence in order to decide whether it was D who left that stain or whether it is possible that it was left by another of the small group of men who share the same DNA characteristics."

f. A summary of any explanation given by D in relation to the DNA findings. In most cases D will accept that DNA which matches their DNA profile is theirs and will give an explanation as to how it came to be where it was found.

g. The jury should be reminded that the DNA findings are of themselves only evidence of a probability of contact between D and the place from which the sample was taken and to the extent shown by the profile. In considering their verdict the jury must have regard to all of the evidence in the case.

h. The jury should be reminded of evidence which is capable of supporting, not capable of supporting and capable of undermining the DNA evidence.

i. Where the profile of DNA found at a particular location does not match that of D, this may, depending on the circumstances of the case, be capable of providing powerful evidence which undermines the Prosecution's case. If this is so, the jury must be directed appropriately.

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Useful Cases

Some useful cases which provide further guidance are as follows:

a. ***Vasyli v R; R v Vasyli*** **(The Bahamas CA, SCCrApp No 255 of 2015, 25 July 2017)**

b. ***Johnson v R*** **(The Bahamas CA, SCCrApp 111 of 2017, 3 July 2019)**

c. ***Smith v R*** **(The Bahamas CA, SCCrApp No 9 of 2013, 2 December 2014)**

d. ***Smith v R*** **(The Bahamas CA, SCCrimApp No 167 of 2015, 30 August 2017)**

e. ***Farrington v R*** **(The Bahamas CA, SCCrApp No 96 of 2014, 27 July 2017)**

f. ***Farrington v R*** **(The Bahamas CA, SCCrApp No 3 of 2016, 25 July 2018)**

g. ***Bullard v DPP*** **(The Bahamas CA, SCCrApp No 123 of 2021, 30 November 2022)**

h. ***Lexidor v R*** **(The Bahamas CA, SCCrApp No 76 of 2017, 22 March 2019)**

i. ***Rahming v R*** **(The Bahamas CA, SCCrApp No 230 of 2014, 23 July 2018)**

j. ***Davis v DPP*** **(The Bahamas CA, SCCrApp No 137 of 2020, 14 February 2022)**

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Example 1
Explanation of DNA **NOTE:** It is important that any explanation is a summary of the evidence given by a forensic scientist and not "evidence" given by the judge. This example is adopted from a UK expert witness statement made in 2013: DNA (Deoxyribonucleic acid) is a complex chemical found in almost all cells in the human body which may be deposited onto an item or on to another person. Where DNA is found it is possible to prepare a DNA profile, that is to say a "picture" of the components of the DNA, which may then be compared with another DNA profile, obtained from a reference sample or reference samples taken from one or more people. If the DNA profiles which are compared are different then the DNA could not have originated from the person with whose reference sample the DNA found has been compared. If they are the same then the evidential significance of the match may be evaluated. No person's DNA profile is unique, and so two or more people will have the same DNA profile. Because of this, the existence of a particular DNA profile in a particular situation cannot prove that a particular person was involved in that situation but instead the existence of the profile together with other scientific data may be used to give an indication of the probability, not of that particular person being involved, but of one of a group of people, of which that person is one, being involved. This indication of probability is provided by reference to the "random occurrence ratio". This is the frequency with which DNA characteristics matching the DNA sample found in a particular situation are likely to be found in the population at large.

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Example 1 cont'd

The DNA analysis technique used in this case examined 10 areas, plus another area that indicates the gender of the source of the DNA. Within each area are two results: one from the mother and one from the father of the person whose DNA it is. The presence of more than two results at one area in the DNA profile indicates the presence of a mixture of DNA from more than one person. Where a mixture of DNA is present it can still be possible to make a statistical assessment of the likelihood of the findings if a person has contributed to the DNA, rather than that they have not and the results are present by chance.

Analysis in a particular case:

In this case we heard of DNA being found on/ at [location]. We also heard that this DNA has been compared with a sample of DNA which was taken from D and that the DNA which was found matches D's DNA. It also matches [number] other members of the population. Based on this evidence E said that the probability of the DNA which was found having been left on/ at [location] by someone other than D was [data]. That is the random occurrence ratio in this case.

If you accept this evidence, it means that there are probably only [insert evidence or probability] from whom that DNA could have come. D is one of them. What you must decide on all the evidence is whether you are sure that it was D who left that DNA or whether it is possible that it was one of that other small group of [state category] who share the same DNA characteristics.

Defendant's explanation: Denial that DNA is D's and assertion that the exhibits have been contaminated:

D denies that the DNA which was recovered from [location] is his and has suggested in his evidence that a possible reason for this is that the DNA taken from [location] has somehow been exposed to his DNA sample during the course of the scientific examination of these exhibits at the laboratory. You should bear in mind that, as it is for the Prosecution to prove the case against D, it is for the Prosecution to establish that the DNA taken from [location] has not been contaminated; it is not for D to establish that it has.

As to this issue you will remember the evidence which he gave about this possibility when he was cross examined, namely that [review evidence]. If having considered that evidence you decide that the DNA taken from [location] may have been contaminated, then you will take no account of this evidence at all. If, on the other hand, you are sure that the DNA taken from [location] has not somehow been mixed with D's DNA, then you are entitled to take the evidence about DNA into account when you are considering whether it has been proved, so that you are sure that D is guilty.

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Example 1 cont'd

Defendant's explanation: Admission that the DNA is D's and suggestion of how it may have been in the place in which it was found:

D has accepted that the DNA found at/ on [location] is his, but he has given evidence that [review evidence]. V's evidence on the other hand is that [review evidence].

You will have to consider these two conflicting accounts and decide whether the account which D has given is, or may be true, or whether you can be sure that it is V who has told you the truth. If you find that D's account is, or may be true, then this would provide a possible explanation for the presence of D's DNA at/ on [location] which is not incriminating. On the other hand, if you find V's account is true, it follows that you will reject D's account, and in this event you are entitled to consider the DNA evidence when you are deciding whether the Prosecution has established, so that you are sure of it, that D committed the offence.

OTHER FACTORS: A Direction in relation to expert evidence must also be given which should include a similar warning to this:

I should point out to you that the expert's findings and evidence are in themselves only evidence of a **probability** of contact between D and the location from which the DNA sample was taken. This evidence does not in itself prove that D committed the offence with which he has been charged and, in order to reach your verdict, you must have regard to all of the evidence in the case of which this is but a part.

As to the other evidence in the case which is capable of supporting/ not capable of supporting/ undermining the DNA evidence [review evidence].

Chapter 9 – Identification Evidence

Example 2*

In ***Doheny***, Phillips LJ, suggested the following be addressed in the summing-up on the aspect of DNA evidence:

The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. Insofar as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case.

"Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only [state number and category] from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who shared the same DNA characteristics".

In The Bahamas, in the context of evidence of a random match probability of 1:… million it might be appropriate to direct the jury in the following manner: "What that means is that the probability of finding another person with the same DNA type from the local Bahamian population who is neither the sample donor nor anyone related to him is one in ……million."

*Adapted from the **Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017*** *at pg 245*

Chapter 10 – Circumstantial Evidence

In This Chapter: **General Scope | Directions | Useful Cases**

Circumstantial evidence is evidence of particular facts (circumstances) from which inferences and/or conclusions (of certain occurrences) may be drawn. The case against a defendant may rely partially or entirely on circumstantial evidence. Common examples of circumstantial evidence may include evidence that goes to motive, opportunity, state of mind, preparation, identification, and possession of items used to commit a crime.

General Scope

Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence; it is in this category that most controversy is generated, and specific directions will be required.

A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence. The Prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence, and motive.

Pollock CB in ***R v Exall*** **(1866) 4 F & F 922, 176 ER 850** at 853, compared circumstantial evidence to a rope comprised of several cords. He went on to say:

> One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

It is to be noted that even where the Prosecution relies on circumstantial evidence, the Judge is not required to direct the jury "to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion" (see ***McGreevy v DPP*** **(1973) 1 WLR 276, [1973] 1 All ER 503;** ***Blackstone's Criminal Practice 2026,*** F1.22).

At the close of the Prosecution's case, the question for the judge is whether looked at critically and in the round, the jury could safely convict (***R v P*** **[2007] EWCA Crim 3216, [2008] 2 Cr App Rep 6**). The question for the jury is whether the facts as they find them to be, drive them to the conclusion, so that they are sure that the defendant is guilty

(***McGreevy***). The case of ***Bassett v R* [2020] EWCA Crim 1376**, is a recent example of the Court of Appeal concluding that the judge should have allowed a submission in a case which depended upon circumstantial evidence. The judgement, at paras 17 – 21, states:

> 17. A criminal case very often depends on a jury, safely, being able to draw logical inferences from a series of established facts. The ultimate question for the judge is, *"could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?"* In order to draw such an inference the jury must be able to *"exclude all realistic possibilities consistent with the defendant's innocence",* per Pitchford LJ in ***R v Masih [2015] EWCA Crim 477 at [3]***.
>
> 18. The test was formulated by Lord Normand in ***Teper v R [1952] AC 480 at 489****: "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*
>
> 19. Lord Simon expressed the test in a way which modern juries may find more accessible: "*Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities."* in ***DPP v Kilbourne [1973] AC 729 at 758.***
>
> 20. ***R v Banfield [2013] EWCA Crim 1394***, as is made clear in the Judge's ruling, became a focus of attention in the submissions in this case. The facts in ***Banfield*** were extremely unusual and the judgement was based on those specific facts. Two defendants were charged with murder. No body was found, the fact of the death was an inference that the jury were asked to draw from a series of facts. The two accused had 'animus' and had pleaded guilty to fraud involving the 'deceased's' pension. However, this court accepted that, on the evidence, it was impossible for the jury to exclude scenarios in which one or other of the accused were uninvolved in the murder ([61] and [62]). We are unpersuaded that the analysis in ***Banfield*** is relevant to the question which the judge had to determine in this case, namely, whether on the facts, the jury could exclude all realistic possibilities consistent with the Appellant's innocence.
>
> 21. The question in this case was whether the possibility could be excluded that he washed his hands, panicked, threatened Wayne Anglin and told him not to call the police, and took the gun and ammunition (thereafter disposing of them) because he had just shot his friend and was frightened of the consequences of the shooting rather than because he had been in possession

> of the gun before he arrived at the flat. It appears to this court that when the question is postulated in that simple way, the possibility of panic as an explanation for his actions after the shooting cannot be eliminated. His actions were consistent with someone who had been unaware of the gun until after he arrived at the flat, but who reacted in shock after it accidentally discharged. If that possibility could not properly be excluded on the available evidence, then a jury could not have safely concluded that the only inference to be drawn from that conduct was his guilt of the count of possession of the weapon before arriving at the flat. The submission that the count should not be left to the jury should have been allowed and we allow the appeal against conviction on count 1 of the indictment.

Evidence, not probative in its own right, might legitimately be used when aggregated with other circumstantial evidence, so as to lend support for the case being advanced (***R v Olive* [2022] EWCA Crim 1141**).

In ***Teper v R* (1952) AC 480, [1952] 2 All ER 447**, Lord Normand commented at 489 that circumstantial evidence must

> …always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another…. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

In a conspiracy trial, the cases of ***R v Hunt* [2015] EWCA Crim 1950** and ***R v Awais* [2017] EWCA Crim 1585**, underline that the judge is required to analyse the evidence to identify whether it could legitimately permit a jury not just to identify the existence of the conspiracy, but also the nature of the crime the agreement is intended to bring about.

The correct question is: "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?": ***Masih v R* [2015] EWCA Crim 477** per Pitchford LJ.

Teper and ***McGreevy*** were considered in ***R v Kelly* [2015] EWCA Crim 817, [2015] All ER (D) 127 (May)**, in which Pitchford LJ said, at para 39:

> The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (see **R v Teper**). However, as the House of Lords explained in **McGreevy**, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: *Has the Prosecution proved upon all the evidence so that the jury is sure that the defendant*

> *is guilty?* It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence.

The following is an extract from the speech of Lord Morris of Borth-y-Gest in ***McGreevy v DPP*** **(1973) 1 WLR 276, [1973] 1 All ER 503**, on the subject of summing-up in a circumstantial case, at 281:

> The particular form and style of a summing up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case but also upon the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt…

A circumstantial case requires judicial scrutiny and care. It is often the fact that circumstances, proved or admitted, are of equivocal effect in the absence of a clinching or explanatory piece of evidence. In such cases, the judge should assist the jury to identify the evidence of circumstances upon which the cogency of the Prosecution's case depends.

Where the accuracy or the truth of evidence is in dispute, the jury may be able to derive assistance from other evidence in resolving that dispute (e.g. consistent accounts by different witnesses). Where, however, the accuracy or truth of evidence standing alone is in dispute (e.g. the quality of identification evidence), consideration of other, unrelated evidence may or may not assist. If it does not assist, the jury should reach a conclusion on the disputed evidence without regard to any other category of evidence. If they reject the evidence, it can form no part of the 'circumstances' to be assessed.

Where the question is not whether the evidence is accurate or true, but whether the evidence supports an inference of guilt or innocence, the circumstances should be considered in the round, since the final question, whether the jury is sure of guilt, can only be answered by assessment of the effect of all the evidence.

An interpretation of the significance of proved or admitted facts is frequently required. One of the possible dangers is an invitation to the jury by the Prosecution or the Defence to rely upon a single alleged fact to support the heaping of inference upon inference, or to 'fit' the evidence to the theory being advanced without sufficient regard to the cogency of the inference. Where the risk exists, a warning may well be required.

Chapter 10 – Circumstantial Evidence

Directions

In a case in which **there is both direct and circumstantial evidence**, the jury should be directed as follows:

a. Some of the evidence on which the Prosecution relies is direct evidence. Briefly summarise the direct evidence.

b. The Prosecution also relies on what is sometimes described as circumstantial evidence. That means different strands of evidence no one of which proves that D is guilty but which, the Prosecution says, when taken together and with other evidence, prove the case against D. Briefly summarise the circumstantial evidence, and the conclusions which the Prosecution says are to be drawn from it.

In a case in which the **only evidence is circumstantial**, the jury should be directed as follows:

a. In some cases, there is direct evidence that a defendant is guilty, for example evidence from an eyewitness who saw the defendant committing the crime, or a confession from the defendant that they committed it.

b. In other cases however, including this one, there is no direct evidence, and the Prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that D is guilty, but which do, says the Prosecution, leave no doubt that D is guilty when they are drawn together.

c. Briefly summarise the circumstantial evidence and the conclusions which the Prosecution says are to be drawn from it.

In any case **involving some circumstantial evidence**, the jury should also be directed as follows:

a. Briefly summarise any evidence and/or arguments relied on by the Defence to rebut the circumstantial evidence and/or the conclusions which the Prosecution contends are to be drawn from it.

b. The jury should therefore examine each of the strands of circumstantial evidence relied on by the Prosecution, decide which, if any, they accept and which, if any, they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.

c. However, the jury must not speculate or guess or make theories about matters which in their views are not proved by any evidence.

d. It is for the jury to decide, having weighed up all the evidence put before them, whether the Prosecution has made them sure that D is guilty.

Useful Cases

a. ***Coakley v R*** **(The Bahamas CA, SCCrApp No 15 of 2017, 25 April 2018)** NB: In this decision Isaacs JA (as he then was) explained what circumstantial evidence is and how it may be used to prove a defendant's guilt in criminal proceedings by the Prosecution. It must be noted that the conviction and sentence of the appellant, Daniel Coakley, were quashed, and a retrial was ordered in a subsequent appeal in ***Coakley v R*** **(The Bahamas CA, SCCrApp No 15 of 2017, 11 November 2021)**

b. ***Munnings Jr v R*** **(The Bahamas CA, SCCrApp No 164 of 2019, 2 December 2020)**

c. ***AG v Bain Thompson*** **(The Bahamas CA, MCCrApp No 81 of 2011, 28 July 2014)**

d. ***Glinton v R*** **(The Bahamas CA, SCCrimApp No 113 of 2012, 15 April 2014)**

e. ***Humes v R; Meadows v R*** **(The Bahamas CA, SCCrApp Nos 92 and 152 of 2018, 21 May 2020**

f. ***McKenzie v R; Bethel v R*** **(The Bahamas CA, SCCrApp Nos 285 of 2016 and 75 of 2017, 9 May 2019)**

g. ***Gay v DPP*** **(The Bahamas CA, SCCrApp No 55 of 2020, 26 September 2022)**

Example

In relation to the evidence of [Witness 1], the Prosecution also relies upon circumstantial evidence to prove guilt. As you consider the circumstantial evidence in this case, you are to consider what is the fair inference to be drawn from all of the circumstances before you and whether you believe that the account given by the defendant, under the circumstances, is reasonable and probable or otherwise. All the circumstances must be considered together. Circumstantial evidence is to be considered as a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of.

Chapter 10 – Circumstantial Evidence

Example cont'd

[Witness 1] stated that at the date and time in question she was at home standing on her balcony. The defendant attacked the deceased by throwing her down in the parking lot and sitting on top of her before returning to her car and leaving the scene. [Witness 1] recalled that when the defendant eventually got up off the deceased, [Witness 1] came downstairs and observed the body of the deceased covered in blood.

Additionally, the medical evidence from the pathologist was that the deceased died of sharp force injuries to the head, neck and torso which were caused by a sharp weapon, consistent with the use of a knife.

These are some of the various strands that when taken together may lead you to conclude from the circumstances that the defendant was the person who inflicted the injuries to the deceased, and also that the attack which led to the deceased being injured was started by the defendant. This simply means that the Prosecution is relying upon evidence of various circumstances relating to the crime and to the defendant, which they say when taken together would lead you to the sure conclusion that it was the defendant who committed the crime.

Chapter 11 – Expert Evidence

In this Chapter: **General Scope | Useful Cases | Directions**

Expert evidence refers generally to information provided by someone with special subject matter knowledge about things that are likely to be, and generally are, outside the common knowledge, understanding, and experience of jurors, a judge, or a judge in a judge alone trial. Expert evidence can be used to assist in determining issues in a case, including the innocence or guilt of a defendant. This type of evidence is given by an expert witness who is duly qualified to do so, and whose opinions in this regard are required to be unbiased and objective.

General Scope

As a general rule, expert opinion evidence is admissible in criminal proceedings at common law if:

a. it is relevant to an issue in the proceedings.

b. it is needed to provide the court with information likely to be outside the court and jury's own knowledge, understanding and experience.

c. the witness is competent to give such an opinion.

d. the evidence satisfies the rules set out by Lord Mansfield CJ in ***Folkes v Chadd* (1782) 3 Doug KB 157, (1782) 99 ER 589** at 159 and summarised by Lord Justice Lawton in ***R v Turner* [1975] QB 834, [1975] 2 WLR 56** at 841 as follows:

> The foundation of these rules was well laid by Lord Mansfield in *Folkes v Chadd* (1782) 3 Doug. K.B. 157 and was well laid: the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

Expert evidence requires special preparation and care. Usually, the results of examination, inspection or test are not in dispute, but the conclusions to be drawn from the results

certainly are. If those conclusions are based upon opinions expressed by the expert, the jury will need to evaluate the quality of the conclusions.

There is no express statutory definition for an "expert witness" in criminal proceedings in The Bahamas. However, legislation provides for the admissibility of expert evidence and the circumstances in which a witness can be deemed to be an expert.

Section 22 of the **Evidence Act, Chapter 65** provides:

> 22. (1) Where the court has to form an opinion on the identity or genuineness of handwriting, or upon a point of foreign law, or of science, art, trade, manufacture or any other subject requiring special skill or knowledge, evidence may be given of the opinion of persons who in the opinion of the court are experts in such subjects and of any facts which support or are inconsistent with such opinions.

The purpose of expert evidence is to provide both fact (e.g. observation, test, calculation) and opinion, which may assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nonetheless, the ultimate decision on matters which the expert has articulated an opinion, rests with the jury and is not for the expert. The jury is not and should be informed that they are not bound by expert opinion, particularly when the expert has expressed an opinion on an issue at trial. Lord Taylor CJ in ***R v Stockwell*** **(1993) 97 Cr App Rep 260** stated at 266, "…an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."

There is no standard rule as to the nature of a direction on expert evidence. Directions may be given to assist the jury with the weight and manner in which they might treat expert opinion evidence during deliberation.

Case management is essential in keeping expert evidence on track and relevant. In a criminal trial, expert evidence is advanced during case management. An expert report is admissible in evidence whether or not that expert is the person who made the evidence and gives it viva voce.

Expert witnesses need not give viva vice evidence in person, but may do so by technological means. Section 22(2) of the **Evidence Act, Chapter 65** provides:

> (2) An expert may give evidence by way of live television link in criminal proceedings under this Act, where the court is satisfied that —
>
> (a) the expert witness is on an island or in a place other than the island on which proceedings are being held; or

> (b) the expert witness is on the island, within the jurisdiction of The Bahamas, and the Court deems it just and convenient so to do.

See also the following legislation for further guidance:

a. Sections 23, 24, 25, 27, and 28 of the **Evidence Act, Chapter 65**.

b. Section 120 of the **Criminal Procedure Code Act, Chapter 91**.

Prior to allowing a witness to be deemed an expert, the Court must assess the value of the opinion evidence. The Court in ***R v Turner*** **[1975] QB 834, 1975] 2 WLR 56** at pg 840 stated:

> Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.

In ***R v Turner*****,** it was also held that certain qualifications of a witness, do not by that fact alone, make their opinion on matters of human nature and behaviour more helpful to the tribunal of fact. An expert witness' evidence is only deemed admissible where it is relevant and may furnish the tribunal with information which is outside their knowledge and experience. If the opinion evidence of an expert witness is within the jury's knowledge and experience, then the expert evidence is inadmissible.

As a preliminary issue, the trial judge just determines whether a witness is suitably qualified as an expert having sufficient skill and knowledge on the relevant topic. It must be noted that this skill need not be acquired as a professional. In ***R v Silverlock*** **[1894] 2 QB 766**, the test is whether the witness is sufficiently skilled to give expert evidence or has the necessary means of knowledge to make their opinion material. A drug abuser may be sufficiently well acquainted with drugs to give expert evidence as to the nature of a substance.

A jury is not bound to accept the evidence of an expert witness; they are however allowed to form their own independent opinion and judgment of all the facts proved in evidence. In ***Walton v R*** **[1978] 1 All ER 542**, as summarised in the headnote, it was held that:

> The jury were bound to consider not only the medical evidence but the whole of the evidence as to the facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after the killing and any history of mental abnormality. Moreover, since the jury might properly refuse to accept any medical evidence, they were entitled

> to consider the quality and weight of such evidence. Having regard to the quality and weight of the medical evidence in the instant case, the jury had been entitled to regard it as not entirely convincing and not indicative of a mental state in the appellant bordering on insanity; and in view of the other evidence before them, as to the appellant's conduct before, during and after the killing, had been entitled to refuse to accept the psychiatrist's opinion that the appellant's mental condition satisfied the statutory definition of diminished responsibility. The jury had therefore been entitled to conclude that on a balance of probabilities the plea of diminished responsibility had not been established. Accordingly, the appeal would be dismissed….

However, when there is no evidence capable of undermining unchallenged expert opinion, that fact may be, and when the evidence is favourable to the Defence's case, should be, emphasised. It may be important to distinguish between expert examination of physical objects under laboratory conditions and the conclusion drawn by the expert from the results. The jury should be discouraged from attempting to act as their own experts, e.g. in handwriting and fingerprint cases: ***R v Sanders*** **[1991] 93 Cr App Rep 245**; ***R v Lanfear*** **[1968] 2 QB** 77.

In The Bahamas, the purpose of expert evidence and the need for proper instructions to be given to the jury was emphasised in ***Miller v R*** **(The Bahamas CA, SCCrApp No 183 of 2015, 13 December 2018)** where it was held:

> 35. As is well-known, the purpose of adducing expert evidence (both of fact and of opinion) in a criminal trial is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without such expert assistance.
>
> …
>
> 40. …in the absence of the required direction from the judge, the jury in this case was left without any guidance as to how they should approach Dr. Sand's expert *findings* as a forensic pathologist made during her post-mortem examination; and further, with no guidance as to how they should approach the *opinions* and *conclusions* which she gave at the trial based on the results of her physical *findings*.

At para 38, the Court noted:

> The standard direction is usually given with the caveat that while the jury is not bound by the expert's evidence or opinion and is free to form its own view of the facts, they should not supplant the expert's physical findings with their own conclusions without reference to the evidence. In this jurisdiction, the standard jury direction which is given on expert evidence generally takes the following form:

Chapter 11 – Expert Evidence

> "Expert evidence is permitted in a criminal trial to provide you with scientific and medical information and opinion which is within the witness' knowledge and expertise, but which is likely to be outside of your knowledge and experience. Expert witnesses are entitled to express their opinion in respect of their findings and you are entitled and would no doubt wish to have regard to that evidence and to the opinions expressed by the experts when coming to your own conclusions about these particular aspects of the case. You should bear in mind, though, if having given the matter careful consideration you do not accept the evidence of the experts, you do not have to act upon it. So notwithstanding that they are experts that does not mean that you have to accept their evidence. You can look at it, carefully consider it and then come to your own conclusions whether or not you accept their opinion, their findings in relation to this matter. Where there is no other evidence which contradicts the evidence of the experts, that is something that you may wish to consider when you come to determine whether you are going to accept their evidence or not."

At para 39 of ***Miller***, the Court also referenced the March 2010 edition of the Crown Court Bench Book, ***Directing the Jury*** published by the then UK Judicial Studies Board, "which recommended that the jury should also be warned against supplanting the expert's physical findings with their own conclusions without reference to the evidence." The Court of Appeal went on to say:

> We consider that in cases where expert evidence is adduced, the standard direction (outlined above) might be further enhanced by the inclusion of a warning to the jury against reliance on self-expertise along the following lines:
>
> > "…That does not mean, however, that you should be tempted to draw conclusions without reference to the evidence which the experts have given. We do not have the skills required to carry out an expert examination…without the assistance of the experts. Your task is to reach a conclusion based upon an assessment of what evidence or parts of the evidence from the experts you accept, not to reach an independent judgment of your own."

The Court in ***Lathario Miller v R*** also held at para 50:

> …depending on the circumstances, a judge may have to fashion his jury instructions so as to draw the jury's attention to the significance of the evidence which an expert witness has given. This may involve drawing a clear

> distinction on the one hand between the evidence which the expert has given as to his or her findings following the witness' physical examination of an object; and any opinions or conclusions which the witness has given in respect of his findings, based on his or her expertise on the other.

Also examined in ***Miller*** was the importance of a judge giving accurate directions to the jury as to how they should approach the findings and opinions of an expert witness. The Court noted that this is best highlighted in the case of ***Anderson v The Queen*** **[1972] AC 100, (1971) 43 WIR 286**, which involved an appeal to the Privy Council from Jamaica. At paras 52 and 53, it was noted that:

> 52. In ***Anderson***, the evidence given at the trial was that the accused's water boots which he had admitted wearing on the night of the murder had been collected by police upon his arrest two days later. The boots, together with a piece of cardboard found inside the right boot, were submitted for forensic examination. At trial, the forensic expert testified that following his physical examination no blood had been *found* on the boots themselves, but that the piece of cardboard found inside the right boot had tested positive for human blood. In the course of his evidence, the witness also expressed his *opinion* that the stains were at least two weeks old and may have been older than two weeks, which was well before the date of the murder.
>
> 53. In his summing-up the judge instructed the jury in relation to the boots and the expert evidence as follows:
>
> > "He…says there was no blood on the shoes — well, that is merely his opinion. Members of the jury, you are not bound to accept it because he happens to be an expert in this particular field. An expert is brought before you merely to guide and assist you in evaluating evidence of a particular nature, he being trained in that particular filed therefor. You will weigh well what an expert has said before you discard his evidence because neither you nor I is trained in that particular field…But you are still judges of the facts and you may accept or reject evidence of the expert."

The Court continued at paras54 and 55, noting:

> 54. It is clear that from the above that the judge in **Anderson** mischaracterized the evidence and failed to distinguish between (i) the forensic expert's *finding* of fact that no human blood had been found on the boots; (ii) his further *finding* that the bloodstains on the cardboard inside the right boot were in fact human blood; and (iii) the expert's *opinion* that the bloodstains on the piece of cardboard found inside the boot must have been about two weeks old. Their Lordships agreed with the Jamaican Court of Appeal that the trial judge's directions to the jury in relation to the findings of the forensic expert had essentially invited the jury to disregard the *findings* of the expert witness that

there was no blood on the boots and to form their own opinion as to whether there was in fact blood upon the boots.

55. Their Lordships further stated:

> "There is no doubt that in the summing-up a confusion might have arisen in the jury's mind as to whether blood on the cardboard could have been of more recent origin than two weeks. Their Lordships are prepared to accept following the Court of Appeal that there were mis-directions by the trial judge in regard to the boots and in regard to the cardboard."

As such, marshalling disputed expert evidence in a form calculated to provide the jury with a comprehensible summary of the issues for their decision, is an important and often difficult task which will require careful preparation.

The trial judge has a responsibility both to present the expert evidence in terms which will assist the jury to arrive at an understanding, as well as to expose any limitations in its effect. The judge is perfectly entitled to intervene during the evidence to seek explanations with a view to assisting the jury in the summing-up. It makes sense to deal with competing expert evidence by category. Only in this way can the jury sensibly follow and resolve any disputes between experts.

The duties of an expert witness in a criminal trial are owed to the court and override any obligation to the person from whom the expert received instructions, or by whom the expert was paid (see ***R v Bowman*** **[2006] EWCA Crim 417, [2006] 2 Cr App Rep 22**).

Useful Cases

Some useful cases which provide further guidance are as follows:

a. ***Gullivan v R*** **(The Bahamas CA, Civil Side No 5 of 2005, 26 September 2005)**

b. ***Adderley v R*** **(The Bahamas CA, SCCrApp No 123 of 2014, 31 May 2017)**

c. ***Edgecombe v DPP*** **(The Bahamas SC, Criminal Division CRI/VBI/24/2018, 16 August 2023)** affirmed by the Court of Appeal in ***Edgecombe v DPP*** **(The Bahamas CA, SCCrApp No 22 of 2024, 29 July 2025)**

Directions

a. Begin by identifying the expert witness/es and, briefly, the issue/s on which they have given evidence.

b. Outline a summary of the evidence which was adduced by the expert witness.

Chapter 11 – Expert Evidence

c. In every case, the jury should then be directed as follows:

i. Expert witnesses give evidence and opinions in criminal trials to assist juries on matters of a specialist kind which are not of common knowledge.

ii. However, as with any other witness, it is the jury's task to weigh up the evidence of the expert(s), which includes any evidence of opinion, and to decide what they accept and which they do not. The jury should take into account [as appropriate] the qualifications/practical experience/ methodology/source material/quality of analysis/whether or not based upon a statistical analysis/objectivity of the experts. Any factors capable of undermining the reliability of the expert opinion or detracting from their credibility or impartiality should be summarised. The reliability factors ought to reflect the common law, and should be used to assist the jury in evaluating and assessing the weight of the expert evidence. It may be that not all these factors will be under consideration during the evidence and therefore the direction and the factors should be tailored to the issues in the case. These factors are:

- the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained.

- if the opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms such as the 'sliding scale').

- if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results.

- the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise such as peer reviewed publications, and the views of those others on that material.

- the extent to which the opinion is based on material which is outside the expert's field of expertise.

- the completeness of the information available to the expert, and whether the expert took account of all relevant information in arriving at the opinion, which includes information as to the context of any facts to which the opinion relates.

- if there is a range of expert opinion on the matter in question, where in that range the expert's own opinion lies and whether the expert's preference has been properly explained.

- whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

iii. The jury's verdicts must be based on the evidence as a whole, of which the expert evidence and opinion forms only a part.

d. In addition, it may be necessary to incorporate one or more of the following directions:

i. The jury are not themselves experts on the matters about which the expert(s) have given evidence, and should not therefore carry out any tests, comparisons or experiments of their own, or try to reach conclusions of their own which disregard the expert evidence.

ii. The jury do not have to accept the expert evidence even though it is uncontested.

Example 1: Facial Mapping Expert
The CCTV footage shows the person who committed the robbery running away from the scene. The Prosecution says that the person shown on the CCTV was D. D says that it is not them. Two facial mapping experts gave evidence about this. Ms Smith for the Prosecution said that there were certain features she could identify on the footage that lent strong support for D being the person shown on the CCTV. Mr Jones for the Defence said that there are strong indications that it was not D on the CCTV. Expert witnesses provide the courts with evidence and opinions in specific areas where we do not have specialist knowledge. In this case, it was on the techniques of facial mapping. Your job as a jury is to weigh up the evidence and opinions of the two experts and decide which parts you accept and which you do not.

Chapter 11 – Expert Evidence

Example 1: Facial Mapping Expert cont'd

With any evidence about identification there is always a need for caution. Experience shows that mistakes about identity can be and are made, even with an honest witness doing their best to give reliable evidence. Bear in mind also that the opinions expressed by both facial mapping experts are not based on statistical analysis or scientific measurement, and the terms they used for the level of certainty of their opinions are not scientific terms.

When you are evaluating the reliability of an expert's opinion, you need to consider the following factors:

a. [List the factors that require consideration in conjunction with a summary of the evidence given relevant to those factors. List and summarise any factors that are capable of undermining the reliability of the expert's opinion or detracting from their credibility or impartiality.]

b. When you assess the experts' different opinions you also need to take into account what you have heard about the experts' qualifications and experience.

c. You must not try to reach conclusions on the expert evidence by carrying out your own experiments, or by comparing the defendant you have seen in court or their image, with the CCTV footage. You are not experts in this field, and you must be guided in this specific area by the experts who are. Everyone involved in the case has agreed that experts were needed to study the CCTV footage.

   [If the imagery is of a quality that would allow the jury to reach their own safe assessment as to whether it showed D or not, then the directions will need to be tailored to reflect that, but in that event the issue of whether there should be expert evidence at all advanced at trial, and the limitations of any opinion that an expert witness is allowed to express on the topic, will need to have been considered at the stage it was admitted and with directions being given to the jury at that stage.]

Finally, please remember that the expert witnesses are only able to give evidence about one element in this case because facial mapping is in their field of expertise. This means the expert's evidence is only part of the evidence you have heard. Your job as a jury is to reach a verdict(s) by considering all the evidence in the case.

Chapter 11 – Expert Evidence

Example 2: Handwriting Expert

It is agreed that the signature on the will has been forged. D says that they did not write it.

Two handwriting experts compared a sample of D's handwriting to the signature on the will and gave evidence about this. Both experts agree that no two writers have identical handwriting, and every person has natural variations in their handwriting. Ms Smith for the Prosecution said that there were strong indications that the signature was written by D. Mr Jones for the Defence said there were strong indications that D did not write it.

Expert witnesses provide the courts with evidence and opinions in specific areas where we do not have specialist knowledge. In this case, it was on the techniques of comparing handwriting. Your job as a jury is to weigh up the evidence and opinions of the two experts and decide which parts you accept and which you do not.

It is important to remember that you are not experts on handwriting. You must not attempt to carry out tests or make comparisons in the way that the two experts have. You also do not have to accept the evidence of either expert. An expert's view is no more than an opinion. Being an expert witness does not mean that the expert must be correct.

When you are evaluating the reliability of the expert's opinion, you need to consider the following factors:

a. Whether Mr Jones was justified in criticising the method Ms Smith used. Mr Jones said Ms Smith should have carried out chromatography in addition to analysing the handwriting style and physical indentations. The experts also disagree about the quality of the sample of D's handwriting. Mr Jones has said the sample was insufficient and he relies on a research paper to support that view. Ms Smith relies on several research papers to support her view that the sample was more than adequate.

b. Both experts have given opinions on the similarities and differences in handwriting. Ms Smith has said that there are very significant similarities in respect of word and letter spacing, the stylistic impression of particular letters, and punctuation. She accepts there are some variations between the sample and the will, but she said these are in the normal range of variation that one would expect. Mr Jones has drawn your attention to what he says are differences in slant and slope and the drawing of particular letters. In his view these differences are so stark that he believes it was not D who wrote the forged signature.

Chapter 11 – Expert Evidence

Example 2: Handwriting Expert cont'd

c. Both experts have the necessary qualifications and experience. But Ms Smith has been an expert witness for the past ten years only for the Prosecution, while Mr Jones has only ever given evidence for the Defence in his twenty-year career. The expert's duty is to the court. But you are entitled to consider these points in assessing the credibility of the experts and deciding whether they are giving impartial evidence or simply helping the side that asked them to give evidence.

Finally, please remember that the expert witnesses are only able to give evidence about one element in this case because handwriting analysis is in their field of expertise. This means the expert's evidence is only part of the evidence in this case. Your job as a jury is to reach a verdict(s) by considering all the evidence in the case.

For example, Mr Phillips says he distinctly remembers a conversation with D about the will in which D was asking questions about it and the place it was kept. The Prosecution relies on this evidence to support their theory that D had an interest in the will, and this conversation revealed D's motivation to commit the crime. Bear in mind, however, that D denies saying any such thing.

So, remember you must consider all the evidence in deciding whether or not you are sure it was D who forged the will.

Chapter 12 – Corroboration

In this Chapter: **General Scope | Mandatory Corroboration | Useful Cases**

Corroboration refers to testimony or evidence that supports other evidence in a case and that goes towards establishing those evidential facts or circumstances. Corroborating evidence also has the effect of strengthening, confirming, substantiating, or making more certain the probative value and/or credibility of the testimony of a witness.

General Scope

Corroboration, as defined by Lord Reading CJ in ***R v Baskerville*** **[1916] 2 KB 658, 12 Cr App Rep 81** at 667:

> must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

For example, measures such as CCTV footage, security footage, Electronic Monitoring Device location pinnings, DNA evidence, and eyewitness testimony, while not exhaustive, can assist in confirming or denying the evidence of the defendant but ultimately assist the role of justice being realized.

Sections 140 – 141 of the **Evidence Act, Chapter 65** state:

> 140. In trials for perjury no person shall be liable to be convicted, unless the falsity of the statement alleged to have been sworn to by him is proved by two witnesses, or by a witness corroborated by material and independent circumstances.
>
> 141. Nothing in this Act shall be deemed to affect the practice or discretion of the court decline to accept evidence without corroboration or to direct the jury to decline to accept evidence without corroboration in cases in which it may deem it expedient so to do.

The general principles of corroboration are set out in the Criminal Procedure title of ***Halsbury's Laws of England*** (5th edn, 2021) vol 28, para 552:

> Corroboration (or 'corroborative evidence') is evidence which tends to confirm the truth or accuracy of other evidence by supporting it in some material particular. Such evidence must itself be admissible and credible, and it must

> come from a source independent of any testimony which is to be supported by it.
>
> Corroborative evidence is always desirable where the truth or accuracy of the evidence it supports has been called into question, but it is only very rarely required by law. A conviction may at common law be based on the evidence of a single competent witness, or of a single document or exhibit, provided that this single piece of evidence is credible and by itself sufficient to convince the court or jury of the defendant's guilt. Where the defendant bears a persuasive or evidential burden of proof, this burden can similarly be discharged, as a general rule, by one piece of evidence or by the testimony of a single witness. (footnotes omitted)

Historically, there were specific categories of cases where, because of the nature of the allegation or the type of witness, a direction was required that the jury should look for corroboration of the evidence in question. Categories included for instance, cases involving evidence of an accomplice, evidence of a complainant in the trial of a sexual offence and evidence of a child. But corroboration is now required by statute only in cases of sedition (see s 396(5) of the **Penal Code, Chapter 84**), perjury (see s 140 of the **Evidence Act, Chapter 65**), speeding (see s 43(5) of the **Road Traffic Act, Chapter 220)** and attempts to commit such offences.

Although corroboration in the strict sense is now no longer required in support of the categories outlined above, circumstances may nevertheless require the judge, as a matter of discretion in summing-up, to give a warning to the jury about the need for caution in the absence of supporting evidence.

The trial judge should discuss with the Prosecution and Defence attorneys the need for, and the terms of, any cautionary direction it is proposed might be given. The direction will be tailored to point out to the jury the particular risk of which they need to be aware, before relying upon the evidence from the 'tainted' source.

The need to direct the jury to be cautious in accepting the evidence of an informant was a significant part of the decision in ***Small v DPP; Gopaul v DPP*** **[2022] CCJ 14 (AJ) GY, (2022) 102 WIR 415**. In considering the issue of the 'unreliable snitch evidence', the Court noted that, in the last two decades, there has been an avalanche of research, studies, reports, official police and prosecutorial policies, and academic writings about the notorious unreliability of evidence provided by prison informants; what in colloquial language is called 'snitch evidence'. This is evidence given by a prisoner, the 'snitch', claiming that a fellow prisoner, the defendant, would have admitted or confessed to them having committed the criminal offence the defendant is charged with. The Court opined at paras 120 – 121:

> **[120]** The many studies suggest that the adversarial process is ill equipped to effectively expose the unreliability of this kind of evidence. Corroboration or

> the existence of supporting evidence, as we saw, is often too easily accepted; very robust and serious corroboration is usually not required. Cross-examination of snitches is usually ineffective because possible incentives for the snitch are often undiscoverable and almost all the fabricated evidence is usually of such a 'he said, she said' character that it would be difficult to debunk or impeach it. Even jury directions have generally been found faulting in effectiveness. First, 'Jury instructions can seem legalistic and get easily lost in the sea of other instructions.' Jurors are said to be 'generally … poor at understanding traditional jury instructions or applying those instructions in deliberations' and 'instructions to disregard relevant evidence do not prevent jurors from incorporating that evidence into deliberations.' Another academic, Findley, remarks that 'empirical evidence suggests that jurors, even when educated about things like snitch testimony and confessions, still find them compelling.' He points out that 'to the extent the courts do utilise instructions, they must be empirically based and specific, so that they can be a meaningful source of decisional information.'
>
> **[121]** It is not only academics and judges who have become increasingly aware of the difficulties with snitch evidence. Several prosecution authorities, especially in the United States and Canada, have also been shown to be very critical of it. And many of them have developed policies cautioning prosecutors to curb their natural enthusiasm for using cellmate evidence…(footnotes omitted).

A particular sensitivity also arises when jointly charged defendants give evidence implicating each other: ***Petkar v R* [2003] EWCA Crim 2668, [2004] 1 Cr App Rep 270**. There is a risk that a direction to exercise caution before acting on the evidence of either defendant will have the effect of diminishing the evidence of both defendants in the eyes of the jury. Judges are expected to give at least the "customary clear warning" to examine the evidence of each with care because each has or may have an interest of their own to serve (see ***R v Knowlden* (1983) 77 Cr App Rep 94**; ***R v Cheema* [1994] 1 WLR 147, [1994] 1 All ER 639**.

It may be implicit that if the first defendant's defence is true, the second defendant must be guilty. In order to acquit the first defendant, the jury need only consider that the first defendant's evidence may be true. Since, however, the Prosecution must prove its case against the second defendant so that the jury is sure, it does not follow that an acquittal of the first defendant must lead to the conviction of the second defendant. That fact may need emphasising.

Alternatively, the first defendant's denial of participation may not of itself imply the guilt of the second defendant. The first defendant's accusation against the second defendant may stand free from the denial and entirely unsupported by any other evidence. If so, the need for caution when considering the accusation against the second defendant, now also relied on by the Prosecution, might be expressed in more trenchant terms.

Chapter 12 – Corroboration

Mandatory Corroboration

There are certain types of cases (such as sedition, perjury, etc.) in which corroboration of evidence is mandatory However, the Court of Appeal in ***SS v R*** **(The Bahamas CA, SCCrApp No 268 of 2015, 17 November 2017)** noted, as summarised in the headnote:

> The 'old' common law rule which governed the giving of corroboration warnings is no longer to be regarded a mandatory rule of law, but rather as a rule of practice based on long experience. The rules of practice which now best fulfill the needs of fairness and safety are those encapsulated in the guidance given by Lord Taylor of Gosforth C.J., in Makanjuola. In accordance with Makanjuola, the exact terms and strength of the warning which a judge decides to give in any particular case is now a matter for the judge's *discretion* depending on: (i) the circumstances of the case; (ii) the issues raised; and (iii) the content and quality of the evidence of particular witnesses.

Makanjuola Factors

The case of ***R v Makanjuola*** **[1995] 1 WLR 1348, [1995] 3 All ER 730**, provides guidance on the discretion of judges to give warnings, the evidential basis required for such warnings, and the strength and form of the warnings.

The Bahamas Court of Appeal's stance as noted in ***SS v R***, at para 18, is as follows:

> Based on the guidance in **Makanjuola** and the settled approach of this Court to evaluating challenges to the exercise of a trial judge's discretion in this area of the law, the question for our determination is therefore whether the directions which the judge gave in the court below represented an improper exercise of his *discretion* and in particular, whether the exercise of his *discretion* was so unreasonable as to warrant interference on this appeal. Based on authority, the judge's directions to the jury will necessarily have to be assessed in the light of the particular circumstances of this case, the issues which arose at the trial and the content and quality of the evidence of the witnesses.

Sexual Offences

In The Bahamas, the restriction on conviction in certain types of sexual offences is addressed in s 9 of the **Sexual Offences Act, Chapter 99** which states, "No person shall be convicted of an offence under s 7 or 8(1) upon the evidence of one witness unless such evidence be corroborated in some material particular by evidence implicating the accused person."

In ***R v Gilbert*** **[2002] UKPC 17, [2002] 2 AC 531**, a decision on appeal from the Court of Appeal of Grenada, the Privy Council abolished the rule of practice requiring a mandatory corroboration warning to the jury in respect of the evidence of complainants in sexual cases. Delivering the judgment of the Board, Lord Hobhouse at para 16 described the belief that, "regardless of the circumstances the evidence of female complainants must

be regarded as particularly suspect and particularly likely to be fabricated", as "discredited" and "not conducive to the fairness of the trial nor to the safety of the verdict". Thus, in that case, in which the only issue on a charge of rape was identification (the appellant having set up an alibi), it was held that the trial judge had been correct to approach the matter on the basis that a ***Turnbull*** warning (***R v Turnbull*** **[1977] QB 224, [1976] 3 WLR 445**) was all that was needed and that it was not necessary to give an additional warning on the danger of acting on the uncorroborated evidence of the complainant. In arriving at this conclusion, the Board adopted the approach of the Court of Appeal of England and Wales in ***R v Chance*** **[1988] QB 932, [1988] 3 WLR 661**, a decision which predated the formal abolition in England and Wales of the need for a mandatory corroboration warning in sexual cases.

In ***Eugene v AG*** **(The Bahamas CA, SCCrApp No 221 of 2015, 17 May 2018)**, the Court of Appeal of The Bahamas had to consider the safety of a verdict on a charge of rape in light of the trial judge's assessment of the evidence and whether such evidence was capable of constituting corroboration. The summary of the Court's decision affirming the conviction and sentence states that:

> The evidence of the DNA expert to the effect that she found semen on the vaginal swab, the crutch of the panty and the jeans of the VC was not corroboration in the proper sense as the evidence was that there was insufficient data to conclude that the semen came from the appellant. Further, the evidence of the mother of the VC of the distraught appearance of the VC at around 10:00pm crying, with prickles all over her clothes; as well as the evidence of the DNA expert of the plant debris on the clothes of the VC, which she says, as an expert, in her opinion, is indicative of a struggle, that occurred outdoor was also not corroboration in the proper sense. It was therefore an error for the trial judge to describe them as corroboration as neither bits of evidence could be said to support a finding that the appellant was the person who committed the crime.
>
> A close review of the passages of the summation as a whole which dealt with corroboration reveals that the learned judge conflated the evidence which supports the crime of rape with corroborative evidence. He combined three sets of evidence to conclude that there is corroboration. However, in its proper sense, for any bit of evidence to be properly termed corroborative evidence it must be evidence, that does not come from the complainant, which confirms in some important respect, not only evidence that the crime has been committed, but that it was the accused, who committed the crime.
>
> The question to be decided is whether the judge's mischaracterization of certain evidence as corroboration was a fatal error as contended by counsel for the appellant. The reality is that there was in fact evidence in the form of the DNA from the appellant's skin cells on the vaginal swab of the VC. The VC's evidence was that she did not consent to sex. This evidence, if believed, was sufficient to satisfy the jury that the appellant had non-consensual sexual

> intercourse as defined by the statute with the VC on the night in question whether it was by penile or finger penetration. It must also be remembered that there is no prohibition on the jury accepting the evidence of the VC, even if they did not accept that there was evidence to corroborate her version of what transpired.
>
> Finally, having regard to the cogency of the evidence I am satisfied that the jury, properly directed, would, in any event, have convicted the appellant. In the circumstances I have no lurking doubt as to the safety of the verdict**.**

Accomplices & Co-Defendants

While a corroboration direction is not mandatory except in the instances mentioned above, it is a matter entirely within the discretion of the trial judge to determine whether, in the light of the content and manner of the witness' evidence, the circumstances of the case and the issues raised, to give any warning at all; and, if so, in what terms.

The need to consider a ***Makanjuola*** direction applies whenever the need for special caution is apparent. A defendant may have a purpose of their own to serve by giving evidence which implicates a co-defendant.

It must also be remembered that there is no prohibition on the jury accepting the evidence of the Virtual Complainant (VC), even if they did not accept that there was evidence to corroborate the VC's version of what transpired: ***Eugene v AG***.

In ***Glinton v R*** **(The Bahamas CA, SCCrimApp No 113 of 2012, 15 April 2014)**, John JA in delivering the unanimous decision for the Court, adjudged that it is within the discretion of the trial judge to determine whether an accomplice warning is required in a given case. However, the appellate court, in determining whether the trial judge properly exercised his or her discretion not to give an accomplice warning, will have regard to the evidence in the case. Particularly, where the credibility of the co-defendant is called into question or is paramount, it will be proper for the trial judge to exercise his or her discretion and give a corroboration warning.

It is important to note that when the court considers a possible direction, it should be seen as that of a legal question or query and discussed in the absence of the jury with both sides.

Useful Cases

a. ***R v Pike*** **[2022] EWCA Crim 1501**

b. ***Richardson v R*** **(The Bahamas CA, SCCrApp No 265 of 2018, 14 February 2020)**

Chapter 13 – Good Character

In this Chapter: **General Scope | Useful Cases | Examples**

Generally, a defendant may have absolute or effective good character. Absolute good character applies where there are no proven or admitted prior convictions, cautions, or instances of reprehensible behaviour. Effective good character applies where there exist minor, old, or irrelevant prior convictions. A defendant's good character can be relevant in two ways: it can go to determinations of credibility, and/ or propensity, both of which could be pivotal to findings of guilt or innocence. Good character influences credibility by increasing the likelihood of the defendant being believed, and it influences propensity by decreasing the likelihood that they acted as alleged.

General Scope

In the modern era, the courts have accepted that good character evidence may be admissible:

a. to bolster the defendant's credibility, and

b. as relevant to the likelihood of guilt.

This has been repeatedly accepted, most prominently in ***R v Vye*** **[1993] 1 WLR 471, [1993] 3 All ER 241**, by the House of Lords in ***R v Aziz*** **[1996] AC 41, [1995] 3 WLR 53**, and by the five-member Court of Appeal in ***R v Hunter*** **[2015] EWCA Crim 631, [2015] 1 WLR 5367**.

The specially constituted five-judge court of the English Court of Appeal in ***R v Hunter***, conducted a truly comprehensive and erudite study of the development of the subject and provided general conclusions to guide future decision-making. Lady Hallet in delivering the judgment of the Court said:

> **38** The Board's principle (i) has been interpreted by some as meaning that a defendant who has a long record of offending but not for offences in the same category as the offence charged is entitled to a good character direction on propensity. That is a misunderstanding of principle (i). **The defendant must be a person of good character, or, if he has previous convictions, deemed to be a person of effective good character, before he will be entitled to benefit from a good character direction.**
>
> **39** As for the stark assertion at the Board's principle (ii) above as to the consequences of a failure to give the direction, in *Singh v the State of Trinidad and Tobago* [2006] 1 WLR 146, para 30, Lord Bingham of Cornhill on behalf of the Board added a rider:

Chapter 13 – Good Character

> The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.

…

64 A judge's directions on good character relate to the law not the facts; nevertheless the extension of the circumstances in which advocates demand of judges a direction on good character has not helped effective trial management. It has led to lengthy discussions at trial about directions to juries, some convoluted directions to a jury, and a flood of applications for leave to appeal. As stated in the current edition of the *Bench Book,* p 162:

> The application of the (good character) principles is not always straightforward in practice. The exercise of judgement as to the terms in which the good character direction will be framed usually arises where the defendant argues that he should be treated as being of good character notwithstanding the presence of (usually minor and/or spent) convictions or where a defendant with previous convictions seeks a favourable direction as to propensity.

65 Our review of the case law leaves us in no doubt that those observations are justified. The application of the principles is not straightforward; attempts by this court to promote consistency of approach have failed.

66 The *Vye* and *Aziz* principles began life as good practice. Good practice became a rule of practice in *R v Vye* because the court needed a pragmatic solution to a problem of inconsistency and uncertainty. The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction. Yet, the principles in *R v Vye* and *R v Aziz* have now been extended to the point where defendants with bad criminal records (as in these appeals) or who have no right to claim a good character are claiming an entitlement to a good character direction. Many judges feel that, as a result, they are being required to give absurd or meaningless directions or ones which are far too generous to a defendant. *Fairness does not require a judge to give a good character direction to a man whose claim to a good character is spurious* (per Lord Steyn in (per Lord Steyn in *R v Aziz* [1996] AC 41, 52 and Taylor LJ in *R v Buzalek* [1991] Crim LR 115.*)* .

67 Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend.

(b) Impact of R v Vye and R v Aziz

68 *We return therefore to the principles we derive from R v Vye* and *R v Aziz and by which we remain bound.*
(a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements.(b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements. (c) Where defendant A, of good character, is tried jointly with B who does not have a good character, (a) and (b) still apply. (d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with R v Vye. The judge then has a residual discretion to decline to give a good character direction. (e) A jury must not be misled. (f) A judge is not obliged to give absurd or meaningless directions.

69 *It is also important to note what R v Vye and R v Aziz did not decide: (a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character; (b) that a defendant with previous convictions is entitled to good character directions; (c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged; (d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely on the previous convictions as probative of guilt; (e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction;*

70 It is clear to us that the good character principles have therefore been extended too far and convictions have been quashed in circumstances we find surprising. The decisions in *R v H* [1994] Crim LR 2005 and *R v Durbin* [1995] 2 Cr App R 84 are usually cited as justification but it is sometimes forgotten that the previous conviction in *R v H* was old, minor and irrelevant to the charge. The defendant H fell into the category of someone with an effective good character. His conviction was not simply irrelevant to the charge. Further, the court in *R v Durbin*, perhaps unaware of the decision in *R v Buzalek*, does not seem to have appreciated that the principle of giving a good character direction only applied where the defendant was of previous

> good character "in the proper sense". This led the court in *R v Durbin* to proceed on the false basis that a man with an undoubtedly bad character as far as propensity and credibility were concerned was entitled to the benefit of a good character direction. We are satisfied that the law thereby took a wrong turn.
>
> **71** In any event, *R v Durbin* was decided before *R v Aziz* in which Lord Steyn stated expressly that judges should not be required to give absurd or meaningless directions. A good character direction on the facts of *R v Durbin* and, in our view, *R v D(P)* [2012] 1 Cr App R 448 would have been absurd and meaningless. Subsequent reliance upon *R v Durbin* in cases like *R v Gray (John)* [2004] 2 Cr App R 498 and *R v D(P)* (in so far as *D(P)* relied on *R v Gray*) to extend the principles of good character to defendants who do not have a good character was therefore misplaced.
>
> …
>
> **96** An appellate court should only interfere if, on the facts, it was not properly open to the judge to reach the conclusions he did, for example to refuse to treat the defendant as a person of effective good character or to refuse to give a particular limb of the direction. As Sir Igor Judge P observed in *R v Renda* the circumstances in which this Court would interfere with the exercise of a judicial discretion or a fact specific judgment are limited. Context is all and the trial judge is likely to have a far better feel for the dynamics of a criminal trial and the interests of justice than an appellate court.
>
> …
>
> **98** We should also add that if defence advocates do not take a point on the character directions at trial and/or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics. In those cases this court should be slow to grant extensions of time and leave to appeal. (emphasis added)

It is to be noted that the failure to give a good character direction does not, as a matter of course, affect the fairness of the trial and does not render the conviction unsafe. There is no mathematical or scientific formula that can prescribe the fate of the conviction; everything depends on the peculiar facts and circumstances of the individual case. Specifically, it is permissible to compare the relative strengths and weaknesses of the case put forward by the Prosecution and the Defence, to get a sense of the approach likely to have been taken by the jury had the appropriate direction been given: ***Hall v R* [2020] CCJ 1 (AJ) (BB), (2020) 95 WIR 201** at paras 63 – 68.

Chapter 13 – Good Character

According to ***R v Hunter***, a defendant is of good character if they have not previously been convicted of any offences. A person with previous convictions may be considered as having effective good character, if those previous convictions are spent, or irrelevant to the offence for which the defendant is at present before the court. The law on what constitutes good character has expanded such that "…good character now means far more than not having previous convictions" (at para 74).

The general rule is that a person of good character or effective good character is entitled to a good character direction. The exception to this general rule applies where a person has no previous convictions but has "admitted other reprehensible conduct" (at para 68). In such a case, it would "be an insult to common sense" to give a good character direction (at para 68). The standard good character direction contains two limbs: credibility, that a person of good character is more likely to be truthful than one of bad character; and propensity, that a person of good character is less likely to commit a crime, especially one of the nature with which they are charged, than a person of bad character: ***Hall*** at para 42.

However, it is important to note that the learning found in the CCJ cases of ***Hall* and *August v The Queen* [2018] CCJ 7 (AJ) (BB)** applies to the Bahamian context, save and except that unsworn evidence at the dock is no longer permitted in criminal proceedings as it has been abolished by s 170(3)of the **Criminal Procedure Code Act, Chapter 91**. ***August*** was considered by The Bahamas Court of Appeal in ***Belazaire v DPP* (The Bahamas CA, SCCrApp No 51 of 2021, 8 March 2022)**.

It is important to note that the direction should be modified:

a. to suit the circumstances of the case, and

b. where the defendant is considered to be of effective good character.

The "directions should be in the form of [an] affirmative statement" rather than asked as a question, per ***R v Hunter*** at para 42 citing **R *v Lloyd* [2000] 2 Cr App Rep 355**.

In ***R v Vye* [1993] 1 WLR 471, [1993] 3 All ER 241**, the Court of Appeal of England and Wales established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant 'does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb [credibility] direction is not required' (per Lord Taylor CJ, at pg 245).

Lord Steyn in the case of ***R v Aziz* [1996] AC 41, [1995] 3 WLR 53** at pg 50 stated that, "It has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question."

As noted above, good character now means more than not having previous convictions; and positive features of a defendant's character may also entitle the defendant to the benefit

of a good character direction (see ***Richardson v R*** **(The Bahamas CA, SCCrApp No 265 of 2018, 14 February 2020)**).

A trial judge should approach the issue of good character having regard to the following propositions, laid down by the case of ***Teeluck v State of Trinidad and Tobago*** **[2005] UKPC 14, (2005) 66 WIR 319** at para 33:

> **[33]**. …Their lordships consider that the principles which are material to the issues now before them can conveniently be encapsulated in the following series of propositions.
>
> (i) When a defendant is of good character, ie 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 R*** (1998) 52 WIR 203 , following ***R v Aziz*** [1996] AC 41 and ***R v Vye*** [1993] 1 WLR 471.
>
> (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 Rep 251 at 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*** (1999) The Times (London), 14 May.
>
> (iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.
>
> (iv) Where credibility is in issue, a 'good character direction' is always relevant: ***Berry v R*** (1992) 41 WIR 244, [1992] 2 AC 364 at 381; ***Barrow v The State*** (1998) 52 WIR 493, [1998] AC 846 at 850; ***Sealey and Headley v The State*** [2002] UKPC 52, 61 WIR 491 at p 505, 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) 52 WIR 493, [1998] AC 846 at852, following ***Thompson v R*** (1998) 52 WIR 203, [1998] AC 811 at 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 R***.

As noted in the case of ***Teeluck***, counsel's duty to their client requires them to ensure that if their client is of good character, evidence of good character is raised during the trial. Further, evidence of good character "may be raised inferentially and [is] not limited to circumstances amounting to good character being led in the "legal sense"": ***Richardson v R* (The Bahamas CA, SCCrApp No 265 of 2018, 14 February 2020)** at para 15.

Where counsel fails in this duty, however, the judge has an independent duty to inquire whether a good character direction would be appropriate. The independent duty of the judge is a part of the judge's duty in ensuring that the defendant has a fair trial: ***Celestin v AG* (The Bahamas CA, SCCrApp No 50 of 2019, 10 June 2020)** per Barnett, P. An alternate view, per Crane-Scott JA in the same case (at para 77), is that where Defence counsel fails in their duty to elicit evidence of the defendant's good character, the judge is under no duty to give a good character direction.

In cases where it is obvious that good character may be in issue, the trial judge should enquire whether a direction on character should be given: ***Scott v R* (The Bahamas CA, SCCrApp No 163 of 2012, 7 November 2016)**; ***Gilbert v R* (Practice Note) [2006] UKPC 15, (2006) 68 WIR 323**.

While good practice dictates that a judge should inquire whether the defendant is of good character and, therefore, entitled to a standard or modified good character direction, this practice does not crystalize into an obligation on the part of the trial judge: ***Belazaire v DPP* (The Bahamas CA, SCCrApp No 51 of 2021, 8 March 2022)** per Isaacs, JA.

Regardless of whose duty it was to ensure that a good character direction was given, or who was at fault for a good character direction not being given by the trial judge, the authorities show that the duty of an appellate court is to determine whether, having considered the totality of the evidence, the lack of a good character direction affected the safety of the conviction: ***Celestin v AG* (The Bahamas CA, SCCrApp No 50 of 2019, 10 June 2020)**.

Where a defendant, who is of good character, gives evidence under oath and/or affirmation and subjects themself to cross examination, they must be given the benefit of a full good character direction which includes the **credibility limb** and the **propensity limb**: See ***Belazaire v DPP*** (in this case the Court referred to the CCJ's decision of ***August v The Queen* [(2018) CCJ 7 (AJ)**).

Where a defendant is not entitled to a good character direction as to credibility because the defendant has not given evidence on oath, the test on appeal is whether the case against the defendant was sufficiently strong that the jury would, inevitably, have arrived at the same verdict.

Chapter 13 – Good Character

The CCJ in ***August v The Queen*** **[2018] CCJ 7 (AJ) (BB)** noted at para 49:

> It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed, and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross- examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is … unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence.

Further, ***Blackstone's Criminal Practice 2026*** states at F14.19 – F14.20:

> Where an accused of good character testifies, the standard direction should be given in full…[as] good character…[is] 'a positive feature which should be taken into account'. ….[W]here the accused has not given evidence at trial but relies on admissible exculpatory statements made to the police or others, the judge should direct the jury to have regard to the accused's good character when considering the credibility of those statements…[W]here an accused of good character does not give evidence and has given no pre-trial answers or statements upon which reliance is placed, a 'first limb' direction is not required as no issue as to the accused's credibility arises.

Regarding the propensity limb of the good character direction, it should be given where a defendant is of good character, regardless of whether the defendant gives evidence on oath or not (***Blackstone's Criminal Practice 2026*** at F14.20).

In the case of ***Hunter***, the Court of Appeal of England and Wales provided guidance relative to various categories which the defendant may fall into. It is important to note that the guidance provided is just that, as the case was decided pursuant to the statutory intervention of the UK **Criminal Justice Act, 2003**. The principles distilled are summarised as follows:

a. Absolute good character: a defendant who has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven. The defendant need not go further and adduce evidence of positive good character. This category of defendant is entitled to both limbs of the good character direction. The law is settled (see ***Hunter*** at para 77).

b. Effective good character: a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge; the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character. It does not follow from the fact that a defendant has previous convictions which are old or irrelevant to the offence charged, that a judge is obliged to treat them as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit an 'effective good character' are afforded one. It is for the judge to make a judgement, by assessing all the circumstances of the offence(s) and the offender to the extent known, and then deciding what fairness to all dictates (see ***Hunter*** at para 79).

c. If the judge decides to treat a defendant as a person of effective good character, the judge does not have a discretion whether to give the direction. The judge must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure the jury is not misled (see ***Hunter*** at para 80).

d. Previous convictions: a defendant with previous convictions or cautions to their name has no entitlement to either limb of the good character direction. It is a matter for the judge's discretion.... The judge will decide what fairness dictates. Fairness may well suggest that a direction would be appropriate but not necessarily (see ***Hunter*** at para 82).

e. Bad character relied upon by the Prosecution: Where the defendant has no previous convictions or cautions, but evidence is admitted and relied upon by the Crown of other misconduct, the judge is obliged to give a bad character direction. The judge may consider that as a matter of fairness, they should weave into their remarks a modified good character direction...This must therefore be left to the good sense of trial judges. This too is a broad discretion (see ***Hunter*** at para 83).

f. Bad character adduced by the Defence and not relied on by the Crown: Where a defendant has no previous convictions but has admitted other "reprehensible conduct", a judge has a residual discretion but prima facie, the judge should give the good character directions, unless it would defy common sense to do so. (see ***Hunter*** at paragraph 85)

As a matter of good practice, ***Hunter*** notes at para 101 that:

> …defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and if so the precise terms. This discussion should take place before the evidence is adduced. This has advantages for the court and for the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the Crown can conduct any necessary checks and the judge will have the fullest possible information on which to rule.

Chapter 13 – Good Character

Useful Cases

a. ***Bain v DPP*** **(The Bahamas CA, SCCrApp No 51 of 2022, 15 November 2022)**

b. ***Burrows v DPP*** **(The Bahamas CA, SCCrApp No 48 of 2022, 30 March 2023)**

c. ***Sawall v R*** **(The Bahamas CA, SCCrApp No 259 of 2015, 7 February 2019)**

d. ***Armbrister v R*** **(The Bahamas CA, SCCrApp No 232 of 2012, 31 August 2017)**

e. ***Edgecombe v R*** **(The Bahamas CA, SCCrApp No 144 of 2015, 17 September 2018)**

f. ***Brennen v DPP; DPP v Brennen*** **(The Bahamas CA, SCCrApp Nos 94 of 2019 and 85 of 2019, 18 August 2021)**

g. ***Birbal v R (No 2)*** **(The Bahamas CA, SCCrApp No 114 of 2014, 30 August 2017)**

Examples

Relevance to D's credibility and propensity - good character is a positive feature of D's case – weight is for the jury
You have heard that D has no previous convictions. Good character is not a defence to the charge(s) but it is relevant in two ways. First, the Defendant, D, has given evidence. D's good character is a positive feature which you should take into account in their favour when considering whether you accept what D told you. Secondly, the fact that D has not offended in the past may make it less likely that D acted as the Prosecution alleges in this case. What importance you attach to D's good character and the extent to which it assists on the facts of this particular case are for you to decide. In making that assessment you may take account of everything you have heard about D.

Chapter 13 – Good Character

D has no previous convictions/cautions and there is evidence from character witnesses

You know/it is agreed that D has no convictions or cautions for any criminal offence and you have also heard unchallenged evidence from witnesses who spoke about D's personal qualities. [Here, summarise the evidence or tell the jury that this will be summarised later].

Obviously just because D is of previous good character does not mean that D could not have committed the offence(s) with which they are charged. But their good character is something you should take into account in D's favour in two ways.

First: D gave evidence, and you should take D's lack of convictions/cautions and D's personal qualities into account when you are deciding whether you believe D's evidence.

Secondly: the fact that D is now [specify] years old, that D has the qualities about which you have been told, and that D has not committed any previous offence may mean that it is less likely that D would have committed the offence/s of [specify].

You should take D's good character into account in D's favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

D has spent convictions, but the judge has decided that D should be treated as someone of "effective good character"

You know/it is agreed that the defendant has two convictions for [specify]. These offences, which are relatively minor, were committed more than 25 years ago when D was still a teenager.

Because of their nature and age, D is to be regarded as if they are a person of previous good character.

This does not mean that D could not have committed the offence/s with which they were charged, but it should be taken into account in D's favour in two ways:

First: D gave evidence and the fact that D is to be treated as someone of good character is something that you should take into account when you are deciding whether you believe D's evidence.

Secondly: the fact that D is now [specify] years old and has not committed any offence for over 25 years (if appropriate: and has never committed any offence of [specify]) may mean that it is less likely that D would have committed the offence(s) with which they were charged.

You should take the fact that D is to be regarded as a person of good character into account in D's favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Chapter 13 – Good Character

D has introduced their previous convictions because they are dissimilar to the charges which they face at trial. The judge decides to give a good character direction limited to the propensity limb

You know/it is agreed that D has convictions for offences of [specify]. D introduced this evidence because D wanted you to know that they have never been convicted of any offence involving [specify].

How should you approach the fact that D has no previous convictions for any offence similar to the charge they now face? This is obviously not a defence to the charge, but it may make it less likely that D has committed an offence of [specify].

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

D is of good character; D has not given evidence but made an out of court statement on which they rely; direction on credibility and propensity limbs

You know/it is agreed that the defendant has no cautions or convictions for any criminal offence; D is a person of previous good character.

This does not mean that D could not have committed the offence(s) with which they are charged, but D's good character is something you should take into account in their favour in two ways.

First: although D did not give evidence, D did give an account to the police when they were interviewed and D relies on that account in this case. You should take D's good character into account when you are deciding whether you accept what they said in that interview. Bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination.

Secondly: the fact that D has not committed any previous offence may mean that it is less likely that D would have committed the offence(s) of [specify].

You should take D's good character in their favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing-up about the inferences that may, or must not, be drawn from the defendant's not having given evidence.

Chapter 13 – Good Character

D is of good character; D did not make any out of court statement and has not given evidence; direction on propensity limb only

You know/it is agreed that D has no convictions or cautions for any criminal offence; D is of good character.

This does not mean that D could not have committed the offence(s) with which they are charged, but it may mean that it is less likely that D would have committed the offence(s).

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing-up about the inferences that may, or must not, be drawn from the defendant not having given evidence.

D is charged with assaulting V; evidence that D is of positive good character, but the jury have also heard evidence, which D disputes, of previous bad character/ misconduct

You know that D has no previous convictions or cautions for any criminal offences. Further, you have heard from witnesses who spoke about D's personal qualities [about which I will remind you in due course]. This does not mean that D could not have committed the offence(s) with which they are charged, but D's good character is something you should take into account in their favour in two ways.

First: D gave evidence, and you should take D's lack of convictions/cautions and D's personal qualities into account when you are deciding whether you believe what they said.

Secondly: the fact that D has not committed any previous offence may mean that it is less likely that D would have committed the offence(s) here alleged.

On the other hand, you have also heard evidence alleging that D assaulted V on a number of previous occasions, something which D denies.

How should you approach the evidence of these alleged previous assaults? If you are sure that one or more of these alleged previous assaults occurred, you would be entitled to consider whether this shows that D had a tendency to be violent towards V. In assessing whether you are sure these earlier assaults took place, and how evidence about them might support the Prosecution's case, you must always bear in mind the direction I have just given to you about D's good character.

Chapter 13 – Good Character

D is charged with assaulting V; evidence that D is of positive good character, but the jury have also heard evidence, which D disputes, of previous bad character/ misconduct

If you are sure that D did have such a tendency, you could treat this as some support for the Prosecution's case. But this would only be part of the evidence against D and you must not convict D wholly or mainly on the strength of it. If you are not sure that D did have such a tendency, then D's previous conduct could not support the Prosecution's case against D.

If, on the other hand, you are not sure that any of these alleged previous assaults occurred, you must ignore them completely; the allegations would have no potential to support the Prosecution's case, nor to undermine in any way the significance that you consider should attach to D's good character and/or personal qualities.

You should take D's good character into account in their favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Co-defendant about whom there is no evidence of character (if any direction is required)

You have heard nothing at all about the character of the co-defendant, and you must not speculate about it.

Good character of a Prosecution witness when D's defence is self-defence, and V does not have any previous convictions

The Prosecution's case is that D attacked V. D says that it was V who started the incident by threatening D with violence and then punching D. D says that they responded to the violence by using only such force as was reasonable in the circumstances of the threat as they perceived it to be.

You have heard that V does not have any previous convictions recorded against them. How might this evidence assist you? The fact that V does not have any previous convictions does not mean that they could not have threatened D or used unlawful violence. However, it is something that you may take into account when deciding whether you are sure that V is telling the truth when V says they did not threaten D, did not use any violence on D, and would not have done so.

I remind you that the Prosecution must prove D's guilt. V's lack of previous convictions does not in itself do that. As I have said, it is something you may take into consideration when considering whether you accept V's evidence that they did not initiate violence towards D.

Chapter 13 – Good Character

Where evidence of general good character is not contested*

D has called evidence to establish that they are a person of good character [*refer to the evidence of good character called*]. That evidence has not been challenged by the Prosecution. Therefore, you should accept the fact that D is a person of good character.

The law provides that a jury is entitled to take evidence of D's good character into account in favour of D on the question of whether the Prosecution has proved D's guilt beyond reasonable doubt. The fact that D is a person of good character is relevant to the likelihood of D having committed the offence alleged. You can take into account D's good character by reasoning that such a person is unlikely to have committed the offence charged by the Prosecution. Whether you do reason in that way is a matter for you.

[*If the issue of D's credibility has arisen because, for example, D has given evidence and/or has made exculpatory statements in a police record of interview, add:*

Further, a jury can use the fact that D is a person of good character to support [their] credibility. You may reason that a person of good character is less likely to lie or give a false account either in giving evidence before you, or in giving an account of the events in answer to questions asked by the police. Whether you reason in that way is a matter for you to determine.]

None of this means, of course, that good character provides D with some kind of defence. It is only one of the many factors which you are to take into account in determining whether you are satisfied beyond reasonable doubt of D's guilt. What weight you give to the fact that D is a person of good character is completely a matter for you, but you should take that fact into account in the [way(s)] I have indicated to you.

*Adapted from the Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book*** (2025) at pg 233

Where good character is contested by evidence in rebuttal from the Prosecution*

D has called evidence to establish that they are a person of good character [refer to the evidence of good character called]. The Prosecution has, however, led evidence to contest that fact.

[Refer to the evidence called in rebuttal by the Prosecution.]

Counsel for D and counsel for the Prosecution have placed arguments before you as to whether you should find that D is a person of good character or not based upon this evidence. It is necessary for you, therefore, to have regard to the totality of the evidence relating to D's character and determine whether you consider that D is a person generally of good character.

Chapter 13 – Good Character

Where good character is contested by evidence in rebuttal from the Prosecution* cont'd

If you find that D is a person of good character, you may take that evidence into account in D's favour in the following [way(s)] … [the good character direction in the previous direction should be adapted to the instant case].

If, on the other hand, you do not accept that D is a person of good character, you cannot use the evidence called by the Prosecution on this issue to strengthen the Prosecution's case against D. Thus, you are not entitled to reason that because of the evidence called by the Prosecution on the issue of D's character, that they are more likely to have committed the offence charged against them. The Prosecution did not call that evidence and does not rely upon that evidence to establish D's guilt of the charge(s) before you. It was simply led on the issue of D's character, and it would be improper of you to use that evidence for any other purpose than on the issue of whether D is a person of good character. If you find after considering the evidence on this issue that D is not a person of good character, you cannot then decide that they are a person of bad character and use that finding against D.

Indeed, if you are not satisfied that D is a person of good character, the law requires you to put all considerations of character out of your minds in determining whether you are satisfied beyond reasonable doubt that D is guilty of the crime charged. That is a direction of law that you are bound by your oaths [or affirmations] to follow during your deliberations.

*Adapted from the Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book*** (2025) at pg 234

Chapter 14 – Bad Character

In this Chapter: **Bad Character of the Defendant | Bad Character of a Witness | Bad Character of a Co-Defendant**

Bad Character of the Defendant

At common law, the Prosecution is not generally permitted to introduce evidence of the bad character of the defendant. The defendant's previous convictions, previous misconduct, disposition towards immorality, or the defendant's foul reputation within their community may therefore not form part of the case against them.

In some jurisdictions, such as the United Kingdom (s 101 of the **Criminal Justice Act, 2003**) and Trinidad and Tobago (s 15N of the **Evidence Act Chapter 7:02** (as amended by Act No 16 of 2009)), the admissibility of bad character evidence is now governed by statute. These statutes abolished the common law rules with respect to the admission of bad character evidence in criminal matters. It should be noted that the UK **Criminal Justice Act, 2003** radically changed the way evidence of the bad character of the defendant was to be considered. Care should be had in placing reliance on English cases decided after the enactment of the UK **Criminal Justice Act** in 2003.

Similar provisions are not found in the Bahamian **Evidence Act, Chapter 65** which codifies the common law position (see ***Gibson v R*** **(The Bahamas CA, SCCrim App No 317 of 2014, 13 December 2016)** at para 76) and seeks to ensure that the Crown does not lead evidence of bad character in support of their effort to make a case against a defendant unless they put their character in issue. As such, the common law rules, relative to the admission of bad character evidence, still apply. The position in The Bahamas is similar to that which obtains in Jamaica.

The Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) notes at pg 154, "Bad character evidence is evidence of, or a disposition towards, misconduct. Apart from evidence of previous convictions other evidence amounting to 'reprehensible behavior' is evidence of bad character."

Misconduct is the commission of an offence or other reprehensible behaviour. The word "reprehensible" connotes culpability or blameworthiness. If the misconduct alleged "has to do with the offence", it may still be admissible as evidence relevant to proof that the defendant committed the offence.

Judges must have in mind that no evidence is admissible unless it is relevant to the issues in the case and there is a duty to consider in advance all evidence that the parties propose to place before the jury.

Section 29 of the **Evidence Act, Chapter 65** states:

Chapter 14 – Bad Character

> In criminal proceedings evidence may be given of the good character of the accused person, but evidence may not be given of his bad character, unless and with leave of the court witnesses have been called or questions have been asked to show that he bears a good character.

Section 30 of the **Evidence Act, Chapter 65** provides that, if an "accused person calls witnesses or asks questions to show that he bears a good character" then, with the leave of the court, evidence may be admitted of the defendant's previous convictions in the following circumstances:

> (a) where a person is on trial for a felony who has been previously convicted of any felony;
>
> (b) where a person is on trial for stealing, or for any offence declared to be punishable as stealing or for false pretences or for receiving stolen property, or for any other offence involving fraud, who has been previously convicted of any felony, misdemeanour or offence punishable upon summary conviction;
>
> (c) where a person is on trial for any offence relating to the coinage who has been previously convicted of any such offence.

When evidence of the bad character of the defendant is admitted, whether deliberately or inadvertently, the trial judge is faced with a choice. As ***Mitcham v R*** **[2009] UKPC 5, [2009] 5 LRC 209** at para 14 notes:

> He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent.

In ***Armbrister v R*** **(The Bahamas CA, SCCrApp No 232 of 2012, 31 August 2017)**, the Court notes at para 55:

> The decision to discharge a jury or to continue with the trial lies in the discretion of a trial judge and must depend on the nature and extent of the disclosure. It is not unusual in the course of a trial that some material prejudicial to an accused is disclosed improperly or inadvertently. Not every revelation will warrant the drastic medicine of discontinuance of the trial.

In ***Edgecombe v R*** **(The Bahamas CA, SCCrApp No 144 of 2015, 17 September 2018)** at para 35, where there are multiple references to the fact that a defendant has been to jail and his photo appeared in a 'rogues gallery', it was noted that there was no warning in

the Judge's direction as to how the jury should treat that highly prejudicial evidence. The Court of Appeal of The Bahamas put forward that the jury should have been directed not to assume that because the defendant had "previously been incarcerated and his photo was in a police gallery that it was or may be relevant to his likelihood of having committed this offence."

The law also provides a statutory shield for the bad character of a defendant to remain undisclosed from the jury. That shield may, however, be lost in certain circumstances. As per s 171(f) of the **Evidence Act, Chapter 65**:

> 171. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided as follows –
>
> …
>
> (f) A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character; unless –
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged,
>
> (ii) he has personally or by his counsel and attorney asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution,
>
> (iii) he has given evidence against any other person charged with the same offence….

The effect of a loss of the statutory shield was discussed in the case of ***Celestin v AG*** (**The Bahamas CA, SCCrApp No 50 of 2019, 10 June 2020)**. By putting the character of a witness in issue, the defendant will put their own character in issue and lose the benefit of the statutory shield. A defendant who has lost their statutory shield may be questioned on their character.

A trial judge, when exercising their discretion relative to s 171(f)(ii) of the **Evidence Act, Chapter 65**, as outlined above, should bear in mind the following propositions per ***R v Mcleod*** **[1994] 1 WLR 1500, [1994] 3 All ER 254** at pg 1512:

Chapter 14 – Bad Character

1. The primary purpose of the cross-examination as to previous convictions and bad character of the accused is to show that he is not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged… But the mere fact that the offences are of a similar type to that charged or because of their number and type have the incidental effect of suggesting a tendency or disposition to commit the offence charged will not make them improper.

2. It is undesirable that there should be prolonged or extensive cross-examination in relation to previous offences. This is because it will divert the jury from the principle issues in the case, which is the guilt of the accused on the instance offence, and not the details of earlier ones. Unless the earlier ones are admissible as similar fact evidence, prosecuting counsel should not seek to probe or emphasise similarities between the underlying facts of previous offences and the instant offence.

3. Similarities of defences which have been rejected by juries on previous occasions, for example false alibis or the defence that the incriminating substance has been planted and whether or not the accused pleaded guilty or was disbelieved having given evidence on oath, may be a legitimate matter for questions. These matters do not show a disposition to commit the offence in question; but they are clearly relevant to credibility.

4. Underlying facts that show particularly bad character over and above the bare facts of the case are not necessarily to be excluded. But the judge should be careful to balance the gravity of the attack on the prosecution with the degree of prejudice to the defendant which will result from the disclosure of the facts in question.

5. If objection is to be taken to a particular line of cross-examination about the underlying facts of a previous offence, it should be taken as soon as it is apparent to defence counsel that it is in danger of going too far. There is little point in taking it subsequently, since it will not normally be a ground for discharging the jury.

6. While it is the duty of the judge to keep cross examination within proper bounds, if no objection is taken at the time it will be difficult thereafter to contend that the judge has wrongly exercised his discretion. In any event, this court will not interfere with the exercise of the judge's discretion save on well-established principles.

7. In every case where the accused has been cross-examined as to his character and previous offences, the judge must in the summing up tell the jury that the purpose of the questioning goes only to credit and they should not consider that it shows a propensity to commit the offence they are considering.

Chapter 14 – Bad Character

In ***Pratt v R*** **(The Bahamas CA, SCCrApp No 41 of 2016, 12 April 2018),** the Court of Appeal of The Bahamas noted with approval the observation by the Court of Appeal for Ontario (Canada) in the case of ***R v Dean*** **[1942] OR 3-14 (Ontario CA, 2 February 1942)**, per Masten JA, that, "It is a thoroughly settled principle of criminal law that the Crown cannot, in making its case against the prisoner, give evidence of his bad character, or of previous convictions."

Further, in ***R v Dean***, per Roberston CJO:

> It is not arguable that, when the question is whether the prisoner is the person who committed the crime charged, evidence that he is a former convict and that the police have his photograph in their gallery is not prejudicial to the prisoner. Not only does it affect his credibility as a witness, but even if he does not become a witness the knowledge will, in every probability, be weighed in the scales against him. It weakens the presumption of innocence to the benefit of which he is entitled."

The Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017), at pg 158 helpfully identifies steps to be considered when directing the jury in circumstances where evidence of bad character is adduced by the defendant. They are as follows:

a. Identify the evidence of bad character.

b. If the defendant elects to adduce evidence of their own bad character that would otherwise have been admissible through one of the other relevant circumstances, the jury must be given directions on the use(s) to which the evidence may be put.

c. If the defendant elects to adduce evidence of relatively minor bad character, for fear that the jury might speculate that it was something worse, the jury must be directed that they know about the defendant's convictions only so that they know about the whole background and, if appropriate, that the character evidence does not make it more or less likely that the defendant committed the offence.

d. If the evidence of bad character is minor and relates to matters of a completely different character from that with which the defendant is being tried, the judge has a discretion, after consideration with the advocates, to give the defendant the benefit of the "propensity limb" of the good character direction.

e. Depending on the nature and extent of the convictions or other evidence of bad character, a direction as to the effect of the evidence upon the defendant's credibility may be required.

f. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that the defendant has been convicted or has behaved badly in the past, means it is more likely that they did so on this occasion.

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Where bad character evidence is admitted on the basis of its relevance to an important issue in the case (e.g. identification, or the defendant's propensity to be untruthful going to the defendant's credibility), the Jamaican Bench Book at pgs 160 – 161 commends the following approach for directing the jury.

a. Identify the evidence of bad character.

b. If the evidence is disputed, the jury should be directed that they must be sure matters have been proved before they can rely on them.

c. If there has been an explanation of it by the Defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.

d. Identify in detail the issue(s) to which the evidence is and is not potentially relevant e.g. propensity, credibility, identity.

e. Direct the jury that it is for them to decide to what extent, if any, the evidence helps them decide the issue(s) to which it is potentially relevant.

f. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury, a direction as to the effect of the evidence upon the defendant's credibility may be required.

g. If the evidence is exclusively within the limits of matters in issue between the Prosecution and the defendant, the jury should be warned against prejudice against the defendant, or over reliance on evidence of bad character and that they must not convict the defendant wholly or mainly on the basis of previous convictions or bad behaviour. If the evidence is in reality "hallmark" evidence and directly relevant to the issue in the case, a warning not to convict wholly or mainly in reliance upon it would be inappropriate.

h. On a multi-count indictment, the issue of cross-admissibility should be considered.

Chapter 14 – Bad Character

Examples

Bad Character (where not introduced as evidence of tendency)*
You have heard evidence that D has a prior conviction for … [*give details of record*]. This has been given in evidence because … [*state the legal reason for which this evidence was allowed*]. Now there is a danger about which I must warn you, and that is the possibility that such evidence will set off in your minds the following prohibited line of reasoning: The evidence shows D to be a person of bad character; crimes are more often committed by the bad than the good. Therefore, D is likely to be guilty of the crime with which they are charged. A jury is never permitted to use such evidence for the purpose of concluding that D is guilty of the crime with which they are charged simply because they are the sort of person who would be likely to commit that crime. As I say, that is a prohibited line of reasoning and my firm direction to you is that you must not allow it to enter into your deliberations. The evidence was not led before you for that purpose, and the Prosecution does not rely upon it in that way. [**Where appropriate, add:** You are, however, free to take that evidence into account, giving it such weight as you think it deserves as evidence showing that D is not a truthful person, when you are assessing the credibility of the evidence D has given in this trial.] [**When the "bad character evidence" is probative of a fact in issue under the coincidence rule, add:** You may, however, bearing in mind my direction about the prohibited line of reasoning, take that evidence into account in the following way in relation to the issue of … [state the issue].] *Adapted from the Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book*** (2025) at pg 235.

Chapter 14 – Bad Character

Evidence of Bad Character Adduced by the Defendant*

D has told you of their convictions for [specify]. There are certain ways in which you may use –and others in which you must not use – this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant.]

*Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 159.

Suggested Direction – Evidence of Bad Character as Important Background/ Explanatory Evidence*

[*Identify the evidence of bad character. Explain why the evidence is put before them e.g. how D came to be in prison or had contact with the complainant. Explain any further purpose(s) for which the conviction(s) or reprehensible behaviour may be used. Depending on the nature and extent of the convictions or other evidence of bad character, a direction as to the effect of the evidence upon D's credibility may be required*.]

You have heard that the incident of violence that is the subject of the charge took place while D and V were in prison. The fact that they were in prison does no more than provide the setting for this incident and it would have been impossible to understand events without knowing this.

But the fact that D was in prison does not make it more or less likely that they committed this offence and provides no support for the Prosecution's case, neither does it make it more or less likely that V attacked D.

*Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pgs 159 – 160.

Evidence of Bad Character Relevant to an Important Matter in Issue – Support for Evidence of Identification*

You have heard that D was picked out on an identification parade. The Prosecution say that the person picked out on that identification parade was the man who [e.g. burgled the house]. The Defence says the identification was mistaken.

I have already told you about the risks surrounding evidence of identification and that you should look to see whether the evidence of identification is supported by other evidence. The Prosecution say that the identification evidence is supported by D's previous convictions, which demonstrate that D [e.g. has committed 3 other burglaries in the same street within the last 2 years] and the Prosecution say that this makes it more likely that the identification evidence is correct.

Chapter 14 – Bad Character

Evidence of Bad Character Relevant to an Important Matter in Issue – Support for Evidence of Identification* cont'd

The Defence accepts that D has these convictions [e.g. for burglary] but they remind you that [e.g. the estate on which the burglary was committed was an area of high crime and that there are many other people who have committed burglaries in that area].

The fact that D has [e.g. committed burglaries in the same street] cannot prove D did so on this occasion, but it is evidence you may take into account as support for the Prosecution's case. How far it supports the Prosecution's case will depend on your view of (a) how much of a coincidence it is that the person identified as the burglar in this case has [e.g. committed burglaries on the same street in the past]; and (b) the Defence's point about the number of other people who have [e.g. committed burglaries on this street].

D's previous convictions may only be used as some support for the Prosecution's case. You must not convict him wholly or mainly because of them.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 161

Evidence of Bad Character Relevant to an Important Matter in Issue: Propensity to be untruthful – bearing only on D's credibility*

D has put his character in issue. In his evidence, he said that ... [specify]. It is for you to decide whether that is or may be true. When you are deciding this question, you may take into account D's previous convictions for [specify e.g. perverting the course of justice, by giving a false name when driving whilst disqualified; and committing perjury, by making a false accusation that someone else had assaulted his brother when in fact D had done so].

The Prosecution says that those convictions are significant because they show that D is prepared to tell lies to avoid responsibility for offences he has committed and has lied to you for the same reason.

The Defence accepts that D has these convictions, but say they are irrelevant because ... [specify e.g. they happened many years ago].

You should bear in mind that just because someone has told lies in the past does not mean that he is telling lies now. You must decide whether these convictions help you when deciding whether his evidence is, or may be, true or whether you are sure that it is untrue, but you must not convict him wholly or mainly because of them.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 162

Chapter 14 – Bad Character

Evidence of Bad Character Relevant to an Important Matter in Issue Between Defendant and Co-Defendant*

Where evidence of bad character has been admitted in relation to an important matter in issue between a defendant and co-defendant, the jury should be directed using the following approach.

a. Identify the evidence of D1's bad character.

b. In relation to D1:

   i. if the evidence of D1's bad character is disputed, the jury may take it into account as part of the case against them only if they are sure that it is true;

   ii. it is for the jury to decide to what extent, if at all, the evidence which they are sure is true, or which is not disputed, demonstrates the matter in issue (e.g. whether D1 has a propensity to commit offences of the type charged, or has been untruthful);

   iii. the jury should be warned against prejudice against D1 arising from the evidence and against over-reliance on it, and directed that they must not convict D1 wholly or mainly on the basis of it; and

   iv. depending on the nature and extent of the evidence, there may have to be a direction as to the effect of the evidence on D1's credibility.

c. In relation to D2:

   i. if the evidence of D1's bad character is disputed, the jury may take it into account as part of the case for D2, if they think that it is or may be true (though not if they are sure that it is untrue);

   ii. it is for the jury to decide to what extent, if at all, the evidence of D1's bad character which they think is or may be true, or which is not disputed, demonstrates the matter in issue (e.g. whether or not D2 was involved in the offence charged).

d. The direction is likely to be complex, should be discussed with the advocates before it is given, and should be provided to the jury in writing.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pgs 163 – 164

Chapter 14 – Bad Character

Undisputed Evidence of D1's Bad Character*

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene but says that the other committed the offence alone. On the application of D2, evidence has been admitted under [s.171(f)(iii) of] the Evidence Act that D1 has previously been convicted of offences of violence.

D2 introduced the fact that D1 has previous convictions for crimes of violence. He did so because he says that they show that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. How should you approach this question? Your approach to this will be different depending on whether you are considering the case for D2 or the case against D1.

When considering D2's case, if, having regard to all of the evidence about D1's convictions [if appropriate, including what D1 himself has told you], you decide that they show that D1 has, or may have, a tendency to use unlawful violence, you may take that into account as some support for D2's case that the offence was committed by D1 alone and that D2 was not involved.

However, when considering the case against D1, because it is for the Prosecution to prove his guilt, it is only if you are sure that D1's convictions show that he has a tendency to use unlawful violence, that you may use this as some support for their case.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it, or allow his previous convictions to prejudice you against him.

Finally, in D1's case, if you are not sure that D1 has a tendency to use unlawful violence, his convictions are of no relevance, and you must ignore them.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 164

Disputed Evidence of D1's Bad Character*

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene but says that the other committed the offence alone. On the application of D2, evidence from D2 himself and from a witness called on his behalf, that D1 had committed numerous past assaults with which he has never been charged, has been admitted under [s.171(f)(iii) of] the Evidence Act. D1 disputes this evidence.

You have heard evidence from D2 and his witness that D1 has committed many assaults in the past for which he was never arrested. D2 says that this shows that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. D1 disputes that he has committed any assault in the past or that he has such a tendency. You will have to consider these matters separately in relation to each defendant.

Chapter 14 – Bad Character

Disputed Evidence of D1's Bad Character* cont'd

When considering D2's case, you will have to decide whether some or all of the evidence of past assaults by D1 is, or may be, true. If you decide that some or all of it is, or may be, true, and that it shows that D1 has or may have a tendency to use unlawful violence, you may use such a tendency as some support for D2's case that the offence was committed by D1 alone and D2 was not involved.

When considering the use of the evidence in the case against D1, the position is different. First you must decide whether you are sure that any of the disputed evidence of past assaults is true. If you [are] not sure that any of it is true, you must ignore it completely when considering the case against D1.

If you are sure that some or all of this evidence is true, you will then have to consider whether it shows that D1 has a tendency to use unlawful violence. If you are sure that it does show that D1 has such a tendency, you may use it as some support for the case against him.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it or allow his previous convictions to prejudice you against him.

Finally, if you are not sure that D1 has a tendency to use unlawful violence, his convictions are of no relevance and you must ignore them.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 165

Evidence of Bad Character to Correct a False Impression Given by the Defendant, Going to Credit and Propensity*

[*Identify the evidence of bad character. If the evidence is disputed, the jury should be directed that they must be sure matters have been proved before they can rely on them. If there has been an explanation of it by the Defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences. Identify in detail the issue(s) to which the evidence is and is not potentially relevant. Since the evidence has been admitted to correct a false impression, this is likely to include a direction as to the effect upon credibility…"*]

In his evidence, D said that he was not the sort of person who would [specify]. As a result of that, the Prosecution was allowed to present evidence that in the past he had been convicted of [specify].

Chapter 14 – Bad Character

Evidence of Bad Character to Correct a False Impression Given by the Defendant, Going to Credit and Propensity* cont'd

What use can you make of that evidence?

The Prosecution says that the evidence of his convictions shows that he was trying to mislead you when he said he would never [specify]. The Defence says that it was not misleading because [specify]. If you are sure D was trying to mislead you about this/these things, that does not mean he was trying to mislead you about everything; but it is evidence that you can use when deciding whether or not he was a truthful witness. If you are not sure he was trying to mislead you, then his previous convictions will not help you to decide whether or not what he said in evidence was true.

The Prosecution also says that the evidence of his previous convictions can help you in another way. They say that those convictions for [specify] show that he is a man who is more likely to [specify]. The Defence say that the convictions are [e.g. so old, not really of the same kind] and so do not show he would be more likely to [specify].

If you are not sure that they show that D1 has such a tendency, you should ignore them: they would be irrelevant. If you are sure that they show that D1 has such a tendency, you may use them as some support for the case against him. How much support, if any, they provide is for you to decide, but remember that the convictions only form a part of the evidence in the case and you should not convict D only or mainly because he has been convicted in the past. Neither should you be prejudiced against him because of his past record.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pgs 166 – 167

Evidence of Bad Character Relating to Defendant's Attack on the Character of Prosecutor or the Prosecutor's Witnesses – Section 171(f)(ii)*

[Identify the evidence of bad character. If the evidence is disputed, the jury should be directed that they must be sure matters have been proved before they can rely on them. If there has been an explanation of it by the Defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences. Direct the jury that where a defendant makes an attack upon another person's character, the jury are entitled to know of the character of the person making the attack, so that they can have all the information about that person and the defendant when deciding where the truth lies.]

You have heard that D has previous convictions for [specify]. The reason you heard about them was because D has alleged that W is/has [specify] and you are entitled to know about the character of the person who makes these allegations - D - when you are deciding whether or not they are true.

Chapter 14 – Bad Character

Evidence of Bad Character Relating to Defendant's Attack on the Character of Prosecutor or the Prosecutor's Witnesses – Section 171(f)(ii)* cont'd

[Here specify the arguments of the Prosecution and the Defence.]

You should bear in mind that just because D has previous convictions, this does not necessarily mean that he is telling lies. You must decide whether these convictions help you when you are considering whether or not he is telling the truth; but you must not convict him of this offence because he has been convicted in the past.

Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pg 169

Bad Character of a Witness

Bad character evidence in relation to witnesses other than a defendant may be used to undermine the credibility of such a witness, or because it is relevant to a fact in issue. In some jurisdictions, legislation permits the questioning of a witness as to whether they have been convicted of any offence, and if necessary, for the convictions to be proved. In such instances, the judge has a discretion to excuse an answer when the truth of the matter suggested, would not in the judge's opinion, affect the credibility of the witness as to the subject matter of their testimony.

Section 33 of the **Evidence Act, Chapter 65** notes, "Evidence may be given in both civil and criminal proceedings of the bad character of any person called as a witness in order to impeach his credit as a witness."

Further, s 148 of the Act states, in relation to questioning a witness regarding conviction of an offence:

> Subject to the provisions of Part VIII [Evidence by persons charged with offences and their husbands or wives], a witness in any proceeding may be questioned as to whether he has been convicted of any offence and on being so questioned, if he either denies the fact or refuses, to answer, it shall be lawful for the opposite party to prove such conviction.

The Court, in ***Wright v AG*** **(The Bahamas CA, SCCrApp Side No 138 of 2018, 9 August 2019)** noted at paras 25 – 27:

> 25. That case involved evidence of bad character of a defendant and not of a witness, but in our judgment the principle remains the same.
>
> 26. There was a real danger that the jury could have concluded that Ms. Gibson was being untruthful simply because it was established that she had a bad character. The jury should have been told that they should not conclude the Ms. Gibson is being untruthful just because she has previous convictions.

Chapter 14 – Bad Character

27. The appellant was entitled to a fair trial and his defense should be put fairly to the jury and not undermined by allowing prejudicial evidence and by failing to caution the jury against drawing inference that a person is not telling the truth simply because he has been previously convicted of criminal offences completely unrelated to the matter before the court.

Example: Bad character of a person other than the Defendant*

The following approach should be adopted in directing the jury regarding bad character evidence admitted in relation to a person other than the defendant.

a. Identify the evidence of bad character.

b. Where the evidence is disputed the jury must decide:

   i. if the evidence is adduced by the Prosecution, whether they are sure it is true;

   ii. if adduced by the Defence, whether it may be true.

c. Identify the issue/s to which the evidence is potentially relevant.

d. The jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue(s).

e. Depending on the nature and extent of the convictions or other evidence of bad character, there may need to be a direction as to the effect on the credibility of the person if they were a witness.

You have heard that W has convictions for offences of violence namely [specify]. You heard about W's convictions because D claims that it was W who started this incident and says that W's convictions support this.

The fact that W has these convictions does not mean that W must have used unlawful force on this occasion, but it is something that you may take into account when you are deciding whether or not the Prosecution has made you sure that it was D, and not W, who started the violence and that D's use of force was unlawful.

*Adapted from Supreme Court of Judicature of Jamaica, ***Criminal Bench Book*** (2017) at pgs 169 – 170.

Chapter 14 – Bad Character

Bad Character of a Co-Defendant

Where a defendant of good character is tried with a co-defendant of bad character, the defendant is still entitled to a good character direction.

Example: Good character raised by one Co-Defendant*

D1 has raised the question of [their] good character, whereas D2 has not. I warn you that you should not be prejudiced in any way, or seek to draw any adverse inferences against D2 because of that situation.

D2 is entitled to conduct [their] case as [they] choose, or might be advised, and the position so far as [they] are concerned is that [their] character is simply not in issue.

*Adapted from the Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book*** (2025) at pg 235.

See also: Evidence of Bad Character Relevant to an Important Matter in Issue Between Defendant and Co-Defendant as discussed above.

Chapter 15 – The Defendant's Statements and Behaviour

In this Chapter: **Confessions | Admissibility of Confessions | Out of Court Statements Made by One Defendant or Another Person Against the Defendant | Silence of the Defendant | Mixed/Exculpatory Statements**

Confessions

Admissions relevant to the issue of guilt in criminal cases are known as confessions. A confession made by a defendant may be given in evidence against them in so far as it is relevant to any matter in issue in the proceedings.

In ***R v Sharp*** **[1988] 1 All ER 65, [1988] 1 WLR 7**, the House of Lords stated that if an out of court statement by the defendant is partly adverse and partly exculpatory, both the adverse parts and the exculpatory parts are to be taken together as one confession.

Where the admissibility of a confession is to be challenged, the jury should not be made aware of it at that stage and the judge should determine its admissibility on a voir dire: ***Adjodha v The State*** **[1982] AC 204, [1981] 3 WLR 1**, per Lord Bridge at pg 223.

Statutory Regime

Section 20 of the **Evidence Act, Chapter 65** relates to the admissibility of confessions and states:

> 20. (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any fact in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession —
>
> > (a) was or may have been obtained by oppression of the person who made it; or
> >
> > (b) is rendered unreliable by reason of anything said or done or omitted to be said or done in the circumstances existing at the time, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

> (3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2).
>
> (4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence of any facts discovered as a result of the confession and of so much of the confession as relates thereto.
>
> (5) In this Act —
>
> "confession" includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise;
>
> "oppression" includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture).

Section 21 of the **Evidence Act, Chapter 65** states:

> 21. (1) Subject to subsection (2) and to any other law to the contrary, it shall be no objection to the admissibility in evidence of a confession that it was made by a person under examination, on oath or in a judicial proceeding.
>
> (2) If in the course of such examination he shall have refused to answer any question and shall have been improperly compelled to do so, evidence shall not be given of the answer to such question.

In ***Harris v COP*** **(The Bahamas, CA, MCCrApp No 38 of 2020, 31 March 2021)**, the Court explained how the discretion should be used when deciding when or when not to admit a confession into evidence. The Court stated, at para 10:

> A confession may be excluded if the court is satisfied that it was obtained by oppression, e.g., threats, beatings, or withholding of food. But in each case of an allegation of involuntariness, the court must satisfy itself of the validity of such an allegation. In the Supreme Court a judge - as the judge of the law - would conduct a voir dire to satisfy himself as to the voluntariness of a confession before allowing it to be placed before the jury - the judges of the facts. However, in a magistrate's court, the magistrate occupies the position of the judge and the jury; a fused responsibility. In that context, therefore, in arriving at a decision of guilt or innocence, there is an inescapable inference that the magistrate has considered the facts of the case and the law appertaining thereto.

The Court held that a threat made by a person, not a police officer, that may make a defendant speak, when they would otherwise have remained silent and inculpate themselves in an offence, may constitute the basis for the rejection of a confession as being involuntary.

Chapter 15 – The Defendant's Statements and Behaviour

In ***Gibbs v DPP*** **(The Bahamas CA, SCCrApp No 135 of 2018, 18 July 2019)**, the Court held that certain admissions allegedly made by the appellant to a 'Person in Authority', not being a police officer, could not be considered voluntary as it could not be said that the appellant came forward of her own volition to answer any questions.

In ***Oliver v R*** **(The Bahamas CA, SCCrApp No 191 of 2014, 20 May 2019)**, the Court held that where a Record of Interview and Confession Statement was not admitted, the trial judge also should have exercised the discretion to exclude evidence obtained by police oppressive conduct. The headnote states at pg 4:

> The law makes admissible facts discovered as a result of an excluded confession. So as a matter of law the material found by the police as a result of the confession were admissible. However, the judge's discretion to exclude that evidence is preserved by section 178 of the Evidence Act. Given the evidence of bruises which was the basis of the judge's decision not to admit the evidence of the ROI and Confession Statement this was clearly a case where the judge ought to have exercised his discretion to exclude the evidence obtained by police oppressive conduct.

Admissibility of Confessions

A confession may be excluded if it was or may have been obtained:

a. by oppression of the person who made it; or

b. in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by a person in consequence thereof.

At common law, therefore, a judge has residuary discretion to exclude admissible evidence if, in their view, its prejudicial effect outweighs its probative value: ***R v Sang*** **[1980] AC 402, [1979] 3 WLR 263** at pg 434.

Oral but Unrecorded Admissions

The Court of Appeal of The Bahamas in ***D'Haiti v R*** **(The Bahamas CA, SCCrApp No 264 of 2018, 3 December 2020)**, discussed the importance of giving careful directions to the jury as to how to treat verbal confessions/admissions that the police say that a defendant has made, which have not been recorded by the police in their police notebooks and acknowledged by a defendant. In that case, 2 officers testified that the defendant, whilst in a hospital bed, confessed to them of his involvement in a murder and armed robbery. Neither police officer recorded that oral admission in their notebook and did not ask the appellant to sign any document memorializing that admission. In that case, the Court emphasized the obligations of a judge to give robust directions to a jury as to how to treat the testimony of police officers.

Chapter 15 – The Defendant's Statements and Behaviour

In ***Williams v DPP*** **(The Bahamas CA, SCCrApp No 140 of 2021, 28 March 2023)**, one of the issues on appeal was the alleged failure of the trial judge to give the jury a robust direction as to how to consider the testimony of oral admissions. The Court stated that there was no issue as to the admissibility of the alleged admission made to two officers which was not written down in their notebooks, as there was no suggestion that the statements were forced out of the appellant. The Court considered what specific direction should be made to the jury in a case where an oral statement made to officers was not recorded. The judgment, at para 53, states:

> At no time did the Judge give any specific direction to the jury as to the need for special care in considering the evidence of police officers as to oral statements made to them by an accused when being interviewed by them, which are not recorded and which are not acknowledged by the accused. However, this omission, although regrettable, is not fatal and does not make the conviction unsafe. As the Privy Council said in **Benjamin and another v The State (2012) 82 WIR 445**:
>
> > **"25. It appears to the Board that the question whether a warning is required about the dangers of relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the accused. But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains. It would be wholly inapt, for instance, to tell a jury that they had to be very careful in attributing weight to an oral confession where an elaborate written statement (whose veracity was unchallenged) had been made by the accused."**

The Mushtaq Direction

In ***Bain v DPP*** **(The Bahamas CA, SCCrApp No 51 of 2022, 15 November 2022),** the Court discussed the locus classicus case of ***R v Mushtaq*** **[2005] UKHL 25, [2005] 3 All ER 885,** which provides the guiding principles a Court must follow on how to treat a confession which might be true, but was obtained by oppression. The Court stated:

> **47.** The term "Mushtaq direction" is derived from a decision emanating from the English House of Lords, that is, **R v Mushtaq** [2005] 3 All ER 885. An issue arose pertaining to how the courts should treat a confession that was or might have been obtained by oppression by the person who made it, notwithstanding that it might be true. In his summing up to the jury, the trial judge had told them, inter alia:

> **"Nevertheless, it is for you to assess what weight should be given to the confession. If you are not sure for whatever reason that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true you may rely on it <u>even if it was or may have been made as a result of oppression or other improper circumstances</u>." [Emphasis Added]**

48. In a judgment with whom the majority of the court agreed, Lord Roger of Earlsferry stated at pages 903-904:

> **"903. In my view, therefore, the logic of s 76(2) of PACE really requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In giving effect to the policy of Parliament in this way, your Lordships are merely reverting to the approach laid down by the Court of Criminal Appeal (Lord Goddard CJ, Byrne and Parker JJ) in *R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680 Giving the judgment of the court, Byrne J ([1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684) quoted the well-known words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at 609-610, [1914-15] 1 All ER Rep 874 at 877:**
>
> > **'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE.'"**

The Court found that the trial judge's direction would have adequately focused the jury's attention to the issue of the voluntariness of the appellant's Record of Interview and the jury's sole role in determining the issue. The Court at para 52 set out the relevant portion of the transcript of the Judge's directions:

> **What about the record of interview, was it given voluntarily? Are you satisfied by the contents? Are you satisfied he was cautioned? Was the record of interview lawfully obtained? Did Steve Bain understand the questions being asked? Does it appear that he was in any way confused or under duress? Did Sergeant Gray exclude or misquote the evidence? You had an opportunity to observed** (sic) **him on the video, how did he appear to you during the interview? Does the record of interview in your opinion amount**

> **to a confession? Did he confess because he was remorseful? The weight you attached** (sic) **to it like all the other evidence is entirely up to you jurors?**
>
> **If you are satisfied, members of the jury, that the record of interview in fact amounts to a confession and was or may have been obtained by oppression or unlawfully obtained you should disregard it and place absolutely no weight on it. If however you are satisfied that it was not obtained by oppression as jurors it will be up to you what weight you attached** (sic) **to it.**

Confessions Obtained from a Minor

In ***Pinder v DPP*; *Fawkes v DPP* (The Bahamas CA, SCCrApp Nos 3 and 4 of 2021, 24 October 2022),** the Court addressed the admissibility of a confession statement given by a minor as follows:

> 69. The law with respect to confession statements obtained from an minor was authoritatively set out by the Privy Council in **Shavargo McPhee v Queen** [2016] UKPC 29 (JCPC 2015/0040). In that case, Mcphee was arrested for murder. He was a juvenile at the time of his arrest. During the trial, the Defence challenged the admissibility of the confession statement made by McPhee on the basis that a Bishop in whose presence a statement was given was not properly advised of his role as an appropriate adult.
>
> 70. Lord Hughes, in writing the advice of the Board summarized the law. He said:
>
> > **"The law**
> >
> > **7. The central rule in the Bahamas, as elsewhere in the common law world, is that the confession of an accused person is admissible evidence against him providing that it was made voluntarily. A confession is not voluntary if it was obtained by oppression, nor if it was obtained as a result of anything said or done which renders it unreliable. If either possibility is raised, it is for the Crown to show that the confession was not obtained in circumstances in which either applied. These central propositions are not in doubt and are expressly laid down in section 20(2) of the Evidence Act.**
> >
> > **8. Section 20(2) and voluntariness apart, the judge in a criminal trial has, by section 178 of the same Act, the power to exclude evidence on which the prosecution proposes to rely to be given if it appears to him that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings**

that the court ought not to admit it. It is well established, and was not in dispute before the Board, that breaches by police interrogators of Codes of Practice and similar standards of behaviour are relevant to whether this power should or should not be exercised in relation to evidence resulting from interviews with suspects. As it was put in the Board's judgment in Peart v The Queen [2006] UKPC 5; [2006] 1 WLR 970, 668 WIR 372, para 24, the criterion for admission of a statement [of confession] is fairness. A breach of proper practice does not necessarily result in unfairness such as to justify exclusion; it must be judged in the context of all the circumstances, foremost amongst which are its gravity and its consequences. A deliberate or reckless breach is plainly more serious than an accidental one.

9. Any arrested person is entitled under section 19(2) of the Constitution of the Bahamas to instruct without delay a legal representative of his own choice and to hold private communication with him. If an arrested person is under 18, he is additionally entitled under the same section to be afforded a reasonable opportunity for communication with his parent or guardian. These two constitutional rights are reflected in express provisions in the Police Force Standing Orders at para 17 of section C4. Those Orders go further because para 20 requires the police, when a minor such as the appellant is in custody, to contact an appropriate adult as soon as practicable and to ask him or her to come to the police station. An appropriate adult is, by para 22, a parent or guardian, a social worker, or, failing such a person, some other responsible adult who is neither a police officer nor a police employee. The same requirement is now made by statute in section 112(1) of the Child Protection Act 2007, but that section was not in force at the time of the appellant's arrest; in his case the relevant rule was para 17 of the Force Standing Orders.

10. The conduct of interviews with suspects is governed both by Police Force Standing Orders and by the (English) Judges' Rules (1964 ed). The latter did not mandate the keeping of records of interviews except those with persons who have been charged, which the appellant had not, and those of children, which in that context then meant persons under 14, rather than all minors (section 107 Children and Young Persons Act 1933). But the Force Standing Orders provided by paras 60-61 of section C4 that a record of all interviews must be kept. Where possible that record is to be a contemporaneous one; otherwise an accurate and adequate summary must be made

promptly in the officer's notebook. This requirement for a scrupulous record of all interviews with a suspect is a critical part of modern policing. Experience the world over has shown the damage that can be done to the criminal process by informal interrogations or assertions of informal admissions and/or by allegations that such conversations have taken place.

The rule requiring a record is both a very necessary protection of suspects and also designed for the protection of police officers against unfounded allegations, all too easily made by those who have little to lose and, in the absence of a record, extremely difficult to refute. In sum, the rule is a vital feature of a system which aims to convict the guilty and acquit those whose guilt is not proved. It is central to the fairness of the process.

11. In the case of minors such as the appellant, para 70 of the Force Standing Orders further requires that interviews are to take place in the presence of an appropriate adult, as defined above. These Force Orders reflect similar provisions in other countries, such as, in England and Wales, the Codes of Conduct made under the Police and Criminal Evidence Act 1984. The expression "appropriate adult" in the Standing Orders is plainly borrowed from those provisions. In Rolle v The Attorney General [2012] 2 BHS J No 42, paras 23, 26 the Court of Appeal for the Bahamas accordingly applied the approach of the English Code to the role of an appropriate adult. It approved the statement in that Code (at Note C13C (now paragraph 11.17 (May 2014 rev)) that:

"The appropriate adult should be informed that he is not expected to act simply as an observer. The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed."

That case came after the present, but the Code paragraph has been in existence in England and Wales since 1985 and attention has been drawn to it in many cases since, beginning with DPP v Blake [1989] 1 WLR 432, 437. Where the law of the Bahamas stipulates the presence of an appropriate adult it accordingly carries with it the role thus described"

Chapter 15 – The Defendant's Statements and Behaviour

The Court of Appeal in ***Mackey v DPP*** **(The Bahamas CA, SCCrApp No 53 of 2020, 18 August 2021)** found that the following direction, given by the trial judge and set out at para 21, had satisfied the test established by the ***Mushtaq*** Direction:

> **Now before I go into the evidence I want to direct you on two other bits of law. First of all, the law in regards to confessions and records of interview. The Crown is not only relying heavily on Brandon Newland in his identification, but also on the statement of the defendant that he gave to the police in the presence of his father and the interview which was recorded also done in the presence of his father. Before you can accept and attach any weight to the record of interview and the statement, you must be sure, first of all, that they were given voluntarily without any form of oppression. The defence's case to the witnesses for the Crown, in particular that of Officer Evans, ACP Clayton Fernander, Denardro Thomas was that they beat, they threatened with death, they hit him about his body for half an hour causing his will to be sapped. And so in the first instance the defence's case to them is that they forced him to sign an already prepared interview and statement. And then the defendant himself's own case is that yes, he said those things. He was told what to say or he gave those statements on what he heard and then he was forced to sign it because of all the threats.**
>
> **You, before considering this evidence and before placing any weight and relying on it, have to decide first of all whether you find they were given voluntarily without any form of oppression. The Crown's case both were given in the presence of his father. His father was there. You saw the father on the interview inquiries where Officer Evans stating that "We will now continue the inquiries. You are still under oath." You will have that disk to take with you and play it for your satisfaction in the jury room. He continue to say -- but all of the questioning by the officers which you hear clearly, you hear Officer Evans very clearly, but you can hardly hear the defendant. Now it's very poor equipment as far as I was concerned. I am really dissatisfied with that type of evidence; I must say because I know that there are better equipment now available. I'm sure they were available two years ago. But I could not -- I put on my headphones at home and I listened very carefully turning it up to the fullest and I could barely make out certain things what the defendant has stated. Maybe when you go up into the jury room you can turn yours up, but you could barely hear. But all of that was given in the presence of the defendant's father, an adult as you saw him there. He did not come to testify in this case, but you saw him in Court on the disk. And the evidence of the Crown was that the defendant gave the statement and interview in his presence, in an adult's presence, his father's presence, and he signed it. But before you could place any weight on it you must be sure that it was given without any form of oppression.** (Emphasis Added)

Chapter 15 – The Defendant's Statements and Behaviour

Out of Court Statements Made by One Defendant or Another Person Against the Defendant

In ***Lexidor v R*** **(The Bahamas CA, SCCrApp No 76 of 2017, 22 March 2019)**, as summarised in the headnote, the Court explained that any confession given which implicates a co-defendant, may only be considered as evidence against the maker unless the co-defendant had somehow aligned himself with the statement during the trial and accepted the truth contained therein. The Court found that because the appellant did not accept his co-defendant's confession as representing the truth, the Judge, when considering the no case to answer submission and subsequently the jury in considering their verdict, must have been influenced by those references to the appellant's conduct in the co-defendant's confession to arrive at his decision.

Directions

Directions to the jury should address the following:

a. A review of the confession itself.

b. If the confession is disputed the jury must decide whether they are satisfied that a confession was made. Accordingly, the jury should be reminded of any evidence tending to support and any evidence tending to rebut the making of the confession. If the confession is admitted but it is disputed that it is true, the jury should be reminded of any evidence relevant to this issue.

c. If it is alleged that the confession was made to the Police as a result of oppression, the jury must be directed that only if they are sure that there was no oppression may they rely upon the confession. The jury should be reminded of any evidence relevant to this issue.

d. If a confession is said to have been made by any defendant who is mentally handicapped and was not made in the presence of an independent person, the jury must be warned that there is special need for caution before convicting the defendant in reliance on the confession.

Silence of the Defendant

At common law, a statement made in the presence of a defendant, accusing them of a crime upon an occasion which may be expected reasonably to call for some explanation or denial, is not evidence against them of the facts stated, save in so far as the defendant accepts the statement so as to make it in effect their own (see Part 1, Section B of ***Archbold 2026,*** Chapter 15B; ***Hall v R*** **[1971] 1 WLR 298, (1970) 16 WIR 276**).

Chapter 15 – The Defendant's Statements and Behaviour

Mixed/Exculpatory Statements

An exculpatory or self-serving denial is not generally admissible unless given in circumstances of spontaneity. The matter was examined in the case of ***Tooke v R* (1990) 90 Cr App Rep 417, (1990) 154 JP 318**. The Court of Appeal stated, at pg 420 "the test which should be applied is partly that of spontaneity, partly that of relevance and partly that of asking whether the statement which is sought to be admitted adds any weight to the other testimony which has been given in the case."

In ***DPP v O'Neill* [2007] IECCA 8, [2007] 4 IR 564**, the Irish Court of Criminal Appeal provided useful guidance on how to address the jury where a mixed statement containing incriminatory and exculpatory matter was included. The Court stated at para 15:

> The Court noted the position in England as outlined in the judgment of the Court of Appeal, Criminal Division in *R v. Duncan* (1981) 73 Cr App R 359 where the judgment at p 365 says as follows:-
>
> > "Where a 'mixed' statement [meaning thereby one that contains incriminatory as well as exculpatory matter] is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge, may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

Useful Cases

a. ***McPhee v R* [2016] UKPC 29, [2016] 4 WLR 166**

b. ***Rolle v AG* (The Bahamas CA, SCCrApp No 182 of 2010, 8 May 2012)**

c. ***Lexidor v R* (The Bahamas CA, SCCrApp No 76 of 2017, 22 March 2019)**

d. ***Moss v R* [1999] BHS J No 108, (The Bahamas CA, Criminal Appeal Nos 19, 20, and 21 of 1999, 30 July 1999)**

e. ***R v Dean* (The Bahamas SC, 28 November 2013)**

Chapter 16 – Cross Admissibility

In this Chapter: **General Scope | When to Give Both Directions | Useful Cases | Directions**

Cross-admissibility addresses the use of evidence in one charge (count) against a defendant, in another charge (count) against them. This is generally permissible once the evidence sought to be relied on is admissible, relevant, and of sufficient probative value. For example, evidence may be 'cross-admissible' if it is relevant to issues of credibility (improbability of coincidence) in relation to more than one charge (count), or if it can go towards establishing a propensity in a defendant to commit that type of offence.

If the indictment against the defendant comprises more than one count, the issue may arise as to whether the evidence relating to one count is "cross-admissible" in relation to another, and if so to what uses it may legitimately be put by the jury.

General Scope

Section 5 of the **Evidence Act, Chapter 65** provides as follows:

> Where there is evidence from which an inference can be drawn that two or more persons have conspired together to commit an offence or an actionable wrong, evidence may be given against each of the persons of anything said, done or written by any one of them in the execution or furtherance of their common purpose.

Section 91 of the **Evidence Act, Chapter 65** further provides:

> Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it, or to have received it knowing it to have been stolen according to the circumstances of the case, unless he shall give some satisfactory explanation of the manner in which it came into his possession.

An example is found in the case of ***Johnson v R*** **(The Bahamas CA, SCCrApp No 100 of 2012, 14 December 2017),** where the Court, at paras 95 – 97, noted:

> 95. In Blackstone's Criminal Practice 2015 the authors suggest that knowledge or ignorance that weapons generally, or of a particular weapon is carried by D1 will be evidence going to show what the intention of D1 was, and may be irresistible evidence one way or the other, but it is evidence and no more. As their Lordships said at paragraph 87 of the judgment [in ***R v Jogee; R v Ruddock*** **[2016] UKSC 8, [2016] UKPC 7, [2017] AC 387**, (2016) 87 WIR 439]:

> **"The error (in Chan [Wing-Siu]) was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence and no more… What was illegitimate was to treat foresight as an inevitable yardstick of common purpose."**
>
> 96. The requirement of intent in cases of common design and extended common purpose, to which their Lordships returned in **Jogee and Ruddock** and which was the position in England prior to **Chan Wing-Siu**, has always been the position in The Bahamas, at least since **Philip Farquharson**.
>
> 97. Suffice it to say that in the present case, there was direct evidence from the actual shooter that he shot the victim, and there was direct evidence from the appellant which, if believed, conclusively proves his agreement with the shooter and the others to rob the victim. Moreover, as noted, the appellant admitted fore-knowledge of the presence of the weapons; and his participation with the others by his presence in waiting with them in the bush awaiting the deceased's arrival; his barging into the deceased's house with his armed associates; and his presence in the house during the incident, is evidence from which the intent to assist in carrying out the plan to rob; and to kill if necessary, may be reasonably inferred.

It is to be noted that cross-admissibility does not describe the admissibility of evidence from a previous incident that does not form part of the current indictment: ***Suleman v R* [2012] EWCA Crim 1569, [2012] 2 Cr App Rep 381**. In this case, the defendant was charged following a series of fires in 2007, 2008 and 2009 involving a family business, a 2 relatives' houses and a relative's car, and the defendant's home. The defendant's father gave evidence that he was present when 5 of the 6 fires in 2007, which were determined to have been deliberately set, were discovered. The defendant denied responsibility for the 2007 fires and no action was taken against anyone with respect to them. Evidence relating to the 2007 and 2008 fires were admitted at trial on which the prosecution relied to establish inter alia a pattern of setting fires. The jury was directed that they could look at all the evidence across all 12 counts before deciding the defendant's guilt on any particular count and thus that the defendant had a propensity to commit that offence. The jury was further directed that where they reached that conclusion, they were permitted to apply it to their deliberations on the other counts. The Court of Appeal determined that the evidence of the 2007 and 2008 fires would not have been admissible to prove propensity but would have been admissible to establish a pattern and progression of the defendant's offending. However, the jury could not have concluded alone that the defendant had been guilty of any one of them and therefore had a propensity to set fires upon proof of the circumstances of the 2007 and 2008 fires alone.

Helpful authority on this point is found in the Court of Appeal's decision in ***Armbrister v R* (The Bahamas CA, SCCrApp No 232 of 2012, 31 August 2017)**. The Court notes at para 54:

> Two factors must be present before the out of court statement of one co-accused can be regarded as evidence against another: 1) evidence proving the existence of the conspiracy must be first adduced; and 2) the statement must have been made in furtherance of the common design....

The law in ***Farquharson v R*** **[1973] AC 786, [1973] 2 WLR 596** has been followed and applied as the law relative to common design cases in The Bahamas. On appeal at the Privy Council, Lord Kilbrandon approved the Judge's direction on joint enterprise, stating at pg 792:

> This is one of the class of cases in which several persons have joined together in a criminal enterprise, one or more of the persons being armed with a lethal weapon, in circumstances in which it may be inferred that there was an intention common to all the participants that a lethal weapon would be used, if necessary, in furtherance of the common purpose for which the persons were associated.

Difficulties with cross-admissibility have largely been addressed in the authority ***R v Freeman*****; *R v Crawford*** **[2008] EWCA Crim 1863, [2009] 1 WLR 2723**. Latham LJ stated at para 20:

> In some of the judgments since *R v Hanson* [2005] 1 WLR 3169, the impression may have been given that the jury, in its decision-making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment. A good example is the judgment of this court in *R v Spencer* [2008] EWCA Crim 544. We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the defendant's guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility.

The Court of Appeal in ***Freeman*** confirms that evidence may be cross-admissible in one or both of the following ways:

a. The evidence may be relevant to more than one count because it rebuts coincidence, as for example, where the Prosecution asserts the unlikelihood of a coincidence that separate and independent complainants have made similar but untrue allegations against the defendant. The jury may be permitted to consider

the improbability that those complaints are the product of mere coincidence or malice (i.e. a complainant's evidence in support of one count is relevant to the credibility of another complainant's evidence on another count as an important matter in issue); and/or

b. The jury may be sure of the defendant's guilt upon one count and if, but only if, they are also sure that guilt of that offence establishes the defendant's propensity to commit that kind of offence, the jury may proceed to consider whether the defendant's propensity makes it more likely that they committed an offence of a similar type alleged in another count in the same indictment.

R v Adams **[2019] EWCA Crim 1363, [2020] Crim LR 69** and ***R v Gabbai*** **[2019] EWCA Crim 2287, [2020] 4 WLR 65** recently reaffirmed ***R v Freeman; R v Crawford***. These cases were also considered in ***R v BQC*** **[2021] EWCA Crim 1944**. Dealing with the issue of the bases of cross-admissibility of evidence, the Court opined at para 21 that:

> There are two main ways in which evidence of an offence charged on one count may be admissible in support of the allegation of an offence charged on another count. One is that if the jury are sure that the conduct charged on one count took place, they may treat that conduct as showing a propensity to commit a particular type of offence, or to behave in a particular way, so as to provide support for a conclusion of guilt on another count. That may apply to different counts relating to a single complainant, as well as to those involving different complainants. The other way in which evidence of one offence may be cross-admissible in support of another arises where there is more than one complainant. In such a case, it may rebut coincidence because of the unlikelihood that separate and independent complainants would have made similar but untrue allegations against the defendant. Sometimes the evidence may be cross-admissible on both bases.

The circumstances in ***R v Adams*** were that the evidence was likely to be considered as being cross-admissible, but the Prosecution did not seek to rely upon it as being so and the judge simply directed the jury to give separate consideration to each of the counts/complainants. Leggatt LJ stated at para 22:

> Looking at the matter more broadly, the general tendency of the criminal law over time has been towards a gradual relaxation of rules of evidence and an increasing willingness to trust to the good sense and rationality of juries to judge for themselves whether particular evidence is relevant to an issue they have to decide and if so in what way. But we have not yet reached the point where evidence of a defendant's bad character can be left as a free for all. The particular ways in which evidence that a person has committed one offence may or may not be relevant in deciding whether that person is guilty of another offence are not always immediately obvious even to legal professionals and have had to be worked out by the courts in a number of cases. Lay jurors are entitled to assistance on these questions and cannot be

> expected to work out the approach which the courts regard as proper for themselves. It therefore seems to us to be essential that, in a case of this kind, the jury should be given clear directions on whether, and if so how, evidence relating to one count may be taken into account in deciding guilt on another count.

Further, in ***R v Gabbai*** at paras 83 – 88, as in ***R v Adams***, the requirement for Prosecution notice was emphasized.

The first question which the trial judge needs to resolve is whether the evidence the Prosecution has adduced in support, for example, of count 1 is evidence of "a disposition towards misconduct" by the defendant, not having "to do with the facts of the offence with which he is charged," charged in, for example, counts 2 and 3. The second question for the judge is for what purpose the jury may use the evidence. It is at this point that it is important to distinguish between (1) evidence which tends to negative coincidence (or to rebut a defence) and which strengthens the Prosecution's case and (2) evidence of propensity to commit the offence:

a. The fact that several complaints of a similar kind are made by different witnesses who have not colluded or been influenced deliberately or unintentionally by the complaints of the others, may be powerful evidence that coincidence or malice towards the defendant (or innocent association between the defendant and the complainants) can be excluded. In ***DPP v Boardman*** **[1975] AC 421, [1974] 3 WLR 673**, Lord Cross at pgs 460 – 461 said:

> > ...the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion into his mouth.

Thus, the evidence of each complainant is supportive of the truth of the others.

b. A propensity to commit an offence is also relevant to guilt on other counts but, before the propensity can be utilised by the jury, it must be proved. Only if the jury is sure that the evidence of A is true can they conclude that the defendant had a propensity to commit the kind of offence alleged by complainant B.

The third question for the Judge is whether the evidence of bad character may be used by the jury both (1) to negative coincidence or rebut a defence; and (2) to establish propensity. If so, the jury may require an explanation how the evidence should be approached in these two different ways.

If the evidence may be used to establish propensity, the jury should receive the conventional warnings about its limitations based on the factual context of the case. The jury must also reach separate verdicts on each count and for each defendant.

Failure to direct the jury on the cross-admissibility of allegations may render a conviction unsafe: ***R v Adams***.

When to Give Both Directions

The judgment whether to explain that a conclusion favourable to the Prosecution on one count, may be evidence from which the jury can additionally find a propensity to commit the offences charged in other counts, is not always straightforward.

It is suggested that where the evidence on Count 1, for example, is independently compelling and consequently, the jury is likely to wonder how a verdict of guilty in respect of Count 1 may affect their consideration of Counts 2 and 3, the propensity direction should be given. This is because it is only if the jury is sure of the propensity that they can utilize the evidence for that purpose.

On the other hand, where there is little to choose between the strength of the evidence supporting each of the counts, the propensity direction may serve only to confuse, because (1) the direction, if given, will be burdened with conditional clauses and (2) in any event, the real question for the jury in such a case is whether the evidence supporting each count tends to strengthen the Prosecution's case on the others.

In ***R v Freeman; R v Crawford***, the defendant was charged with two street robberies, three weeks apart and committed in similar circumstances. Each complainant identified her attacker. There was little, if anything, to choose between the strength of the evidence in each count. However, the Prosecution was permitted to adduce evidence of previous convictions for similar offences. The trial judge gave both a propensity direction in relation to the previous convictions and a cross-admissibility direction in relation to the two counts in the indictment. His directions were upheld.

The jury should always be reminded of the need to return separate verdicts on each count.

Misuse Cross-Admissibility Evidence and Safeguards

Cross-admissible evidence should only be admitted in criminal proceedings where the evidence is relevant to the facts-in-issue before the Court and so long as its admission is of a probative value; the probative value must outweigh the prejudicial value. This maintains the fair trial concept.

The need to admit cross-admissible evidence must not be to demonstrate to the jury a mere inference of guilt on the part of the defendant based on the defendant's alleged involvement in other offences. Neither should it be admitted to merely infer bad character on the part of the defendant.

There is no special formula for a direction on cross-admissible evidence. The strength and terms of the direction are at the direction of the Court. However, the direction should be

clear in providing the jury instructions on how they are to approach the cross-admissible evidence.

The direction should stress to the jury the importance of considering each count separately and not to allow the evidence from one count to improperly influence their decision on another count. This does not, however, prevent the jury from using the cross-admissible evidence from one count to deal with any other count in the indictment.

Where a cross-admissibility evidence direction is contemplated, the Court may also inquire from Counsel for the Prosecution and Defence (or the defendant, if self-represented), in the absence of the jury and before their respective closing addresses, the need for and the form of any cross-admissibility evidence direction.

Useful Cases

a. ***Munnings Jr v R*** **(The Bahamas CA, SCCrApp No 164 of 2019, 2 December 2020)**

b. ***Birbal v R*** **(The Bahamas CA, SCCrApp No 18 of 2011, 13 December 2012)**

Directions

In any case in which a cross-admissibility direction is contemplated, it is essential to discuss with the advocates in the absence of the jury and before closing speeches, the need for and form of any such direction.

In a 'coincidence approach' case, the jury should be directed as follows:

a. They must consider each count separately.

b. The similarities between the evidence of the complainants that the Prosecution relies on should be identified for the jury.

c. If the complainants have, or may have, concocted false accusations against the defendant, any such similarities would count for nothing, and the jury should reject each complainant's evidence.

d. If there was no concoction but a complainant had or may have learned what the other(s) had said or were going to say about the defendant, and had or may have been influenced by this, consciously or unconsciously, when making their own accusations, any such similarities would count for nothing, and the jury should take this matter into account when deciding how far they accept the evidence of the complainant concerned. Depending on the issues in the case, it will sometimes be essential to direct the jury on the difference between collusion and innocent contamination/unconscious influence and that both have to be excluded.

e. If the jury is sure that there has been no such concoction/influence, they should consider how likely it is that two (or more) people would, independently of each other, make similar accusations and yet both/all be lying / mistaken. If the jury thought this unlikely, they could, if they thought it right, treat the evidence of each of the complainants as mutually supportive.

f. When deciding how much support, if any, the evidence of one complainant gives to another, the jury should take into account how similar their accusations are, since the jury might take the view that the closer the similarities the more likely it is that the complainants were telling the truth.

NOTE: The directions in paragraphs (c) and (d) above should only be given if the issue has arisen in evidence. If the issue has not arisen, the direction in paragraph (e) should be modified accordingly.

In a 'propensity approach' case, the jury direction should be based on and consistent with bad character directions. The jury should be directed to the effect that an adverse finding on one count can only provide some support for the Prosecution's case on another count and not to convict the defendant solely or mainly on that finding.

Depending on the evidence and issues in the case, a direction based on both propensity and coincidence approaches may be appropriate. However, such a direction is likely to be complex and, unless great care is taken, confusing. It is suggested that such a direction be given, if at all, only in cases where the evidence on one or more counts is significantly stronger than that on the others(and in which the jury might therefore convict on the stronger counts first, and then treat that as establishing a propensity on the defendant's part to commit offences of the kind charged in the other counts). Examples would be where there is a recording of the defendant(s) committing one of the offences charged in the indictment; where one or more witnesses say that they saw the defendant(s) committing one of the offences charged; or where the defendant(s) is/are said to have confessed to committing one of the offences charged.

If a direction based on both approaches is given, then, to avoid the risk of the impermissible double counting, it is suggested that the jury be directed to consider the propensity approach first.

It is suggested that directions on cross-admissibility should ideally be given to the jury in writing, although a failure to do so is of itself unlikely to prove fatal to the safety of the conviction. In the case of ***Bastian v R*** **[2024] UKPC 14**, **[2024] 5 LRC 222**, at para 57 the Board made an observation as follows:

> The trial before Charles J in these proceedings raised complicated issues of law and fact, including complex issues of joint enterprise, alternative verdicts, cross-admissibility of evidence and inculpatory and exculpatory statements in interview. In the Board's view the jury would have been assisted and clarity

would have been promoted had the Judge reduced the necessary directions of law to writing and after hearing (and where appropriate responding to) any submissions about them from Counsel, provided copies to the jury during the summing up. This procedure has now become the norm in most criminal trials in Crown Courts in England and Wales. This course has the advantage of allowing Counsel to make submissions in advance of delivery of the summing up on what may be disputed points of law. It encourages clear and concise explanation of complex issues. It is likely to reduce the risk of repetition or contradiction in directions. It assists the jury in understanding and retaining the legal directions and can provide a sound basis for discussion when they retire to consider their verdict. The Court of Appeal may wish to consider whether such a procedure should be followed in The Bahamas.

Chapter 17 – Hearsay

In this Chapter: **General Scope | Statutory Regime | General Directions | Absent Witness | Examples of Hearsay | Documents Produced by a Computer | Agreement/ Stipulation | Previous Inconsistent Statement/Previous Inconsistent Statement of an Adverse Witness | Memory Refreshing | Statement to Rebut an Accusation of Recent Fabrication | Res Gestae | Dying Declaration | Statements in Furtherance of a Common Enterprise | Out of Cout Statement by One Defendant**

General Scope

Hearsay evidence is any statement that is made by a person other than the person giving oral evidence and is tendered to prove the truth of some fact that has been asserted. Such evidence is generally not admissible: ***Shaw v Roberts*** **(1818) 2 Stark 455, (1818) 171 ER 703**.

As such, when a witness has not personally perceived or experienced the fact or event in question but has merely heard or read about it through statements made by others, any purported evidence from the witness will be second hand evidence and thus hearsay.

The reason for the hearsay rule is that "[t]he truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination", since the speaker is not, or cannot be called as a witness: ***Teper v R*** **[1952] AC 480, [1952] 2 All ER 447** at pg 486.

The rule is based on an awareness that hearsay, if admitted, would carry with it two formidable difficulties: first, the inherent danger of unreliability through repetition, which increases in proportion to the number of repetitions and the complexity of the statement; second, the Court cannot see and hear the evidence directly tested and the defendant is denied their right to confront the witness: ***R v Blastland*** **[1986] AC 41, [1985] 3 WLR 345** at pg 54 per Lord Bridge of Harwich. Accordingly, the primary purpose of the rule is to ensure that witnesses give evidence as to facts that are within their own knowledge. This exclusionary rule applies equally to the Defence and the Prosecution.

Despite the general rule, judges must determine the purpose for which the evidence will be used before peremptorily excluding it under the hearsay rule. For instance, evidence of a statement made to a witness by a person who is not themselves called as a witness, is not hearsay if it is tendered only to prove the fact that the statement was made, and not to prove the truth of its contents: ***Subramaniam v Public Prosecutor*** **[1956] 1 WLR 965**.

Hearsay evidence may also be given to challenge, or support, a witness who is present and does give evidence. The factors to be considered by the jury will therefore be different from case to case depending upon the purpose for which the evidence is being used.

The emphasis to be given to the reliability and effect of hearsay evidence may, by reason of the burden and standard of proof, depend upon whether the hearsay is relied upon by the Prosecution or the Defence or between defendants. Thus, hearsay evidence may pose a particular threat to the fairness of a criminal trial. It is necessary for courts to be vigilant, first that hearsay is recognised and treated as such, and second that it is received in evidence only where the appropriate safeguards are in place.

Many jurisdictions have legislated guidelines for judges when assessing whether the hearsay evidence should be admitted. Judges must exercise care in crafting directions in order to ensure that hearsay evidence is considered fairly. The task of the trial judge in examining the appropriate statutory route to admissibility, is to consider whether there is enough evidence on which a jury could be satisfied that the hearsay is reliable. Although it is permissible to rule a hearsay statement admissible and give reasons later in the trial, the detailed ruling should be given before the advocates make their speeches, so that they can tailor their submissions accordingly: ***R v Kiziltan*** **[2017] EWCA Crim 1461, [2018] 4 WLR 43** and ***Nguyen v R*** **[2020] EWCA Crim 140, [2020] 1 WLR 3084**.

Therefore, in this context, the task of the jury is to assess the probative value (weight) and reliability of evidence admitted as hearsay. The Courts have on several occasions reminded judges of the need for care in crafting directions, in order to ensure that hearsay evidence is considered fairly and that the jury is warned about the limitations of such evidence. The strength of the warning depends on the facts of the case and the significance of the hearsay evidence in the context of the case as a whole. In general, a warning should be given prior to the hearsay evidence being adduced, as to what have been described as the three key limitations of such evidence, namely: the inability of the jury to assess the demeanour of the witness; the fact that the statement was not made on oath; and the lack of any opportunity for the evidence to be tested on oath. The warning should be repeated in the summing-up: ***Daley v R*** **[2017] EWCA Crim 1971, [2018] Crim LR 403**. In ***R v Wilson*** **[2018] EWCA Crim 1352, [2018] 2 Cr App Rep (S) 228**, the Court emphasised that the strength of the warning that ought to be given to the jury depends upon the facts of the case and the significance of the hearsay to the case as a whole.

When summing-up, the judge should not refer to the statutory provisions under which hearsay came to be admitted. While in many cases it is possible for the jury to know the reason for admitting the evidence (e.g. a witness has died), or the reason why a witness could not be expected to remember the information recorded, in some cases (e.g. fear), this cannot be done. Any consideration of hearsay should encompass the learning found in the judgment of ***Riat v R*** **[2012] EWCA Crim 1509, [2013] 1 WLR 2592**.

Statutory Regime

According to s 38 of the **Evidence Act, Chapter 65**:

> 38. When a fact is proved by evidence –

(a) that a statement as to the fact was made by any person;

(b) that a statement as to the fact is contained or recorded in any book, document or other record, the fact is said to be proved by hearsay evidence.

In criminal proceedings, a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated, if it is captured under any of the exceptions contained in s 39(2).

General Directions

According to ***The Crown Court Compendium Part I*** (June 2022), there are certain factors which hearsay directions should generally include:

a. Whether the evidence is agreed or disputed and, if disputed, the extent of the dispute.

b. The source of the evidence should be identified (e.g. a deceased witness or business records) and the jury reminded of any evidence about the maker of the statement, so that they may be assisted in judging whether the witness was independent, or may have had a purpose of their own or another to serve.

c. Where the statement is oral, evidence about the reliability of the reporter should be identified.

d. Any other evidence which may assist the jury to judge the reliability of the evidence should be identified (e.g. any mistakes that had been found elsewhere in the business records, or information as to the circumstances in which the statement was made).

e. Reference should not be made to the statutory provisions under which hearsay came to be admitted.

f. In some cases, it is possible for the jury to know the reason for admitting the evidence (e.g. the witness has died), or the reason why a witness could not be expected to remember the information recorded; in other cases this cannot be done (e.g. fear).

g. Where it is the Defence who is seeking to rely on hearsay evidence, the directions must be tailored to reflect the fact that the burden of proof is on the Prosecution.

h. It is suggested that as well as giving a direction about hearsay in the summing-up, it is helpful to give the jury a summary of the direction, by way of explanation, just before such evidence is adduced.

i. The jury need to be directed that hearsay evidence may suffer from the following limitations, when compared with evidence given on oath by a witness at trial:

   i. There has usually been no opportunity to see the demeanour of the person who made the statement.

   ii. The statement admitted as hearsay was not made on oath.

   iii. There is no opportunity to see the witness's account tested under cross-examination, for example as to accuracy, truthfulness, ambiguity, or misperception, and how the witness would respond to this process. **In some cases, the credibility of the absent witness and/or their consistency would be challenged under a specific piece of legislation. In such cases, the jury needs to be reminded of those challenges and of any discrepancies or weaknesses revealed.**

Absent Witness

The evidence of a witness who for certain reasons is unable to attend court may be admissible in lieu of oral evidence in criminal proceedings. Where this information is contained in a document, s 66 of the **Evidence Act, Chapter 65** is engaged.

Statutory Regime

The admissibility of first-hand hearsay is governed by s 66 of the **Evidence Act, Chapter 65**. This section allows evidence to be admitted in criminal proceedings of facts which would have been admissible as direct oral evidence if:

a. the document is or forms part of a record compiled by a person acting under a duty, from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and

b. any of the conditions relating to the person who supplied the information, as set out in s 66(2) is satisfied.

Section 66(2)(a) requires that the person who supplied the information:

a. is either dead or unfit to attend as a witness (whether because of a physical or mental condition); is outside The Bahamas and it is not reasonably practicable to ensure their attendance; or

b. cannot reasonably be expected to have any recollection of the matters dealt with in that information, because of the amount of time that has elapsed since supplying or acquiring the information and all the circumstances of the case.

Other conditions provided for in s 66 2(b) and (c) that may need to be satisfied, depending on the circumstances of the case, are that all reasonable steps have been taken to identify the person who gave the information, but their identity cannot be determined; or, if the identity of the person who gave the information is known, that after taking all reasonable steps, they still cannot be located.

The most common example of evidence falling under s 66, is where a witness supplied information to the police which was reduced to writing in the form of a witness statement.

The admissibility of the witness statement is subject to certain safeguards requiring the court to consider the interests of justice. Evidence may also be led as against the maker of the statement that would impeach their credibility.

Case Law Illustrating the Provisions

The case of ***Clarke v AG*** **(The Bahamas CA, SCCrApp No 156 of 2017, 21 October 2020),** considered how to treat statements of deceased people which contain identification evidence and adopted the position of the Judicial Committee of the Privy Council in ***Scott v R*** **[1989] AC 1242, (1989) 37 WIR 330**. In that case, the Board noted at pg 1259:

> It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example, if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case, and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition.

In ***McPhee v R; Ellis v R*** **(The Bahamas CA**, **SCCrApp Nos 270 and 292 of 2018, 8 July 2020)**, in determining whether all reasonable steps had been taken to locate a witness, the Court indicated at para 15 that, "[t]he fact that a witness is…avoiding being located imposes on the Crown the responsibility to take appropriate steps to counter as best as possible, his efforts to avoid detection." More particularly, where the search for the witness led to the possibility of the witness having relocated to another island, evidence must be led to show the efforts made there to locate the witness and in the absence of this, the Court cannot therefore determine whether the efforts made were reasonable.

However, the case of ***Taylor v R*** **(The Bahamas CA, SCCrApp No 259 of 2017, 12 May 2020)** confirms that s 66 of the **Evidence Act, Chapter 65** cannot apply to a witness who was found and served but does not appear.

Examples of Hearsay

a. In ***Philome v R*** **(The Bahamas CA, SCCrApp No 159 of 2016, 28 May 2019)**, it was held that the evidence from a third party that a witness who did not give evidence at trial, identified the appellant as the person responsible for the death of the deceased, was inadmissible hearsay.

b. In ***Brennen v DPP; DPP v Brennen*** **(The Bahamas CA, SCCrApp Nos 94 and 85 of 2019, 18 August 2021)** the appellant was convicted of manslaughter and on appeal, the appellant submitted that the trial judge erred in allowing evidence from the girlfriend of the deceased/ex-girlfriend of the appellant, Ms. Christina Adderley, of a previous out of court statement by the appellant. Adderley stated that sometime in August as she was leaving her home, she heard a commotion which caused her to look outside, where she observed the appellant and the deceased in their vehicles. The deceased said to Adderley to call the police because the appellant just tried to run him off of the road and that she heard the appellant shout to the deceased that he was going to kill him, at a time when both men were side by side in their vehicles and the appellant has his door open. The Court found that the basis of admissibility of this evidence was twofold. It was firstly admissible under s 4 of the **Evidence Act, Chapter 65** as it showed motive or preparation for a fact in issue and secondly, under s 10 of the Act, where the Court had to inquire as to the existence of any intention, motive, state of feeling or state of mind…which existed with reference to the matter in question.

Directions

Example: Hearsay – Statement of Absent Witness

Reliance is being placed on the statement made by X who did not come before you to give evidence [because X is eg. dead, cannot be located, etc]. However, X gave evidence through their statement(s) which was/were given to the police on [date(s)] and read into evidence in this court. X did not come to give evidence before you on oath or affirmation as the other witnesses in the trial did. Therefore, X, who is the author of the statement(s), has not had their evidence tested by cross-examination.

In reading the statement(s) it may appear to be clear and even convincing in its contents but there are risks in relying on such a statement since you have not been able to attest to the maker at this stage. And so, I would warn you of the special need for caution in considering X's evidence. There is a potential risk and danger in relying on the statement(s) of such a witness whom you have not seen, not been able to assess their evidence and whose evidence has not been tested in cross-examination. Therefore, you do not have the benefit of being able to observe X's words or assess X's demeanour as they testified. Further since X has not been cross-examined you have not been able to determine through that process any potential weaknesses in X's evidence. Nor has the Defence/Prosecution been able to put to this witness any suggestions as to any motive for them giving evidence.

You will scrutinise X's evidence with care, give it such weight as you deem fit, remembering that you are the sole judges of fact. However, if having carefully considered my warning, you find X's evidence to be reliable then you can act on that evidence. You may use X's evidence to assist you, in deciding the innocence or guilt of the defendants.

You should consider that evidence in the context of all of the other evidence, as there may be discrepancies between X's statement and the [eg. oral] evidence of the other witnesses.

Documents Produced by a Computer

Documentary records of transactions or events are a species of hearsay, which are not admissible unless they come within the scope of a common law or statutory exception to the hearsay rule: ***R v Minors*; *R v Harper* [1989] 1 WLR 441, [1989] 2 All ER 208** at pg 446.

In ***Archbold* 2026** at para 9-69 to 9-71, the authors identified classes or categories of computer-generated information to determine which of the categories are considered hearsay. It was stated that

> [i]nformation obtained from a computer, whether printed out or read from a display, may be divided into three categories. The first is where the computer has been used simply as a calculator to process information…

> The second category is information which the computer has been programmed to record… ([for example] recording of serial numbers of bank notes… recording of details of outgoing telephone calls from hotel rooms… and computer printout with breakdown of defendant's attempts to enter a website and of charges to be made to his credit card). Apart from the programming, installation and maintenance of the computer, there is no human input in the information produced.
>
> The third category is information recorded and processed by the computer which has been entered by a person, whether directly or indirectly. It is only information from a computer in this third category which is hearsay: to be admissible, it must be brought within one of the exceptions to the rule against hearsay. The computer output in the first two categories is sometimes referred to as "real evidence"…. (references omitted)

Therefore, documentary evidence produced by a computer is only hearsay if what is produced is from the input of information by a person and in such a case, the document is only admissible if it falls within one of the exceptions in s 66 of the **Evidence Act, Chapter 65**, and the conditions in s 67 are met**.**

Sections 66, 67 and 68 of the **Evidence Act, Chapter 65** provide for the admissibility of documentary evidence in criminal proceedings and more specifically, s 67 allows for the admissibility of a document produced by a computer subject to certain requirements as contained in subsections (1) through (4). In discussing the evidentiary requirements relative to s 67(1)-(4), the Court of Appeal in ***Taylor v R; Evans v R*** **(The Bahamas CA, SCCrApp Nos 70 and 71 of 2013, 17 September 2015)** opined at para 73 that:

> It is clear from the above provisions that any party seeking to rely on evidence from computer records must prove the matters set out in (a), (b), and (c) of s 67 (1). Those conditions must be established by evidence, and where it is tendered by the Prosecution, that evidence must be to the criminal standard of proof.

In highlighting the kind of evidence that may be led, the Court indicated at para 74 that, "proof that the conditions above have been met may be established by calling oral evidence, or by tendering a written certificate": (see s 67). Where oral evidence is relied upon, "it will only be rarely necessary for the witness to be a computer expert": ***R v Shephard*** **[1993] AC 380, [1993] 2 WLR 102**.

Before a party can rely on computer records, they must demonstrate that, inter alia, there are no reasonable grounds for believing that the records are inaccurate because of improper use of the computer, that at all material times the computer was operating properly and that the rules of court have been satisfied: ***R v Shephard*** (see also ***Taylor v R; Evans v R*** and ***Smith v R*** **(The Bahamas CA, SCCrimApp No 167 of 2015, 30 August 2017**).

It should be noted that where the information contained in the computer records was recorded without human intervention, that evidence is not classified as hearsay.

Additionally, there is no requirement for the witness to be absent for the document produced by a computer to be admitted.

Case Law Illustrating the Provisions

a. In the case of ***Taylor v R; Evans v R***, in considering what evidence may be sufficient to satisfy the conditions of s 67 of the Evidence Act, Chapter 65 for the admissibility of evidence from computer records, it was held that the oral evidence of the witness, Cleare, who based on her role as Senior Manager of Field Operations at Bank of Nova Scotia Bahamas, was familiar with the ITP System and explained to the Court its use in the day to day operations of the bank coupled with the evidence of the witness Forbes, Senior Manager of the System Support Center of Bank of Nova Scotia Bahamas, who indicated that the ITP and Operation Control Systems were functioning properly, as checks of the systems functionality are done daily, was sufficient for the Court to be satisfied that the Prosecution discharged its burden of proof in compliance with s 67.

b. In the case of ***Gibbs v DPP*** **(The Bahamas CA, SCCrApp No 135 of 2018, 18 July 2019)**, in relation to the witness, Smith, who was in charge of Information Technology and the Chief Information Officer at the University of The Bahamas, whose evidence was based on a report he prepared from information on his computer which came from information he obtained from the appellant's computer at the University of The Bahamas, the Court was of the view that compliance with s 67 could be garnered by the Prosecution leading direct evidence of the working condition of the appellant's computer.

c. In the case of ***Bowe v COP*** **(The Bahamas CA, MCCrApp No 15 of 2018, 4 December 2019)**, the computer record in question was an Audit Report. The computer recorded the activity logs automatically without any human intervention and the data was obtained by a request being made for specific time periods and the recorded information was retrieved. The Court was of the view that an Audit Report was 'real evidence' and not documentary hearsay within the provisions of ss 66 and 67 of the Evidence Act, Chapter 65. It was direct evidence and admissible under s 37 of the Act. It was stated that the Audit Report was "simply a printout of the interconnection between the usernames and test cards associated with the suspicious transactions in a given time frame" (para 12).

Directions

Example: Hearsay – Computer Records*
I must now explain to you the relevance of [description of the computer record relied upon] and the approach you must take in relation to it. The issue for you to decide is whether the Prosecution has proved that the defendant was the man driving the car. DC Gibbs has testified that the person he arrested at the scene gave his name as A. That person then ran away from the scene. The police eventually traced this person and when questioned he said his name was B, and that he had never heard of the name A. He also said he did not drive that car at the time of the accident and challenges DC Gibbs' identification evidence. In assessing the identification evidence, you are entitled to consider the fact that the computer records of the Road Traffic Department show a man carrying the name "A" whose date of birth and address are identical to the defendant. You have heard evidence that since the creation of the database, the policy of the Department has been to compile information submitted by citizens applying for permits and certified copies. This information is made available to police officers responsible for road traffic and safety who may refer to these records for tracing. The officers responsible for taking the information and creating the record cannot be identified with certainty. The Prosecution says that the only way the name "A" could appear in the computer records is if this defendant gave the name "A" to the licensing officer on an earlier date. The Defence says in response that a computer database of this kind is not perfect. The accuracy of the record depends on the accuracy of the information put into it. The information, name, date of birth and address contained in the database may have been recorded incorrectly through human error. This evidence is called hearsay because the person(s) who recorded the information over the counter and the person(s) who created the computer record are not here to give evidence. They have not given evidence under oath and the reliability of the evidence contained in the record has not been tested by cross-examination. Although this evidence is hearsay, it has been admitted into evidence. You are therefore entitled to assess this evidence, and you must decide whether you find it reliable. As you have been told before, you must bring to bear your collective common sense and your collective everyday experiences in assessing the evidence. In doing so, you may consider the likelihood of DC Gibbs and an unknown licensing officer making unrelated mistakes about the man using the name "A". You may also consider the likelihood that the officer whose job it was to create the record entered the information incorrectly.

Example: Hearsay – Computer Records* cont'd
If you feel sure that there was no realistic chance of mistake in the making of the report of the incident by DC Gibbs, or the creation of the record, you may find that the licensing database record is strong and reliable evidence that the defendant calls himself "A". If you find the evidence to be reliable you may use it as evidence in support of the identification evidence of DC Gibbs. You are to give consideration to both sides of the argument. You must determine for yourselves whether you consider the computer records to be accurate and, if they are accurate, what support, if any, do they give to the identification evidence of DC Gibbs. * Adapted from Judicial Education Institute of Trinidad and Tobago (JEITT), ***Criminal Bench Book 2015***

Agreement/Stipulation

Where the parties agree to the admission of hearsay the court should be informed. In ***R v J*** **[2010] EWCA Crim 385, [2010] 2 Cr App Rep 8**, it was said that it was in the interests of good trial management that any agreement to admit hearsay should be communicated to the court at the beginning of the trial or immediately after agreement, where this occurs during the trial.

Section 19 of the **Evidence Act, Chapter 65** deals with proof by formal admission in criminal proceedings, otherwise known as 'stipulation'. On the agreement of both parties to the proceedings, oral evidence may be admitted by or on behalf of the Prosecution or Defence and the admission by either party of any such fact shall, as against the other party, be conclusive evidence in those proceedings of the fact admitted and is treated as an admission for the purposes of any subsequent criminal proceedings relating to the same matter (see ***Dickerson v R*** **(The Bahamas CA, SCCrApp No 63 of 2018, 22 April 2021)**).

The guidelines governing the manner in which such an admission shall be made is contained in s19(2) and outlines circumstances where the admission must be in writing, as well as who is authorised to make such an admission on the concerned party's behalf.

Case Law illustrating the Provisions

In ***R v Bhagchandka*** **[2016] EWCA Crim 700,** the defendant was charged with perverting the course of justice and was asked in his record of interview about an accusation by J, who was not called to give evidence, that the defendant had asked J to lie to the police. The defendant denied that this was the case. It was held that J's accusation should have been edited from the record of interview, that the defendant should not have been cross-examined about it, and that it should have formed no part of the case against the defendant. Defence counsel had objected to the line of cross-examination immediately, and it did not matter that there appeared to have been a prior understanding between trial

counsel that the interview was admissible "in its entirety". Consequently, the Court of Appeal quashed this conviction due to the defendant's record of interview being adduced in evidence while containing an out of court statement made to the police by the absent co-defendant.

Directions

Example: Hearsay – Agreement/Stipulation
You can only have regard to the facts and the evidence as have been adduced to you in this trial, either from the witness box on oath and upon affirmation, or in respect of the statements stipulated and read to you by agreement of both sides. As part of the disclosure process in preparation for trial, the Defence receives all of the witness statements containing the evidence upon which the Prosecution intends to rely, and this would assist them in deciding which witnesses they need to ask questions or cross-examine. In circumstances where they have no questions for a witness, it is unnecessary for the Prosecution to bring the witness to court to say only what is in their statement/report. Therefore, where both sides agree, the law permits the parties to agree to or stipulate to the evidence that of those facts that are not in dispute. So, the evidence of the witnesses from the witness box is evidence. Stipulated statements are evidence, and the contents of the statement are just as much evidence as if the witness had come into the witness box, taken the oath/affirmation and given the information contained in their statements in answer to the questions. You would recall that the evidence of Sgt. 3112 Pinder was stipulated and by my clerk. This was the officer who on 4th February 2019 was at the Central Detective Unit, when a "dark male" came into the office at the Central Detective Unit and identified himself as [John Doe]. He was accompanied by his mother and his lawyer [Jane Bain]. Sgt. Pinder cautioned and arrested the defendant, told him of his right to a lawyer and then transported him to the Grove Station where the defendant was booked and later brought back to the Central Detective Unit for safe keeping. While the Defence is saying that they have no dispute that this state of affairs existed, the fact of the defendant's arrest does not establish guilt, and the defendant is not agreeing that he is guilty of the offence(s). Therefore, as you assess the statement of Sgt. Pinder you should bear in mind that you have not been able to see him/her testify to assess their demeanour. You should bear that in mind as you determine what you make of Sgt. Pinder's statement.

Previous Inconsistent Statement/Previous Inconsistent Statement of an Adverse Witness

A cross-examiner may put to a witness their previous inconsistent statements in efforts to attack the credibility of a witness. Having done so, jurors must be directed by the trial judge on how to assess the evidence given by witnesses both for the Prosecution and for the Defence. They are informed that inconsistencies may appear between what a witness said on a previous occasion and what they have said in the trial. The effect of the inconsistency may vary in that they must first decide whether they find it to be an inconsistency; whether it is material; whether it affects their view of the witness on that particular point; whether it causes them to reject the witness as a whole as being a witness of truth; or whether the inconsistency is immaterial and does not affect the evidence of the witness in any way.

For example, an inconsistency may be accounted for and explained away based on the ability of the witness to recall, or even the length of time that has passed since the date of the alleged offence.
The Court of Appeal in ***Black v R*** **(1989) 42 WIR 1** at pg 5 stated that:

> …unless the evidence of a witness has, in the view of the trial judge, been so discredited by such previous inconsistent statements as to make his evidence unacceptable by a reasonable jury, the question whether the witness's evidence is reliable or not should be left to be answered by the jury with proper directions and guidance from the judge on the purpose and likely effect of adducing evidence of the previous statements. .

Further, when considering the evidence of an adverse witness, it should be noted that though the evidence of a witness is unfavourable to the party calling that witness, it does not necessarily entitle the party calling the witness to cross-examine the witness. However, once leave is granted to the party calling the witness, that party is permitted to cross-examine their own witness.

More specifically, leave may be granted in at least two instances, the first being where the witness shows hostility to the party calling them and the second is where at trial it can be shown that a witness made previous statements inconsistent with their testimony in the witness box. Therefore, evidence at variance with previous statements may suggest hostility (see ***Stuart v R*** **(The Bahamas CA, SCCrApp No 68 of 2012, 23 March 2015**).

The use of previous inconsistent statements in cross-examination is governed by s 147 of the **Evidence Act, Chapter 65**. This section indicates that the cross-examination of a witness on their previous statement in writing may be done without the writing being shown to the witness. However, if it is intended to be used to contradict the witness, the witness' attention must, before such contradictory proof can be given, first be called to those parts of the writing which are to be used for the purpose of contradicting the witness.

Additionally, in relation to the previous inconsistent statements of an adverse witness**,** s 151 of the Act defines an adverse witness as one who appears to desire to avoid giving testimony about the facts in issue, or one who gives testimony about facts in issue that will harm the party calling them or help the adversary. Leave of the court is required under this section to allow a party calling a witness to cross-examine them.

Case Law Illustrating the Provisions

a. In ***Taylor v R*** **(The Bahamas CA, SCCrApp No 265 of 2017, 13 June 2019)**, the Court referenced the case of ***R v Golder; R v Jones; R v Porritt*** **[1960] 1 WLR 1169, [1960] 3 All ER 457**, maintaining that the contents of previous statements made by witnesses whether sworn or unsworn do not constitute evidence on which a jury can rely. It was stated that when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act.

b. In the case of ***Rahming v R*** **(The Bahamas CA, SCCrApp No 230 of 2014, 23 July 2018),** the witnesses, Bain, Jones and Destine had given statements to the police in which none of them indicated that they knew the Appellant before the incident but in Court, when they testified under oath, claimed to have known him before. Their credibility was therefore in issue. It was stated that the failure of the judge to go into detail explaining the issue which the discrepancy [inconsistency] affected when she outlined the evidence of the various witnesses for the Crown and the inconsistencies therein; and the failure to explain the significance of the differences between the witnesses' statements to the Police and the evidence they gave in Court, for example, Destine's statement which did not identify the intended appellant as the man he had seen come out of the truck pursuing Troy and his testimony which purported to identify the intended appellant, affected the credibility and reliability of Destine's evidence, was an error by the Judge.

c. Similarly, in relation to previous inconsistent statements in as much as an adverse witness is concerned, the case of ***Musgrove v R*** **(The Bahamas CA, SCCrApp No 140 of 2012, 26 March 2018)** maintains that while previous statements may be put to an adverse witness to destroy their credit and thus to render their evidence given at the trial negligible, the statements are not admissible evidence of the truth of the facts stated therein.

d. In ***Stuart v R*** **(The Bahamas CA, SCCrApp No 68 of 2012, 23 March 2015**), the VC Johnson in his evidence in chief explained that the Appellant robbed him of his truck with the use of a firearm. However, he then indicated his desire to not want to waste the Court's time nor proceed with the case for certain reasons, including forgiveness. The witness explained that he tried to drop the case at Nassau Street (presumably the Magistrate's Court), but he was sent to the

Supreme Court, nevertheless. An application pursuant to s 151 of the Evidence Act, Chapter 65 was acceded to and when the witness was shown his statement, he testified that he never said he was mistaken or that it wasn't his statement. However, he went on to accept the contents of his previous statement to the police, though maintaining his desire to drop the case. His desire to not give evidence was apparent. In considering the safety of the conviction and the appropriateness of the party calling the VC to cross examine him, the Court of Appeal referenced the case of ***State v Solomon*** **(1982) 33 WIR 149** which indicated that there are instances where the rule relating to the exercise of the Court's discretion under s 151 of the Act may be relaxed. It was stated at pg 148 that:

> Whether the witness proves unfavourable or hostile in the witness box, there is a rule of practice which has hardened into a rule of the common law; and a very sensible rule it is, I respectfully say. It directs that as a general rule a party has no right to impeach or discredit *his own witness*, or to call any evidence to contradict him, for he has voluntarily placed the witness before the court as worthy of belief. But it sometimes happens that a party calling a witness to prove certain facts may be disappointed by his failure to do so. When a witness proves unexpectedly *adverse* to the party calling him, the rule may be relaxed...

Directions

Example 1: Hearsay – Previous Inconsistent Statement
An inconsistency occurs when a witness gives different evidence concerning the same facts and circumstances. You would recall the evidence of [X] who admitted that he had previously made a statement three days after the incident, which conflicted with his evidence. In doing so, [X] explained in relation to some aspects of his evidence, that the events of the night in question were fresher in his mind then and were therefore correct. However, he also indicated in other aspects of his evidence that notwithstanding the timing of him giving the initial statement, that his evidence in Court represents the truth of the matter, insisting that his statement was wrong and that his evidence in Court was correct. In a trial it is always possible to find inconsistencies [or discrepancies] in the evidence of the witnesses, especially when the facts for which they are speaking are not recent occurrences. You are entitled to look at the inconsistencies in order to decide how much reliance you can place on what a witness has said. You may consider that the passage of time will affect the accuracy of memory and so every detail may not be the same from one account to the next and therefore nothing turns on them.

Example 1: Hearsay – Previous Inconsistent Statement cont'd

Inconsistencies go to the credit of the witness. If you find the witness is inconsistent, you may take into account any explanation for the inconsistency offered by the witness in assessing the credibility of the witness. You therefore have to decide, if you find that there are any inconsistencies, whether they go to the root of the case or whether they are not really serious inconsistencies at all and have no serious effect on the credibility of a witness.

In your assessment, you may consider whether there is an acceptable explanation for the change. In relation to the evidence of [X], you would recall this incident occurred in February of 2018, which was almost three years ago. [X] indicated in his statement shortly after the incident that it wasn't light enough for him to see what was going on. Then in Court he also indicated that he saw the altercation from his balcony; he saw how it began and how it ended. When you consider his explanation that he meant he couldn't see what was happening while the defendant was on top of the deceased because the defendant's back was to [X], do you find that he was inconsistent in his evidence? Was this merely an error in his recollection of events or a lack of explanation in the statement? Or do you find that this inconsistency is so material that you wish to question the reliability of his evidence? Do you accept the explanation, jurors? You have seen the light in the photographs and the layout of the area, so you can determine for yourselves whether you accept that explanation or whether you find that he is not a credible witness. Jurors, these are matters for you to consider.

Example 2: Hearsay – Previous Inconsistent Statement of an Adverse Witness

As you know [X] was a witness for the Prosecution, but he has now given evidence that does not support, in some portions, the Prosecution's case. The Prosecution was therefore permitted to treat him as what we call in law an adverse witness. In essence, it is a witness who seeks in the course of giving their evidence, to change sides. And so, the Prosecutor was able to cross-examine her own witness to show that [X] had given one account to the police in his witness statement and at trial he sought to give a different account. At the time, [X] would have picked out this defendant who sits in this Court at the identification parade which was conducted by Inspector Jones. And he would have said so in his witness statement, which he gave to the police. In his testimony in this Court, [X] said that he had only picked out the defendant because of the wanted poster he saw circulating.

Example 2: Hearsay – Previous Inconsistent Statement of an Adverse Witness cont'd

The Prosecution is inviting you to find that X had effectively changed sides in that portion of his evidence and in relation to that portion of his evidence, you can treat that portion of his evidence as suspect, and that in fact what X said to the police was a truthful account. In the witness statement, [X] would have told the police that the individual who he was picking out on the identification parade was in fact the individual who had robbed him. You will have to decide whether you can accept any part of the evidence which [X] told you, or the evidence he has given in this Court. And if so which part of the evidence, do you accept. If you decide there is a serious conflict between the evidence that he gave in this Court and his previous account, you may think that you would wish to reject the evidence altogether and not rely on anything said in the witness box.

Memory Refreshing

The rules which govern the grant of leave to a witness to refresh their memory from a document, were originally established as part of the common law. It has long been understood that if a witness cannot recall facts and so informs the Court, the rules of evidence permit the witness to refresh their memory on the witness stand. The witness is permitted to look at a document to remind themselves of the facts before they state them orally in evidence. The document should have been made while the matter which it records was fresh in the recollection of the witness (see ***R v Toppin*** **(2008) 75 WIR 76**).

A document used by a witness to refresh their memory need not have been made by the witness personally, provided it was verified by the witness while the facts were relatively fresh in their memory. Where a witness has dictated a note to, for example, a police officer, the witness need not verify the original by inspecting it (for example if a witness cannot read); it is enough if the officer reads back to the witness what the officer has written (see ***R v Kelsey*** **(1982) 74 Cr App Rep 213**).

The provisions covering memory refreshing are contained in ss 159 to 163 of the **Evidence Act, Chapter 65**. A witness is permitted to refresh their memory from their contemporaneous writings and may refer to writings made by any other person and read by the witness within the time aforesaid, if when they read it, they knew it to be correct.

Case Law Illustrating the Provisions

a. In ***Dean v R*** **(The Bahamas CA, SCCrApp No 43 of 2014, 19 February 2018),** as the investigating officer testified that he wrote the questions and answers in the record of interview at the time he interviewed the appellant, the two preconditions of s 159 were met, namely, the writing was made by him contemporaneously and the fact that the record was not signed by the appellant is of no moment to the use made of it by Officer Knowles to refresh his memory.

b. In ***R v Sealy*** **[2016] CCJ 1 (AJ), (2016) 88 WIR 70** , the CCJ held that there was no error by the trial judge permitting two police officers to refresh their memories from their note books of oral statements attributable to the defendant, in circumstances where those notes had not been signed by the defendant; and there was no evidence adduced that the defendant had acknowledged, by initialling the notes, what had been written; nor that what had been written had been read over to him and also that the notes were concocted.

c. In the case of ***R v Mangena*** **[2009] EWCA Crim 2535, (2010) 174 JP 67**, the trial judge made a blanket order that allowed all the investor witnesses to refresh their memories from the witness statements that they had given to the police (though they were each taken through the preconditions required for making the statement and it being contemporaneously done). On appeal, it was held that there was no requirement for it to first be shown that the witness stumbled in their evidence by reference to a faulty memory, for the witness to be permitted to refresh their memory.

Directions

Sometimes a witness may refresh their memory from their witness statement before giving any evidence about a particular topic, or during the course of their evidence. If having done so the witness maintains what is stated in the statement, then that is the witness' unequivocal evidence and it will rarely be necessary to give any direction about this.

Statement to Rebut an Accusation of Recent Fabrication

When the cross-examining party suggests to a witness that their evidence in Court is a recent fabrication, the common law permits the cross-examining party to put the witness' statement to them. The witness' statement may be put to show that the evidence in Court was never stated previously in the statement that was given contemporaneously, or shortly after the alleged incident occurred, which was at a time when the matters were fresher in the mind of the witness. The purpose of this process is to attack the credibility of the witness. As a result of this omission or inconsistency, directions on this issue are usually contained in the directions on inconsistencies.

At common law, the evidential effect of the earlier statements is limited to the rebutting of the suggestion made of recent concoction and cannot extend to evidence of the truth.

Maurice Kay LJ at para 58 of ***R v Athwal*** **[2009] EWCA Crim 789, [2009] 1 WLR 2430**, stated:

> …The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence.

It should be noted that in this jurisdiction, there are no statutory provisions which permit an out of court statement to be exhibited merely to rebut an allegation of recent complaint, which does not go to the truth of the matter, but merely that it was said. The admissibility of the statement which may contain evidence to rebut the allegation would be subject to the provisions of s 66 of the **Evidence Act, Chapter 65**.

However, in matters such as sexual offences, viva voce evidence from the witness may be led by the party calling the witness to rebut the allegation of recent fabrication, notwithstanding that it is not admissible as a recent complaint.

Res Gestae

Actions, statements and incidents which are connected with and occur at the same time as the facts in issue, so as to be part of the same story, are admissible in evidence. They are often referred to as being part of the res gestae. Thus, a court is enabled to hear what words were spoken and admit what would otherwise be a statement excluded under the hearsay rule, because it was clearly made in circumstances of spontaneity, or involvement in the event, and being approximately contemporaneous with that event. As a result of those circumstances, the possibility of concoction or fabrication can be disregarded. For example, a statement made by the victim of an attack or by a bystander indicating the identity of the attacker, would fall under this exception (see ***Ratten v R* [1972] AC 378, [1971] 3 WLR 990** (AU).

Applications for the admissibility of an out of court statement as res gestae engage s 4(a) of the **Evidence Act, Chapter 65,** which permits evidence to be given of facts relevant to any fact in issue, including any fact which is so closely connected with any fact in issue, as to form in the opinion of the court part of the same transaction, whether it occurred at the same time and place or at some different time and place.

Additionally, s 39(2)(a) of the Act supports admissibility in these circumstances where the statement is a necessary part of any fact or transaction which is being investigated by the court.

An application under these sections calls for a thorough examination of the common law principles which have emerged in assessing whether an out of court statement may be admitted as res gestae.

In ***R v Andrews* [1987] AC 281, [1987] 2 WLR 413** at pg 302, Lord Ackner noted:

> Of course, having ruled the statement admissible the judge must....make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any

malice or ill-will. Further where there are special features that bear on the possibility of mistake then the juries' attention must be invited those matters.

Case Law Illustrating the Provisions

a. In ***Ratten v R***, at pg 389, the Privy Council stated that the true test was whether "the statement was so clearly made in circumstances of spontaneity or involvement in the event, that the possibility of concoction can be disregarded."

b. In ***Adderley v R*** **(The Bahamas CA, SCCrApp No 250 of 2017, 1 April 2020)**, the deceased, 'Marcus', was shot to the face while at Gibson's Bar located on Carmichael Road, after which he was transported to the hospital. While at the hospital he was visited by his father and in response to his father's question as to whether he knew who shot him Marcus replied, "A man named Blue shoot me." The reference to Blue was to the intended appellant. Their Lordships at para 62 indicated that the judge and jury must always bear in mind two difficulties with res gestae evidence: namely, that it may be concocted, and also, that the exactness of the words may not be sure. The possibility of concoction is the real test of admissibility. In assessing the statement by Marcus to his father, the Court indicated that there had been only a short time between when Marcus was shot and when he was questioned by his father. The Court took the view in para 63 that, "given the nature of his injury and the brief compass of time, there was little time for reflection and opportunity for concoction. The answer that it was "Blue" who shot him was made with the degree of spontaneity associated with the rule."

Directions

Example: Hearsay – Res Gestae
Mr. Foreman and members of the jury, you would recall the evidence of Mr. Johnson who indicated that he is the father of the deceased and that he visited his son (the deceased) in hospital the same night the deceased was shot. He stated that he was in the hospital room of the deceased, who was suffering from a single gunshot wound to the face and in and out of consciousness. Mr. Johnson testified that he asked the deceased whether he knew who shot him and the deceased replied, "A man named Smokey shoot me." You must first decide whether you accept that the deceased responded to his father's question, or whether Mr. Johnson is deliberately lying to you. You observed him as he gave evidence, and you saw his demeanour. Was Mr. Johnson able to make out clearly what the deceased said? You must first be sure that the statement was made by the deceased and if you are sure, then you may go on to consider whether Mr. Johnson's recollection is accurate. However, if you are not satisfied so that you feel sure that the deceased said those words, or that Mr. Johnsons recollection is accurate, you must ignore this evidence.

Example: Hearsay – Res Gestae cont'd

If you feel sure that Mr. Johnson's recollection is accurate then you must next decide whether when the deceased said 'Smokey' shot me, whether that was a reference to the defendant. You would recall Mr. Johnson further testified that the deceased went on to say that it was the same 'Smokey' who lives through the next corner that just had the baby with Keisha; and Mr. Johnson indicated that he was familiar with 'Smokey' from living in the area, as both he and 'Smokey' lived at their residences for over ten years. You would also recall that the defendant, in his unchallenged record of interview, accepts that he goes by the alias 'Smokey' and that he lives one corner away from the deceased. It should be noted that the defendant relies on this to show that being neighbours with the deceased, he had no animus towards him and therefore had no reason to shoot the deceased and did not shoot the deceased. If you are not satisfied that the reference by the deceased (and subsequently Mr. Johnson) of 'Smokey' was being attributed to the defendant, then you must ignore this evidence.

However, if the Prosecution has satisfied you so that you feel sure that the deceased was referencing the defendant then you must ask yourselves did the deceased concoct this statement? Was he mistaken? Consider the condition of the deceased as I described above. If you are sure that the deceased made the statement in response to a question from his father, whether he knew who had shot him and that it was the defendant, then this evidence provides support for the identification of the defendant as the person responsible for the death of the deceased.

However, if the Prosecution has not satisfied you so that you feel sure that the deceased identified the accused, shortly after being shot, as his assailant or if you are unsure, you must disregard this evidence and give no further consideration to it.

Dying Declaration

An oral statement made by a person who has since died, may be admitted into evidence by the person to whom the statement was made, or by a person who overheard it being said, as an exception to the hearsay rule.

This exception is contained in s 39(2)(f) of the **Evidence Act, Chapter 65** and is engaged when the statement was made by a person since dead, as to the cause of his death or as to any of the circumstances of the transaction resulting in his death, in cases in which the person's death is the subject of a criminal charge; provided that the person, at the time he made the statement, was in actual danger of death and in the expectation of death, and that the statement was of such a nature that it could have been given in evidence in legal proceedings if the person making it had survived.

The proviso of s 39(2)(f) continues to depend on the common law test, that is, on the deceased having at the time of the making of the declaration, a settled hopeless expectation of impending death (see ***King v R*** **(The Bahamas CA, SCCrApp No 280 of 2018, 30 September 2020)** at para 27).

Case Law illustrating the Provisions

a. In ***King v R***, after being shot, the deceased said to DC Teneil Sherman, who attended the scene, "Man, Devon from upstairs shot me, officer. Get me some help, please. I feel like I ga' die." While this was sufficient to satisfy the requirement for there to be a settled expectation of death, the reliability of the alleged dying declaration had to also be considered in light of the accuracy of the purported identification by the deceased. In this case, the evidence disclosed that the shooter's face was partially hidden by a cloth which would have impaired the deceased's ability to accurately identify his assailant. Therefore, the Court found that it was incumbent for the judge "to tell the jury the unvarnished truth about the state of the evidence". In addition to this, the judge ought to have placed before the jury for their consideration, the possibility of fabrication or concoction due to what the Prosecution portrayed as its motive for the shooting, revenge.

b. In ***Adderley v R***, the evening of being shot to the face, while in hospital, the deceased 'Marcus" told his father that 'Blue' shot him. Also, the following day, Marcus told the police that the Appellant ('Blue') and his co-defendant ('Bats') were responsible and this was reduced to writing. Thirdly, Marcus also made a verbal statement to two police officers some eight days later in the presence of his brother, Tyrone Miller. He was asked if it was Bats and Blue who shot him and he replied, 'yes'. He died later that day. He said that he heard a shot, realized that he could move and when he looked up, he saw the Appellant holding a gun in his hand and the co-defendant walking towards him with a shot gun. One Mr. Lan also gave evidence that after hearing the gunshot he looked at his security monitor and saw a man with a handgun whose face was covered with a red cloth/towel running east and that there were no lights on the side of his building. This had the effect of weakening Marcus' statements, and the Court was of the view that the evidence that it was the Appellant who shot Marcus was manifestly unreliable and that a jury properly directed could not convict upon it.

Directions

Similar directions to that of res gestae apply and the directions must be considered in conjunction with the ***Turnbull*** guidelines on identification, include the possibility for concoction and the judge must indicate the unvarnished truth about the state of the evidence.

Statements in Furtherance of Common Enterprise

Aside from circumstantial evidence of the conspiracy, which itself can be minimal where the conspiracy has been caught early, the declarations of the conspirators were, in the past, often the only available evidence of the conspiracy, which ordinarily would amount to hearsay. Consequently, at common law there is now a co-conspirators or common enterprise exception to the hearsay rule, which renders declarations made by a co-conspirator in the course of, and in furtherance of, the conspiracy, admissible against every

other co-conspirator, or person involved in the common enterprise. This is an exception to the general rule that D1 is not to be prejudiced by the acts or statements of D2, not made in his presence, and is an exception to the hearsay rule by permitting reliance on D2's statements as evidence of their truth.

For this exception to apply, prima facie evidence that the conspiracy existed, and that the defendant was party to it must first be adduced.

The Prosecution must prove that the act or declaration of the co-conspirator puts into effect, or further advances, the joint enterprise; and the 'in furtherance' requirement applies both to the circumstances of the declaration and its content. Declarations that have this quality can be admitted against a defendant even though they were absent when the statement was made (***R v Walters*** **(1979) 69 Cr App Rep 115** at pg 121).

Narratives, descriptions and subsequent confessions of the co-defendant are inadmissible against co-conspirators, as none of these will satisfy the 'in furtherance' requirement since past statements about the conspiracy cannot further it.

According to s 5 of the **Evidence Act, Chapter 65**:

> Where there is evidence from which an inference can be drawn that two or more persons have conspired together to commit an offence or an actionable wrong, evidence may be given against each of the persons of anything said, done or written by any one of them in the execution or furtherance of their common purpose.

Case Law Illustrating the Provisions

a. In ***R v Gray*** **[1995] 2 Cr App Rep 100** at pgs 124 – 125**,** the Court stated that

> where a defendant is charged with being party to a conspiracy, evidence of acts done or statements made by a co-conspirator in furtherance of the conspiracy may be admissible in evidence against him, even though he was not present at the time, provided that it is proved that there was a conspiracy to which he was a party.

b. In ***R v Murray*** **[1997] 2 Cr App Rep 136, [1997] Crim LR 506**, although the co-defendant had absconded prior to the trial, declarations made by him during and in furtherance of the conspiracy were, nevertheless, used in evidence against the co-conspirators.

c. In ***Armbrister v R*** **(The Bahamas CA, SCCrApp No 232 of 2012, 31 August 2017)**, Isaacs, JA indicated at para 54 that "[t]wo factors must be present before the out of court statement of one co-accused can be regarded as evidence against another". These are: 1) evidence proving the existence of the conspiracy must be first adduced; and 2) the statement must have been made in furtherance of

the common design. In this case, the second factor was absent as the alleged confession of the co-conspirator Collins, "[did] not fall within the category of a statement made in pursuance or furtherance of the conspiracy. At the time of its making, the conspiracy had already concluded."

d. In ***R v Williams*** **[2002] EWCA Crim 2208** at para 49, the Court declared that, "acts and declarations of A are not admissible against B, unless there is independent evidence admissible against B of B's complicity in the common design."

e. In ***R v Platten*** **[2006] EWCA Crim 140, [2006] Crim LR 920** the Court at para 22, citing ***R v Smart*** **[2002] EWCA Crim 772** at para 8, approved the test regarding admissibility requiring that there be "some further evidence beyond the [contested] document or utterance" to prove that the accused had been party to the agreement.

Directions

Example: Hearsay – Statements in Furtherance of Common Enterprise
Mr. Foreman and members of the jury, ordinarily a defendant is not to be held liable for the acts or statements of others if he is not present when those acts were done, or statements were made. However, there is an exception to this rule, in that the evidence of statements made in furtherance of a common enterprise may be admissible and this usually occurs, as in this case, when there is a charge of conspiracy. You've heard the charges as they were read, and the defendants are charged with conspiracy to commit armed robbery. The Prosecution is relying on the statements made and acts done by D1 and D2 before, during and after the alleged commission of the offence. You would recall the evidence of James Rolle who stated that he accepted D1 and D2's invitation to meet to discuss 'business' and upon his arrival at Starbucks on the day agreed, he met with D1 in the presence of D2. At the meeting, D1 told Rolle that he had sold a car to the deceased which he wanted back. He also told Rolle that when he holds up the deceased and his wife at their residence located Nassau East, Rolle was to bring him [D1] the car and Rolle could keep any money or jewellery he retrieves for himself. This evidence is disputed and the defendants indicated that no such meeting or discussion ever took place. Moreover, on the Prosecution's case, neither of the defendants were present when the armed robbery occurred.

Example: Hearsay – Statements in Furtherance of Common Enterprise cont'd

When you assess the evidence of Rolle, it is important to note that if you accept his evidence, then he is in effect an accomplice and you should therefore scrutinize his evidence with great care. An accomplice is one who is a party to the crime alleged. There may be all sorts of reasons for him to tell lies and to implicate other persons. An accomplice may have a motivation to give false evidence. He may want to curry favour with the Prosecution. An accomplice may be motivated to place the defendant in a bad light or the worst possible light, and himself, in the best possible light. He may therefore downplay or minimise his own role and maximise or exaggerate the role of someone else, or he may even give completely or partially false evidence about that other person's alleged role. It may well be sometimes that an accomplice witness alone knows why he wants to come to court and give false or partly false evidence. It may be something hidden away in an accomplice's mind that nobody knows of.

Therefore, the first question to ask yourselves is whether or not this evidence is true. If you are not sure that it is true then you must ignore it, but if you are sure it is true, you can then consider whether the alleged conspiracy actually existed and whether D1 and/or D2 was involved. You should scrutinise this evidence of Rolle very carefully and consider it in conjunction with all of the evidence upon which the Prosecution intends to rely.

Look at exactly what was said and done and if the Prosecution satisfies you so that you feel sure that the words said and acts done were true, decide whether it was said in order to further the alleged conspiracy; meaning carry out the alleged conspiracy. If you feel sure of both of these elements, then you may take that into account when you consider the case against each of the defendants. As the trier of the facts in this case, it is for you to determine how much weight you attach to this evidence. However, if you are not satisfied so that you are not sure whether these words and acts were said or done, or whether they were said and done in furtherance of a conspiracy, then you must put that evidence aside.

Out of Court Statement by One Defendant

Acts done or words uttered by an offender will not be evidence against a co-defendant absent at the time the acts or declarations were made; it is only evidence against the maker and cannot be used against their co-defendant at trial. Moreover, even where the statement is made in the presence of a defendant when they should be expected reasonably to call for some explanation or denial from the defendant, it is not evidence against the defendant of the facts stated unless the defendant accepts the statement, so as to make it, in effect, their own. The defendant may accept the statement by word or conduct, action or demeanour, and it is the function of the Court to determine whether their words, action, conduct or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part.

Where the court is deciding on the admissibility of such evidence, consideration must be given to whether it is "a proper conclusion that the defendant adopted the statement in question; if so, is the matter of sufficient relevance to justify its admission in evidence; and if so, would its admission have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." (***Stone's Justices' Manual*** (157th edn, 2025) vol 1, 2.114) citing ***R v Osborne*** **[2005] TLR 525**).

It should be noted that silence alone cannot give rise to an inference that the defendant accepts the truth of the statement, except where the defendant remains silent in the face of an accusation made among persons speaking on even terms (see ***Stone's Justices' Manual*** (157th edn, 2025) vol 1, 2.114); ***Parkes v R*** **[1976] 3 All ER 380**).

To minimise the prejudicial effect of one co-defendant's statement in relation to the other, a judge may edit a defendant's statement (unless the information supported the defence of a co-defendant). The indictment may also be severed.

Case Law illustrating the Provisions

a. In ***Collie v R*** **(The Bahamas CA, SCCrApp No 16 of 2015, 26 September 2018)**, the trial judge admitted into evidence an account of an alleged oral confession made by the appellant's co-defendant, Natario, to Ryan Pinder (Pinder) (a Crown witness). That account prejudiced the appellant in that Pinder, when giving evidence during his examination in chief of what Natario told him, mentioned that Tattoo Man did certain things. Pinder then being allowed, using his personal knowledge, to identify 'Tattoo Man' as the appellant, further exacerbated that prejudice. The Court was of the view that this portion of Pinder's evidence was "highly prejudicial" to the appellant particularly in light of the fact that it had not been established that the "Tattoo Man" that Natario was referring to, was the same "Tattoo Man" that Pinder knew.

b. In ***AG v Andrews*** **(The Bahamas CA, SCCrApp No 212 of 2017, 26 October 2020)**, Andrews and his co-defendant, TD, were charged with murder, attempted armed robbery and burglary. Following a no-case submission, the trial judge determined that only the lesser offence of being an accessory after the fact should be left to the jury for consideration. However, two days later, following an application to re-open the no-case submission, the judge ruled that Andrews was not required to answer any of the charges. In supporting the trial judge's latter ruling, the Court of Appeal opined that to establish the offence of being accessory after the fact, the evidence needed to show that the Andrews assisted TD to avoid the due process of law, knowing that TD committed an offence. The crux of the evidence for the Prosecution was a statement purportedly made by TD placing himself and Andrews at the scene. However, that statement could not be considered as evidence against Andrews as it needed to be capable fof proving more than a suspicion that he was aware TD had committed an offence. Accordingly, the trial judge was correct to direct Andrews' acquittal.

Directions

Example: Hearsay – Out of Court Statement by One Defendant
Mr. Foreman and members of the jury, a fundamental principle in law is that what one defendant says out of court is evidence as against that defendant only and is not evidence against any other defendant. The principal evidence in this case is contained in the record of interviews of both defendants; as you would recall, there was no eyewitness to give direct evidence as to the incident in question. In these circumstances, s 20(1) of the Evidence Act states, "In any proceedings a confession made by a defendant may be given in evidence against him in so far as it is relevant to any fact in issue in the proceedings and is not excluded by the court pursuant to this section." Additionally, s 20(5) tells us what a confession is and says that "confession" includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether in words or otherwise. So in considering the statements of the defendant Tucker and the defendant Jones, you must have regard only to what that particular defendant said about his own involvement. You cannot and must not consider anything said about the involvement or activities of any of the co-defendant. So when the defendant Tucker says in his interview that the defendant Jones was the person who held the firearm on the date and time in question at XYZ bank while he [Tucker] collected the money from the occupants of the bank, this is not evidence against the defendant Jones because Jones did not accept the defendant Tucker's admission as representing the truth in that regard; meaning Jones did not align himself with that statement during the trial. Before you can rely on these statements you must feel sure that what each defendant said is true, accurate and reliable and you must consider the case for each defendant separately. According to both defendants as was put through cross examination of the Prosecution witnesses, the contents of their record of interviews were fabricated by the police and they never gave that information. However, you've seen the recordings of the interviews, and you will have a copy of them to take into the deliberation room. It is for you to listen to the interviews and determine for yourselves whether the evidence given by the investigator as to their respective roles in the alleged commission of the offence, is consistent with what is being said by each defendant on the recording of his record of interview. If, having regard to the totality of the evidence before you, are satisfied so that you feel sure that the defendant Jones held up XYZ bank with a firearm while the defendant Tucker collected the money from the occupants of the bank, based on the directions that I have given you, it is open for you to find that the elements of armed robbery have been made out. However, if you are not sure, then you must reject this evidence that you are unsure of and in such a case find that defendant not guilty.

Chapter 18 – Submission of No Case to Answer

In this Chapter: **General Scope | Statutory Regime | General Principles | Case Law Illustrations | Useful Cases**

General Scope

At the close of the Prosecution's case, a submission of no case to answer by the defence may be made. The locus classicus is the case of ***R v Galbraith*** **[1981] 1 WLR 1039, [1981] 2 All ER 1060**, in which Lord Lane CJ set out a two-limb test, stating at pg 1042:

> How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

His Lordship further noted that, "[t]here will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." At this stage in the proceedings, the Court is only concerned with whether a *prima facie* case has been made out.

Munnings Jr v R **(The Bahamas CA, SCCrApp No 164 of 2019, 2 December 2020)** at para 14 states, "It is now well accepted that these principles enunciated by Lord Lane LCJ in **Galbraith** form a part of our legal jurisprudence in the jurisdiction as it has often been applied in our courts."

Statutory Regime

According to s 170 (1) and (2) of the **Criminal Procedure Code, Chapter 91**:

> (1)When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that

> there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing any arguments which the counsel for the prosecution or the defence may desire to submit, record a finding of not guilty.
>
> (2) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person, or any one or more of several accused persons, committed the offence, shall inform each such accused person of his right to address the court, either personally or by his counsel (if any), to give evidence on his own behalf, and to call witnesses in his defence, and in all cases shall require him or his counsel to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the judge shall record the same.

Section 203 of the **Criminal Procedure Code, Chapter 91**, in relation to trials in the Magistrates' Court, makes provision for the acquittal of a defendant if there is no case to answer. It states that:

> 203. At the close of the evidence in support of the charge, the court shall consider whether or not a sufficient case is made out against the accused person to require him to make a defence, and if the court considers that such a case is not made out the charge shall be dismissed and the accused forthwith acquitted and discharged.

General Principles

a. A submission of no case should be made in the absence of the jury.

b. The charges (where there are more than one) are to be considered individually to determine whether the prosecution's evidence reveals a prima facie case on one or more of the charges.

c. If, at the conclusion of the evidence, the trial judge is of the opinion that no reasonable jury properly directed could safely convict, the judge should raise the matter for discussion with counsel even if no submission of no case to answer is made. If, having heard submissions, the judge is of the same opinion, the judge should withdraw the case from the jury. The trial judge may re-open a no case submission application, or revisit its decision even after a decision that the defendant has a case to answer has been given. This point was canvassed in the Court of Appeal's decision in ***AG v Andrews*** **(The Bahamas CA, SCCrApp No 212 of 2017, 26 October 2020)**, where at paras 34 and 35, the Court referenced the Guyanese case of ***The State v Sattaur*** **(1976) 24 WIR 157**. At para 35 in ***AG v Andrews***, the Court noted:

> 35. In **Sattaur** the trial judge had ruled that despite breaches of the Judges' Rules a defendant's confession was voluntary. It subsequently emerged through the evidence of three witnesses taken in the presence of the jury, that the circumstances touching the propriety of the admissibility of Sattaur's confession could have impacted the trial judge's decision. The trial judge appears to have thought he could not re-visit the matter as he had already ruled the statement admissible so he left it to the jury to consider the question of voluntariness. The Guyanese Court of Appeal held that in those circumstances the trial judge should have reconsidered his ruling. In the course of their judgment the court set out a number of authorities which support their view.

Case Law Illustrations

Identification Evidence

Where the case for the Prosecution turns wholly or substantially on visual identification evidence, the court has a further duty at the no case submission stage to consider not only ***Galbraith,*** but also the **Turnbull** principles on identification, in determining whether to withdraw the case from jury.

In ***DPP v Bain*** **(The Bahamas CA, SCCrApp No 204 of 2018, 24 September 2020)** at para 15**,** the Court of Appeal referred to the case of ***McPhee v R*** **(The Bahamas CA, SCCrApp No 128 of 2012, 29 January 2016)** where at para 46, it was noted as follows:

> …It is now well established that in cases (like the current one) where the Crown's case is wholly or substantially based on visual identification evidence, a trial judge, faced at the close of the prosecution's case with a submission of no-case to answer, must in deciding whether to withdraw the case from the jury or call upon the accused for a defence, walk a fine line between "two parallel lines of authority" namely **R v. Turnbull (1977) QB 224** and **R v Galbraith (1981) 1 WLR 1039** both of which were judicially discussed and explained in the Privy Council case of **Daley v. The Queen (1993) 4 All ER 86**.

Circumstantial Evidence

In cases concerning circumstantial evidence and the drawing of inferences, it is not the function of the judge to choose between inferences which are reasonably open to the jury. At paragraph 10 of the Court of Appeal's decision in ***DPP v Smtih*** **(The Bahamas CA, SCCrApp No 166 of 2022, 29 June 2023),** their Lordships noted the guidance given by the Privy Council in ***DPP v Varlack*** **[2008] UKPC 56, [2009] 4 LRC 392**. The Court of Appeal quoted paras 21 – 22 of ***Varlack***, where the Privy Council restated the basic rule on a submission of no case to answer, as follows:

21.The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.

22. The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:

> **"It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence arc reasonably open on the evidence … He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…**
>
> **I would re-state the principles, in summary form, as follows. <u>If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and</u>**

> **all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."** [Emphasis added]

Circumstantial Evidence (Electronic Monitoring Device)

If the case for the Prosecution is reliant solely on an Electronic Monitoring Device (EMD) report, then this is insufficient to make out a prima facie case, as mere presence is insufficient. In the case of ***Munnings Jr v R*** **(The Bahamas CA, SCCrApp No 164 of 2019, 2 December 2020)**, the Prosecution's case was purely circumstantial and relied on an EMD which placed the appellant in the area at the time of the robbery and showed him leaving at a high rate of speed in circumstances where he said he was never there but was at home. Additionally, when he left the area at a high rate of speed (according to the EMD), the EMD tracked him to Montel Heights, where police officers arrested him.

One of the grounds of appeal was that the learned judge erred in failing to withdraw the case from the jury under the principles of ***Galbraith***. The Court of Appeal noted at para 18, "It must first be acknowledged that the mere presence of the appellant in the 'area' by itself is not sufficient evidence to find that he was involved in the crime".

Their Lordships held that notwithstanding the appellant's suspicious conduct, taking the evidence as a whole, the no case submission ought to have been upheld

Useful Cases

a. ***COP v Smith*** **(The Bahamas CA, MCCrApp No 15 of 2019, 28 August 2019)**

b. ***DPP v Foulkes*** **(The Bahamas CA, SCCrApp No 8 of 2020, 25 February 2021)**

c. ***DE v DPP*** **(The Bahamas CA, SCCrApp 215 of 2023, 16 October 2024)**

d. ***AG v Fraser*** **(The Bahamas CA, SCCivApp No 13 of 2007, 29 September 2008)**

Chapter 19 – Lies

In this Chapter: **General Scope | Directions | Motive to Lie | Lucas Direction | Lies and Bad Character | Case Law Illustrations | Useful Cases | Lucas Direction Specimens**

General Scope

A defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt: ***R v Goodway*** **[1993] 4 All ER 894, [1993] Crim LR 948**.

In ***Goodway***, the Court held that where a lie is relied on by the Prosecution as supportive of guilt, the conditions set out in ***R v Lucas*** **[1981] QB 720, [1981] 3 WLR 120** must be fully met. These are that:

a. it is shown, by other evidence in the case, to be a deliberate untruth, i.e. it did not arise from confusion or mistake.

b. it relates to a significant issue.

c. it was not told for a reason advanced by or on behalf of the defendant, or for some other reason arising from the evidence, which does not point to the defendant's guilt (see also ***R v Taylor*** **[1998] Crim LR 822**).

The direction should be tailored to the circumstances of the case. The jury must be directed that only if they are sure that these criteria are satisfied can the defendant's lie be used as some support for the Prosecution's case, but that the lie itself cannot prove guilt: (See ***R v Strudwi*****ck (1993) 99 Cr App Rep 326** at 331). It is important that care is taken to make clear these criteria.

If the issue for the jury is whether to believe the Prosecution's witnesses rather than the defendant and doing so will necessarily lead them to conclude that the defendant was lying in the account they gave, such a direction is not necessary (***R v Harron*** **[1996] 2 Cr App Rep 457, [1996] Crim LR 581**).

Similarly, a lie direction is not needed where the defendant's explanation for his admitted lie can be dealt with fairly in summing-up (***R v Saunders*** **[1996] 1 Cr App Rep 463, [1996] Crim LR 420** at pgs 518–19). As well, it may also not necessarily be required where the defendant relies upon an alibi that the jury may reject: ***R v Hussain*** **[2024] EWCA Crim 228**.

Where the defendant told lie(s) in their interview and did not mention matters on which the defendant relied in their defence, a single direction should be given which addresses both points; giving separate directions about lie(s) is always unhelpful.

Whether a direction should be given to the jury in respect of any admitted or proved lie(s) should be the subject of discussion with Counsel before speeches. In particular, care should be taken to identify with them the lie(s) in respect of which the direction is to be given.

Directions

Before the jury may use an alleged or admitted lie against the defendant, they must be sure of **all** of the following:

a. that it is either admitted or shown, by other evidence in the case, to be a deliberate untruth: i.e. it did not arise from confusion or mistake.

b. that it relates to a significant issue.

c. that it was not told for a reason advanced by or on behalf of the defendant, or some other reason arising from the evidence, which does not point to the defendant's guilt.

The jury must be directed that unless they are sure of **all** of the above, the [alleged] lie is not relevant and must be ignored.

If the jury is sure of all of the above, they may use the lie as some support for the Prosecution's case, but it must be made clear that a lie can never by itself prove guilt.

Motive to Lie

Evidence which may raise a witness' motive to lie must be approached with caution, as there is a possibility that such evidence may be tainted by an improper motive. Therefore, the jury must be directed to consider whether the witness has fabricated or embellished their evidence in the hope of gaining an advantage for themselves, for example, a lighter sentence, prosecution for a lesser offence, or immunity from prosecution.

Lucas Direction

A Lucas direction is given where the prosecution is seeking to rely on the lies of the defendant as proof of guilt (see ***Daniels v AG*** **(The Bahamas CA, SCCrApp No 263 of 2017, 14 March 2019)**).

In ***Knowles Jr v DPP*** **(The Bahamas CA, SCCrApp No 97 of 2021, 30 May 2022)**, the Court stated at paras 19 – 20:

> **19. If it is however appropriate to give a Lucas direction, the Court of Appeal noted in** *R v Burge* [1996] 1Cr App R163, 174, **that it should be tailored to the circumstances of the case, but it would normally be sufficient to make two basic points:**

> **"1. that the lie must be admitted or proved beyond reasonable doubt, and; 2.that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons, so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case**."

…

> **20. The circumstances where a Lucas** (*R v Lucas* [1981] QB 720) **direction should be given were also set out in the decision of the Court of Appeal of Jamaica in** *R v Vassell (Courtney)* (2001) 62 WIR 258. **In that case the court, after reviewing the cases, said:**
>
> > **"These cases establish that the underpinning for the requirement of the Lucas direction is a dependence by the Crown, for proof of its case, on the lies told by the defendant.** In our judgment, the direction would not be required where the lies are only relied upon by the Crown merely to attack the credibility of the defendant."

In ***R v Burge*** **[1996] 1 Cr App Rep 163**, the Court of Appeal of England and Wales held that a ***Lucas*** direction is usually required in four situations, which may overlap. At 173, Kennedy LJ noted:

> 1. Where the defence relies on an alibi.
>
> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.
>
> 3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.
>
> 4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

The Court of Appeal held that the direction (if given) should, so far as possible, be tailored to the circumstances of the case, but that it will normally suffice to make two points: first, that the lie must be admitted or proved beyond reasonable doubt, and secondly, that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons; so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the Prosecution's case. The Court also stressed that

the need for the direction arises only in cases where the Prosecution says, or the judge envisages that the jury may say, that the lie is evidence against the defendant, in effect using it as an implied admission of guilt. The direction is not needed in run of the mill cases, where the Defence's case is contradicted by the evidence of Prosecution witnesses in such a way as to make it necessary for the Prosecution to say that, insofar as the two sides are in conflict, the defendant's account is untrue.

Lies and Bad Character

In ***R v Campbell*** **[2009] EWCA Crim 1076, [2009] Crim LR 822**, the defendant was charged with murder. He had earlier pleaded guilty to unlawful possession of firearms and ammunition found in his possession 11 days after the shooting. There was also found on a glove in his possession, firearms residue. The Prosecution relied on these convictions and the glove as evidence of bad character, from which the jury could infer a propensity to commit firearms offences. The defendant advanced explanations which, if accepted, would remove the potential for a finding of propensity. It was argued on appeal that the trial judge should have given a lies direction. The Court held that an occasion for a lies direction had not arisen. Either the jury could not exclude the defendant's explanation (in which case the defendant had not lied), or the jury would disbelieve the explanation (in which case the jury would find propensity). Since the jury would be given a propensity warning (as they had been), the defendant was adequately protected against an assumption of guilt.

It may not be that in all such situations both a bad character and a lies direction would be inappropriate. There *may* be a risk that the jury would find not only propensity, but also that the defendant would not have lied about their bad character unless guilty. A lies direction in ***Campbell*** could simply have pointed out that the defendant had an obvious possible motive for placing an 'innocent' gloss on the bad character evidence. Even if the defendant had lied about his access to and familiarity with unlawful firearms, it did not automatically follow he was guilty of this murder.

Directions

a. Discussion with the advocates is essential both as to the question whether a ***Lucas*** direction is required at all and, in any event, as to the terms in which the issue of lies is to be left to the jury.

b. The lies on which the Prosecution relies, or which the judge considers may be used by the jury to support an inference of guilt, should be identified for the jury.

c. The jury must be sure that a deliberate lie was told either because the lie is admitted or because it is proved.

d. Any explanation for the lie tendered by the defendant or advanced in argument on his behalf should be summarised for the jury.

e. The jury may be told that the defendant's lie is relevant to the credibility of the defendant's account in interview and/or evidence.

f. The jury should be directed that before they can treat the defendant's lie as additional support for the Prosecution's case they must exclude, so that they are sure, the possibility that the lie was told for an 'innocent' reason (meaning a reason other than guilt). Such directions should always be framed within the context of the facts of the case.

g. Should the defendant advance a reason why they lied, it is not incumbent upon the judge to list others, unless it is a reasonable possibility that they may arise on the facts; nor, when none is advanced, is it necessary to cover every theoretical possibility, only those which might reasonably arise on the facts.

h. What weight the jury attaches to the lie is a matter for them. However, it may be necessary to ascertain whether the lie alleged is capable of supporting an adverse inference on some, or all, of the issues between the Prosecution and Defence. Where, therefore, the offence charged requires specific intent and the motive for the lie could have been an attempt to avoid a charge even of the lesser offence, the jury should receive a direction to be cautious before using the lie as any support for the inference of specific intent.

i. The jury should be told that lies cannot of themselves prove guilt. They may, depending on their view, provide support for the Prosecution's case or a specific part of it.

j. One of the reasons why directions in relation to lies can be confusing to juries is that concepts such as 'credibility', 'consciousness or realisation of guilt', 'the defendant's lies may support an inference of guilt', and 'support for the Prosecution's case', are unfamiliar and capable of being misunderstood unless explained through the factual context of the case.

Case Law Illustrations

Vasyli v R; R v Vasyli **(The Bahamas CA, SCCrApp No 255 of 2015, 25 July 2017)**: the Court held that the circumstances of the case ought to have attracted a ***Lucas*** direction addressing the significance of lies. The Court determined that the learned judge was under a duty to give that direction to the jury. Allen, P found the failure of the judge to do so was an "irregularity which substantially affected the merits of the case". On that ground Allen, P allowed the appeal.

Patterson v R **(The Bahamas CA, SCCrApp No 213 of 2014, 17 March 2016)**: the judge in her direction to the jury in this case, did not suggest that the Prosecution was relying on the lies or the inconsistencies as evidence of guilt. They were simply matters that affected the credibility of the evidence of the appellant. A ***Lucas*** direction may have

been given out of an abundance of caution; it was not necessary and the failure to give one did not make the verdict unsafe.

***Black v R* (The Bahamas CA, SCCrApp No 40 of 2014, 24 July 2017)** at para 74: the judge. "should have directed the jury along the lines of a "Lucas Direction", i.e. that lies told by a defendant are not always indicative of guilt of the offence charged; and they must be satisfied the appellant lied and that she did so deliberately out of a realisation of guilt and a fear of the truth." The Judge failed to give the Lucas Direction to the jury and fell into error.

***Stuart v R* (SCCrApp Nos 223 and 267 of 2016, 4 September 2018)** at para 18: the directions given by the trial judge "…were quite satisfactory. No other direction was necessary. As the Prosecution was not relying on any lie of the intended appellant with respect to his alibi, there was no need to give any more expansive a direction than was in fact given."

Thompson v R* (The Bahamas CA, SCCrApp No 125 of 2015, 3 May 2019)**: there was no need to give the ***Lucas direction in this case in as much as there was no proven or admitted lie by the appellant upon which the Prosecution sought to rely as proof of his guilt. Even though the appellant relied on an alibi, the Crown did not adduce rebuttal evidence in order to prove that the alibi was a lie.

Useful Cases

a. ***McPhee v R* (The Bahamas CA, SCCrApp No 9 of 2017, 25 April 2019)**

b. ***Sawall v R* (The Bahamas CA, SCCrApp No 259 of 2015, 7 February 2019)**

c. ***Musgrove v R* (The Bahamas CA, SCCrApp No 140 of 2012, 26 March 2018)**

Lucas Direction Specimens

Example 1: Where the Defendant denies saying what is alleged
The Prosecution says that when D was {e.g. arrested/interviewed/ charged} D said {specify}. They say that this was a deliberate lie which D made up in an attempt to cover up the fact that {specify}. D denies that they said this at all. In considering this evidence you must answer three questions: 1. Did D say this? If you are not sure that D said it, then you must ignore this point completely. 2. If you are sure that D did say this, was it a deliberate untruth, or may it have been said because of {e.g. confusion, mistake}. If you are not sure that it was a deliberate lie, then again you must ignore this point. 3. If you are sure that it was a deliberate lie, then why did D lie? In answering this question, you must bear in mind that a defendant who tells a lie is not necessarily guilty: sometimes a defendant who is not guilty will tell a lie for some other reason.

Example 1: Where the Defendant denies saying what is alleged cont'd
In this case, given the evidence that {specify}, you should consider whether D lied, or may have lied, because {specify}. If, having considered these questions you are sure that D did say this, that it was a deliberate lie and that D did not have any "innocent" reason for lying, you may use this as evidence which supports the Prosecution's case, but D is not to be convicted either wholly or mainly on the basis that they lied. The fact that D lied does not, on its own, prove that D is guilty. NOTE: The example may be tailored to fit cases in which D admits that they said what is alleged but denies that it was untrue. The warning that D is not to be convicted wholly or mainly on the basis that they lied must be given in every case.

Example 2*
It is alleged by the Prosecution (or the defendant has admitted) that the defendant lied to the police (or to a witness), (or in their evidence before you). It is for you to decide whether or not the lie supports the case against the defendant. In deciding this issue, you must consider the following questions: Did the defendant tell a deliberate lie (to the police) (to the witness) (in his evidence)? If you are not sure whether they did, then you need not consider this matter any further. If, however you are sure that the defendant told a deliberate lie, then you go to the next question. Is there an innocent explanation for the lie? You must bear in mind that the fact that a defendant tells a lie is not necessarily evidence of guilt. A defendant may lie for a number of reasons, for example: to bolster a genuine defence, or to conceal some disgraceful conduct, or out of panic or confusion or embarrassment, or for some other reason not related to the commission of the offence. In this case the defendant's explanation is (summarise explanation if one is given). If you conclude that this is, or may be an innocent explanation for the defendant's lie, then you must disregard it, and consider it no further. However, if you are sure that the defendant has told a deliberate lie, and you are sure that there is no innocent explanation for it, then it is open to you to consider the lie in deciding whether or not the defendant has committed the offence. *Adapted from Judicial Education Institute of Trinidad and Tobago (JEITT), ***Criminal Bench Book 2015***

Example 3: D admits telling a lie and gives a reason for having done so
When D was {e.g. arrested/interviewed/ charged} D said {specify}. D admits saying this and accepts that it was a lie, but gave an explanation, namely {specify}. When you are considering this evidence, you must consider why D lied. In doing so, you must bear in mind that a defendant who tells a lie is not necessarily guilty; sometimes a defendant who is not guilty will tell a lie for some other reason. The reason given by D for lying was a fear of not being believed. D says the account now given is the truth, but D panicked in interview. If you decide the explanation given by D is, or may be, true then the lie is of no relevance, and you must not hold it against D. {Only if there is an evidential basis for the following: If you are satisfied that this was not the reason that D lied, you should also consider whether there may be some other reason. D may have been afraid to tell the truth, e.g. D does not want to incriminate the co-defendants and, for obvious reasons, has not felt able to say so. If you find that this is, or may be, the reason for D to have lied, then again you will take no notice of this lie and not hold it against D.} If, however, you are sure that D did not have this/these reason(s) for lying, you may use this as evidence which supports the Prosecution's case. You must not convict D wholly or mainly because they lied.

Chapter 20 – Defences

In this Chapter: **Alibi | Insanity | Non-Insane Automatism | Provocation (Murder) | Diminished Responsibility (Murder) | Intoxication (Self-induced or Voluntary) | Duress | Defence Available but Not Raised | Self-Defence**

Alibi

Where the defendant merely states that they were not at the place where the offence was committed, this does not raise the defence of alibi. Alibi means more than being not present, but rather the defendant was at a specific place elsewhere.

In ***Suer v R*** **(The Bahamas CA, SCCrApp No 318 of 2014, 17 May 2016)**, the Court noted that s 173 of the **Criminal Procedure Code Act, Chapter 91** governs the circumstances in which a defendant may lead evidence in support of an alibi defence on a trial on information in the Supreme Court. It was also noted that the section curtails the ability of a defendant on a trial on information to effectively ambush the Prosecution by calling, at the eleventh hour, evidence in support of an alibi defence. The section also provides statutory safeguards which must be observed before evidence in support of an alibi is excluded.

Where a defendant relied on an alibi and calls a witness in support of that alibi, a Judge is required to give a proper alibi direction: ***Belazaire v DPP*** **(The Bahamas CA, SCCrApp No 51 of 2021, 8 March 2022)**.

In ***Adderley v DPP*** **(The Bahamas CA, SCCrApp No 212 of 2018, 14 June 2021),** the Court stated that any details relating to possible alibi witnesses should be provided to the Magistrate's Court during a preliminary inquiry, or at the defendant's arraignment in the Supreme Court, as it provides police officers with an opportunity to investigate the veracity of the alibi by locating and obtaining statements from the witnesses. If the information about the witnesses is given and the police fail to act on it, a court may make comments about such failure adverse to the Prosecution's case during the trial.

The first requirement of the direction to the jury is that they understand that there is no burden on the defendant to prove that they were elsewhere. The Prosecution must prove its case beyond a reasonable doubt and that includes the need to prove that the defendant was not elsewhere, but was at the scene committing the offence.

The second requirement is to guard against the danger that, if the jury disbelieves the alibi of the defendant, whether it is a mere denial of presence or a positive assertion that the defendant was elsewhere, they might assume the defendant is guilty. Particular care is required when the contest is between identifying witnesses and the evidence of alibi. The members of the jury should be reminded that if they are convinced that the defendant has

told lies about where they were at the material time, this does not by itself prove that the defendant was where the identifying witness said they were.

In a case in which identification evidence is crucial, if the defendant seeks to establish an alibi, it is not necessary for the trial judge to direct the jury expressly that the rejection by them of the defendant's alibi would not prove that the defendant was where the identifying witness said that the defendant had been, unless there are circumstances which create a risk that the jury might use the rejection of the alibi in an unwarranted manner as confirmation of guilt: ***London v The State*** **(1999) 57 WIR 424**. See also ***R v Brown*** **(2001) 62 WIR 234**; ***R v Turnbull*** **[1977] QB 224, [1976] 3 WLR 445**. In ***Broadhurst v R*** **[1964] AC 441, [1964] 2 WLR 38** at 457, the Court said:

> It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.

Thus, the warning should be given whenever there is a risk that the jury will, having rejected the alibi evidence, assume guilt of the offence charged.

If the jury is not satisfied with the evidence and is in doubt, the jury must acquit. If the jury is sure that the defendant was present as the Prosecution allege, the jury must be satisfied of any other elements of the offence that are in issue.

In ***Mackey v DPP*** **(The Bahamas CA, SCCrApp No 53 of 2020, 18 August 2021)**, the Court found that the trial judge's alibi direction was robust. The Court noted at paras 38 and 39 that:

> 38. The trial judge in her summation to the jury gave a direction on the alibi defence. She said:
>
> > **"Secondly, I want to let you know of the law of alibi. I thought of giving you this when I came to the defendant's defence, but I'd like to give you it now the directions of law.**
> >
> > **The accused's defence is one of alibi. He says that he was not at the scene of the crime when it was committed. He was**

elsewhere. The prosecution has to prove his guilt so that you are sure of it. He doesn't have to prove anything. He doesn't have to prove he was elsewhere, but as he has raised it the prosecution must disprove the alibi. You must be satisfied so that you are sure that the accused was where the prosecution said he was committing these offences before you can convict him. He called his sister as his witness. And I will go through her evidence. But even if you conclude that the alibi was false, because as you know certain things were said by the sister which was not said by the defendant, and certain things were said by the defendant which the sister did not endorse. Their evidence conflicted.

So even if you conclude that the alibi is false that does not of itself entitle you to convict the accused because sometimes an alibi is invented sometimes to bolster a genuine defence, a true defence, and sometimes persons often get their witnesses to lie for them thinking that their defence is not sufficient, and sometimes witnesses also make genuine mistakes. But even if you don't believe a word of what he says or what his witness said, that does not entitle you to convict him. You must be satisfied on the prosecution's case that he committed these offences. He has nothing to prove. And if you think what he told you is or may be true, then he would not be guilty. The crux of the Crown has to satisfy you beyond reasonable doubt. Even if you reject the case for the accused you have to be satisfied on the prosecution's case before you could find him guilty of committing the offences, one or both…

39. And later the judge gave the following direction:

"Now, Members of the Jury, if you accept that Brandon Newland is mistaken in his identification for the person who shot and killed his brother and who shot him, you may find the defendant not guilty. But that you only can find him nothing if you too do not accept that the statements and the record of interview given by him were not given without any form of oppression, because it is the Crown's case that he did give them, he gave them without form of oppression. So you have to determine too as well whether he did give those statements and whether he gave it without any form of oppression. But if you find that you resolve that and if you find that Brandon Newland is mistaken in his identification of the person who shot him and who shot and killed his brother, you must find the defendant not guilty. If he is

> **mistaken, then the defendant is the wrong person before the Court. If you believe the defendant's alibi, the one given by him and reinforced by his sister, you must find him not guilty as well. However, if you reject his defence of an alibi, you still do not automatically convict the defendant, you fall back on the prosecution's case having regard to the legal directions I gave you. You must not shirk from your duty. And if you find that the Crown has made out its case against him on one or both, murder and attempted murder, or even one alone, you must find him guilty of the offence or the offences as charged. If you find, on the other hand, that any of the ingredients that constitute murder is missing, or any of the ingredients that constitute attempted murder is missing, then you must acquit because all of the ingredients must be present for the crime to be committed."**

False Alibi

A false alibi warning should be given where the fact of rejection of the alibi is seen as capable of supporting the identification evidence, or where the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence.

> In ***Pinder v DPP; Fawkes v DPP*** **(The Bahamas CA, SCCrApp Nos 3 and 4 of 2021, 24 October 2022)**;, the Court held that an alibi direction by a trial judge should make it clear that the rejection of alibi evidence in itself was insufficient to convict, as there may be other reasons for giving a false alibi other than being guilty of the offence for which a defendant is charged.

In ***Turnbull***, Lord Chief Justice Widgery said, at 230:

> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

The Board of the Privy Council in ***Mills v R*** **[1995] 1 WLR 511, (1995) 46 WIR 240**, did not give the above direction. However, the Board did direct the jury in the following terms:

> Mr Arthur Mills and the two sons, Garfield and Julius, they say that we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi, they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not, as Mr Mills said, at some lady's house talking, or as the boys said, in their house with their mother.

The Board went on to state:

> Counsel submitted that this direction was insufficient and that there was a material failure to direct the jury properly. The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:
>
> > Where an accused makes an unsworn statement, no such directions [about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves…

Lord Steyn delivering the advice of the Board, stated, "The jury is told to accord to such statement such weight as they fully consider it deserves", which reflected the guidance given by the Privy Council in ***DPP v Walker*** **[1974] 1 WLR 1090, (1974) 21 WIR 406** at 411. See also ***Brown v R*** **[2010] JMCA Crim 38** at para 15.

Insanity

The plea of insanity may take the form of insane automatism (i.e. that the defendant has a total loss of control as a result of some disease of the mind). The defence is mutually exclusive from that of sane automatism, which requires that the total loss of control arises from some external factor. It is for the judge to distinguish clearly between them as a matter of law. Where the evidence is capable of supporting both insanity and sane automatism (because the defendant suffers a combination of internal and external factors), the sane automatism defence should be left to the jury. The direction will be complicated by the fact that the burden of proof is on the Prosecution in a case of insane automatism and on the defendant in a case of insanity.

When a defence of insanity is put forward by the defence on a criminal charge, the defendant must prove that at the time of committing the criminal act they were labouring under a 'defect of reason' resulting from "disease of the mind" (see ***R v Sullivan*** **[1984] AC 156, [1983] 3 WLR 123**). This must be such that the defendant either did not know the quality and nature of their act or that it was legally wrong. "Disease of the

mind," within the meaning of the ***M'Naghten* Rules**, is a malfunctioning of the mind caused by disease and does not include a malfunctioning of the mind of a transitory effect caused by the application to the body of some external factor, such as insulin.

Statutory Regime

Section 92 of the **Penal Code, Chapter 84** states:

> "92. A person accused of an offence shall be deemed to have been insane at the time he committed the act in respect of which he is accused —
> (1) if he was prevented, by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused;
> (2) if he did the act in respect of which he is accused under the influence of an insane delusion of such a nature as to render him, in the opinion of the jury or of the court, an unfit subject for punishment of any kind in respect of such act.
>
> *Illustrations*
>
> Para. (1) —(*a*) A person who, by reason of idiocy, is incapable of knowing that his act will cause death cannot be convicted of murder, but if he did the act in respect of which he is charged, a special verdict should be found in accordance with the provisions of any Act dealing with criminal procedure.
> (*b*) A person who commits homicide by reason of such a paroxysm of madness as at the time makes him incapable of considering that murder is a crime, cannot be convicted of murder, but a special verdict should be found as in illustration (*a*).
> (*c*) A person is not to be acquitted of murder under this section merely because it is proved that, by reason of mental derangement, he has a propensity to homicide.
> Para. (2) —(*a*) *A*. kills *B*. by reason of an insane delusion that *B*. is attempting to kill *A*. Here the jury will be justified in finding a special verdict as in illustration (1) (*a*).
> (*b*) *A*. is subject to insane delusions. In an interval of freedom from these delusions, *A*. kills *B*. Here the jury ought not to take into account the fact that at other times *A*. was subject to delusions."

A defence of insanity has no relevance to a charge that does not require proof of mens rea: ***DPP v H* [1997] 1 WLR 1406, 1409B-E** per McCowan LJ.

The locus classicus case on the law governing the defence of insanity is ***M'Naghten's Case* [1843-60] All ER Rep 229, (1843) 8 ER 718**, which considered what were the proper questions that should be put to the jury where the defence of insanity was being relied on.

The case of ***Loake v Crown Prosecution Service*** **[2017] EWHC 2855 (Admin), [2018] QB 998**, helpfully sets out key considerations for the Defence:

> 20. The authors of *Smith and Hogan's Criminal Law* (14th Edn, 2015), at paragraph 11.2.2.2, summarise the two limbs of the insanity defence as expressed in the M'Naghten Rules in the following terms:
>
> > "1. He must be found not guilty by reason of insanity if, because of a disease of the mind, he did not know the nature and quality of his act (effectively a denial of *mens rea*); or
> >
> > 2. Even if he did know the nature and quality of his act, he must be acquitted if, because of a disease of the mind, he did not know it was 'wrong'."
>
> 21. The burden of establishing the defence of insanity lies upon the defendant, on the balance of probabilities: *R v Smith (Oliver)* 6 Cr App R 19; *R v Carr-Briant* [1943] KB 607; *Sodeman v The King* [1936] ALR 156.
>
> 22. In relation to the first limb, not knowing the "nature and quality of his act" refers to the physical nature and quality of the act and not to its moral or legal quality: *R v Codere* (1917) 12 Cr App R 21.
>
> 23. In relation to the second limb, *Codere,* supra, *Windle* [1952] QB 826 and *Johnson* [2007] EWCA Crim 1978 establish that "he did not know it was wrong" means legally wrong, and not morally wrong. Thus, if a person does something knowing it is legally wrong but believing that it is nonetheless morally justified, he will not succeed on a plea of insanity. In *Windle*, supra, the appellant killed his wife who was herself insane. He said to the police on arrest, "I suppose they will hang me for this?" (indicating, said the prosecution, that he knew the legal wrongness of what he had done). The doctor who was called for the defence said the Appellant was suffering from a form of communicated insanity known as *folie à deux*. The judge withdrew the defence of insanity from the jury. Lord Goddard CJ said at p834:
>
> > "In the opinion of the court there is no doubt that in the McNaghten Rules "wrong" means contrary to law and not "wrong" according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified. In the present case, it could not be challenged that the appellant knew that what he was doing was contrary to law … the judge was entitled to withdraw the case from the jury and was, I think, right in doing so."

24. Earlier, at p832 he had said:

> "It may well be that, in the misery in which he had been living, with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought that she would be better out of this world than in it. He may have thought that it would be a kindly act to release her from what she was suffering from — or thought she was suffering from — but that the law does not permit."

The illustration below, found in the Trinidad and Tobago ***Criminal Bench Book 2015*** at pg 269 is helpful in this area:

> Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. In order to establish insanity, it must be clearly proved that, at the time of the committing of the act, the accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the acts he was doing, or if he did know, that he did not know that what he was doing was wrong.
>
> Therefore, the first thing you need to consider is whether the accused was suffering a disease of the mind, in other words an impairment of mental functioning caused by a medical condition. If you consider that it is more likely than not that the accused was suffering from a disease of the mind then you need to consider the second question which is whether the degree of impairment of the accused's mental faculties was such that when he committed the act, he did not know what he was doing or did not know that it was wrong. If you conclude it is more likely than not that he did not know what he was doing or did not know it was legally wrong, your verdicts on both counts would be 'not guilty by reason of insanity'.
>
> If, on the other hand, you decide that it is more likely than not either (1) that the accused was not suffering a disease of the mind or (2) that he knew what he was doing and knew that it was wrong, then you will have rejected the defence of insanity.
>
> In order for you to consider the question of insanity, there must be evidence placed before you which you must then consider. However, once the evidential foundation has been laid so that the question of insanity is before you, then the burden of proof is on the prosecution to show that the accused acted consciously and voluntarily.

Special Verdict if the Defence is Made Out

(See Chapter on Verdicts)

Directions

Example

D has raised the defence of insanity, insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.

In law, a person is presumed to be sane and reasonable enough to be responsible for their actions. But if D proves that it is more likely than not that, when they did a particular act, because they were suffering from a disease of the mind, either they did not know what they were doing, or they did not know that that they were doing was wrong by the standards of reasonable ordinary people, D is to be found 'not guilty by reason of insanity'.

You should address this aspect of the case in two stages.

Firstly, you must decide whether D has proved that at the time D [ ] it is more likely than not that they were suffering from a disease of the mind. In this case you have heard evidence from [ ].

If D has not proved that they were suffering from a disease of the mind, then D does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty.

If, however, you decide that it is more likely than not that D was suffering from a disease of the mind, then you must go on to decide whether, as a result of that disease, it is more likely than not that:

a. Either D did not know what they were doing when D [ ]; and/or

b. D did not know that what they were doing when D [ ] was wrong by standards of reasonable ordinary people.

If D has not proved either of these things, then they do not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty. If D has proved that it is more likely than not that as a result of their disease of mind, they did not know what they were doing and/or they did not know that what they were doing was wrong, then you will find D not guilty by reason of insanity

Non-Insane Automatism

An issue such as the defence of automatism, must be raised in a way which makes it fit to be considered by the jury. The crucial question in cases where automatism is raised, is whether, on the evidence as a whole, there is any evidence which would put in issue the defence of automatism which, if accepted as being true or possibly true, would have resulted in the defendant's acquittal: ***Raphael v R*** **(The Bahamas CA, SCCrimApp No 317 of 2014, 13 December 2016)**.

It is suggested that the correct definition of the defence is focused not on whether the defendant was conscious or unconscious, but on whether they were acting with or without control at the time of the alleged offence.

In ***Bratty v AG of Northern Ireland*** **[1963] AC 388, [1962] 2 WLR 388**, Lord Denning defined automatism as "..an act which is done by the muscles without any control by the mind such as a spasm, a reflex action, or a convulsion, or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from a concussion or whilst sleep walking."

The defence of automatism must be raised in a way which makes it fit to be considered by the jury. The Court of Appeal, at para 38 of ***Raphael v R***, considered ***Bratty v AG*** and stated as follows:

> **I think that the difficulty is to be resolved by remembering that, whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may be reasonably inferred…So also it seems to me that a man's act is presumed to be a voluntary act unless there is evidence from which it can be reasonably inferred that the act was involuntary...The necessity of laying the proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury… What then is a proper foundation? The presumption of mental capacity is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden proving that the act was voluntary…In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary… <u>The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of mental incapacity…It is not sufficient for a man to say "I blacked out': for 'black out' as Stable J said in Cooper v McKenna, ex parte Cooper [1960] Qd. L.R. 406,419</u>**

> **'is one of the first refuges of a guilty conscience and a popular excuse'. The words of Devlin J. in Hill v Baxter [1958] 1 QB 277, 285 should be remembered: 'I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.**

The crucial question is therefore whether, as a whole, there is any evidence which would put in issue the defence of automatism which, if accepted as being true or possibly true, would have resulted in the defendant's acquittal.

Provocation (Murder)

Provocation is some act, or series of acts, done by the deceased person to the defendant which would cause in any reasonable person, and actually causes in the defendant, a sudden and temporary loss of self-control, rendering the defendant so subject to passion as to make them for the moment not master of their mind (see ***Joseph v AG*** **(The Bahamas CA, SCCrApp No 88 of 2013, 14 July 2015)** at para 20; ***R v Duffy*** **(1949) 1 All ER 932** per Lord Goddard).

Provocation is a partial defence to murder only. Once there is evidence of provocation to be left to the jury, the burden is on the Prosecution to disprove provocation to the required criminal standard. If the elements of murder are proved and provocation is not disproved, the defendant is entitled to a verdict of manslaughter.

Statutory Regime

Section 299 of the **Penal Code, Chapter 84** states,

> 299. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if any of the following matters of extenuation are proved on his behalf, namely —
> (1) that he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 300…

Section 301 of the **Penal Code, Chapter 84** states,

> 301. (1) Notwithstanding proof on behalf of the accused person of such matter of extreme provocation as in section 300 is mentioned, his crime shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf or from evidence given on the part of the prosecution —
>
> > (a) that he was not in fact deprived of the power of self control by the provocation;

> (b) that he acted wholly or partly from a previous purpose to cause death, or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation;
> (c) that, after the provocation was given, and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self control; or
> d) that his act was, in respect either of the instrument or means used or of the cruel or other manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self control by the provocation.
>
> (2) Where a person, in the course of a fight, uses any deadly or dangerous means against an adversary who has not used or commenced to use any deadly or dangerous means against him, if it appears that the accused person purposed or prepared to use such means before he had received any such blow or hurt in the fight as might be a sufficient provocation to use means of that kind, he shall be presumed to have used the means from a previous purpose to cause death, notwithstanding that, before the actual use of the means, he may have received any such blow or hurt in the fight as might amount to extreme provocation.
>
> *Illustrations*
>
> Subs. (1) —(*b*) *A*., who has long been seeking an occasion to fight in a deadly manner with *B*., is struck by *B*. and kills *B*. Here, if the jury think that *A*. put himself in *B*.'s way for the purpose of taking any opportunity which might occur to fight with *B*., the crime of *A*. is not reduced to manslaughter by reason of the blow which he received from *B*.
> (*d*) *A*. receives a slight blow from a weaker man *B*., and beats and kicks *B*. to death. *A*.'s crime is not reduced to manslaughter.

Section 304 of the **Penal Code, Chapter 84** states,

> 304. Where on the charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

In ***Davis v R*** **(The Bahamas CA, SCCrApp No 310 of 2014, 5 February 2019)**, the Court considered the relevant section of the **Penal Code, Chapter 84** with respect to when

the defence of provocation should be put to the jury. The headnote on pg 2 summarises the Court's discussion as follows:

> Under the Penal Code where the issue of provocation arises, the jury is required to consider whether there might have been a sudden and temporary loss of control on the part of an appellant sufficient to cause him to act as he had done. If the jury are not satisfied that provocation did not exist, their duty is to bring in a verdict of manslaughter. The burden of proving lack of provocation is on the prosecution. Where there is evidence that an accused had lost his self-control as a result of provocation, however small that evidence may be, the trial judge ought to leave the issue of provocation to the jury.

Diminished Responsibility (Murder)

The term "diminished responsibility" absolves a defendant of part of the liability for their criminal act if they suffer from such abnormality of mind as to substantially impair their responsibility in committing or being a party to an alleged violation. The doctrine of diminished responsibility provides a mitigating defence in cases in which the mental disease or defect is not of such magnitude as to exclude criminal responsibility altogether.

In ***Hepburn v R*** **(The Bahamas CA, SCCrApp No 79 of 2013, 4 December 2014)**, the Court noted at para 22 the correct direction in the case of diminished responsibility stating that:

> 22. What is a correct direction in the case of diminished responsibility was set out in the dictum of Lord Keith of Kinkel in the Privy Council case of **Walton v R (1978) 66 CR. App. R. (1978) A.C. 788.** The principle was applied by Watkins LJ in **Leonard John Saunders (1991) 93 Cr. App. R** in delivering the judgment for the Court in relation to a defence of diminished responsibility under section 2 of the UK Homicide Act 1957 (the equivalent of s.305 of the Penal Code). Relying on the dictum in Walton, and its approval by Bridge LJ in **Kiszko (1979) 68 Cr. App. R. 62,** Watkins L J made the following statement of principle in relation to the treatment of medical evidence in cases involving diminished responsibility at page 249 C:
>
> > **"…Further these cases, in our opinion, two clear principles emerge where the issue is diminished responsibility. The first is that if there are no circumstances to consider, unequivocal, uncontradicted medical evidence favourable to a defendant should be accepted bu a jury and thet should be so directed. The second is that where there are other circumstances to be considered the medical evidence, though it be unequivocal and uncontradicted, must be assessed in light of the other circumstances."**

Statutory Regime

Section 305 of the **Penal Code, Chapter 84** states,

> 305. (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.
>
> (5) The defences provided in this section shall be in addition and without prejudice to and notwithstanding the provisions of this Code.

In ***Adderley v R*** **(The Bahamas CA, SCCrApp No 123 of 2014, 31 May 2017)**, the Court cited what a Court should direct a jury to consider when a defence of diminished responsibility is raised. At para 21 of the judgment, the Court went on to discuss the burden and standard of proof, stating, "Clearly, by the express provisions of section 305, the burden of establishing diminished responsibility is placed upon the defendant, and is to be discharged by proof on the balance of probabilities as is the case of any other legal burden of proof which is laid upon a defendant."

The Court also noted that the question whether the defendant has discharged the onus of proving that they were in fact suffering from diminished responsibility is to be determined by the jury. At pg 4, the Court stated that:

> The Privy Council in **Robinson** (a case where the law of diminished responsibility in Trinidad and Tobago corresponds to s. 2 of the 1957 Act before its amendment) underscored once again, the principle, already well established in the decided cases, that the issue of "substantial impairment" is a jury question. Their Lordships expressly declined to investigate the circumstances (if any) in which (as was contended) a trial judge would be justified in withdrawing murder from the jury in circumstances in which there is psychiatric evidence going to diminished responsibility "on one side only".

The Court also considered numerous decisions throughout its judgment which it found explicitly stated the legal principles governing the exercise of the function of the jury in deciding whether the defence of diminished responsibility was made out. Allen P stated at paras 56 and 57:

> 56. … as is made clear in all of the cases, upon an issue of diminished responsibility, the jury is entitled to, and is bound to consider not only the medical evidence but all of the facts and circumstances of the case, including the nature of the killing, the conduct of the appellant before, at the time of, and after the killing, and any history of previous mental abnormality. In considering the evidence they are of course entitled to consider the quality and weight of the evidence.
>
> 57. Inexorably, the determination of whether the defendant was suffering from diminished responsibility at the time of the killing is for the jury and not for doctors.

Intoxication (Self-induced or Voluntary)

Statutory Regime

Section 93 of the **Penal Code, Chapter 84** states:

> 93. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged, at the time of the act or omission complained of, did not know that such an act or omission was wrong or did not know what he was doing; and —
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
> (3) Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged and in a case falling under paragraph (b) the ordinary criminal law relating to insanity shall apply.
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence.
> (5) For the purposes of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

In ***R v Mcknight*** **[2000) All ER (D) 764**, the Court held that the direction on specific intent need not be given in every specific intent case in which alcohol played a part. It

need only be given where the evidence, taken at its highest, justified the conclusion that the defendant might not have been able to form the necessary intention because of drink.

In ***R v Allen*** **(1988) Crim LR 698**, the defendant knew that he was drinking alcohol, and the drinking of it did not become involuntary merely because he did not know or may not have known the precise nature or strength of the alcohol. However, it would appear from ***R v Richardson*** **(1999) 1 Cr App Rep 392** at pg **397,** that self-induced intoxication is a defence to an assault not requiring a specific intent, if it induces the defendant genuinely but mistakenly to believe that the alleged victim was consenting to the use of force against them, in circumstances in which the law recognizes consent as a defence.

Useful Cases

a. ***Greene v R*** **(The Bahamas CA, SCCrApp No 73 of 2020, 4 October 2022)**

b. ***Stuart v AG*** **(The Bahamas CA, SCCrApp No 173 of 2010, 27 February 2014)**

Duress

A defendant who commits a crime under duress may, in certain circumstances, be excused liability. The defence can arise where the duress results from threats or from the defendant's circumstances: ***R v Hasan*** **[2005] UKHL 22, [2005] 2 AC 467**; ***R v Martin*** **[1989] 1 All ER 652, [1989] LRC (Crim) 377**.

The defence of duress has been shaped by policy and moral considerations reflecting the fact that the defendant is exculpated for what would otherwise be a crime. The rationale underlying the plea, is that the defendant is not blameworthy because they had no true freedom of choice. As a matter of policy, this requires a balancing of the interests of society on the one hand and the interests of the defendant on the other, bearing in mind that the defendant has, by their own admission, intentionally committed a criminal offence (see ***Moss v DPP*** **(The Bahamas CA, SCCrApp Nos 230 and 238 of 2018, 29 May 2024**).

Duress in either form is not a defence to those charged with murder, attempted murder, and a limited number of other very serious offences. The English Crown Court case of ***R v Ness*** **[2011] Crim LR 645** has been relied on to support the position that duress is an available defence to a charge of conspiracy to murder. However, the Privy Council in ***Moss v R*** **[2023] UKPC 28, [2023] All ER (D)**, an appeal from the Court of Appeal of The Bahamas, has left open the question of whether duress is available as a matter of law as a defence to the offence of conspiracy to murder. If manslaughter is left as an alternative, then the jury must be directed to consider duress, where it arises, as a defence to this charge.

In ***Musgrove v DPP*** **(The Bahamas CA, SCCrApp No 75 of 2019, 10 June 2020)**, the Court, as summarised at pg 2, held that when summing up the issue of duress to the jury, a judge was mandated to direct the jury to answer the following questions:

> …first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established." In the present case the judge put both of those questions to the jury and the Court is satisfied that there is no merit in this ground.

Example: Sample Directions

The defendant, D, has raised the defence of duress. D says that they were driven to do what D did by threats, namely…

Because it is for the Prosecution to prove D's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for D to prove that it does apply.

You must first decide whether the threats to which D referred were or may have been made: if you are sure that they were not made, or sure that D did not reasonably believe them to have been made, the defence of duress does not arise, and your verdict will be 'Guilty'. However, if you decide that the threats were or may have been made, or that D may reasonably have believed them to have been made, then go on to answer the following questions:

a. First you must ask whether D acted as they did because they genuinely and reasonably believed that if they did not do so, D or a member of D's immediate family would be killed or seriously injured, either immediately or almost immediately. If you are sure that this was not the case, the defence of duress does not apply, and your verdict will be 'Guilty'. However, if you decide that this was or may have been D's belief, you must go on to consider a further question. Go to b. below if escape from/avoidance of the threat arises. If not, go to c.

b. Before acting as they did, did D have an opportunity to escape from/avoid the threats without death or serious injury, which a reasonable person in D's situation would have taken but D did not [refer to any escape or avoidance route]. If you are sure that there was a course of action D could have taken to avoid the threat D reasonably believed to exist without having to commit the crime, the defence of duress does not apply and your verdict will be 'Guilty', However, if you decide there was or may have been no opportunity to escape, or avoid the threatened action, then go on to the next question.

Example: Sample Directions cont'd

c. You must ask whether a reasonable person, in D's situation and believing what D did, would have done what D did. By a reasonable person I mean a sober person of reasonable strength of character of D's age and sex [refer to any other characteristics]. If you are sure that a reasonable person would not have done what D did, the defence of duress does not apply, and your verdict will be 'Guilty'. However, if you decide that a reasonable person would or may have done what D did, then either, if the issue referred to in para 4 below does not arise the defence of duress does apply and your verdict will be 'Not Guilty'; or if the issue referred to in d below does arise you must go on to consider the final question.

d. You must finally ask whether D had voluntarily put himself/herself in a position in which they knew or ought reasonably to have known that they might be compelled to commit a crime by threats of violence from other people. The Prosecution say that D did by [ ]. But it is for you to decide, if you are sure that D did voluntarily put himself/herself in such a position, that the defence of duress does not apply, and your verdict will be 'Guilty'. However, if you decide that D did not do so or may not have done so, the defence of duress does apply, and your verdict will be 'Not Guilty'.

Defence Available but Not Raised

Where there is evidence from which a jury could reasonably infer that a defence might be available which has not been relied upon by the defendant or their counsel, it must be put before the jury. Sometimes a defence may not have been put by inadvertence, sometimes it may not have been put for tactical reasons, for instance that it would be inconsistent with, or weaken the force of, some other defence specifically and primarily relied upon. But there is no duty to leave to the jury defences which have not been put, and which are fanciful or speculative. See generally, ***R v Critchley*** **(1982) Crim LR 524** and ***R v Bonnick*** **(1977) 66 Cr App Rep 266**. Particular care should be taken to ensure that where appropriate, Self Defence, Duress and Provocation - Murder are left to the jury.

In ***R v Conway*** **[1989] QB 290, (1989) 88 Cr App Rep 159**, it was held that the judge was obliged to put a defence (duress) to the jury, despite the defendant's counsel's submission to the contrary.

Self-Defence

It is always the obligation of the trial judge to consider whether the evidence advanced at the trial raises any possible defence to the charge, even where the defendant has not specifically raised that defence. Once there is such evidence, the trial judge is under a duty to direct the jury on that defence.

In ***Darling v R*** **(The Bahamas CA, SCCrApp No 155 of 2017, 15 January 2019)**, the Court held that where the defence of self-defence is raised, the trial judge must direct the jury that they must consider whether the appellant held an honest belief that the defendant's actions were necessary and if so, taking the circumstances as the defendant honestly believed them to be, was his responsible reasonable.

Section 107 of the **Penal Code Chapter 84** provides for the use of force for prevention of or defence against crime.

Useful Cases

a. ***Johnson v DPP*** **(The Bahamas CA, SCCrApp No 22 of 2023, 10 December 2024)**

b. ***Francis v R*** **(The Bahamas CA, SCCrApp No 133 of 2009, 27 June 2011)**

c. ***Dean v R*** **(The Bahamas CA, SCCrApp No 177 of 2016, 13 December 2018)**

d. ***Mackey v DPP*** **(The Bahamas CA, SCCrApp No 187 of 2019, 1 July 2021)**

e. ***AG v Jones*** **(The Bahamas CA, SCCrApp No 89 of 2009, 31 May 2010)**

Chapter 21 – Sexual Offences

In this Chapter: **General Guidelines | Statutory Regime | Consent | Children and the Vulnerable | Outside Influence and Assumption | Delayed Complaints | Corroboration | Useful Cases**

It is imperative for meticulous attention to be paid in cases involving sexual offences, particularly for those who experience specific vulnerabilities. As judicial officers, it is our solemn duty to exercise prudence and diligence in adjudicating trials of this nature and ensuring their execution with unwavering impartiality and fairness. We bear the profound responsibility of providing the jury with precise and comprehensive instructions pertaining to the legal principles and the jury's role as the ultimate arbiters of fact. This necessitates a resolute commitment to disentangle their deliberations from extraneous preconceptions or assumptions concerning the nature of these offences, anchoring their judgment solely upon the evidentiary foundation established during the course of the trial.

General Guidelines

Sexual violence in the Caribbean has engaged our courts and attracted comments from the judiciary regarding the alarming statistics. In ***Pompey v DPP*** **[2020] CCJ 7 (AJ) GY**, Rajnauth-Lee, JCCJ noted at paras 37 and 38:

> …As a result, governments throughout the Caribbean have taken on board the need to address this worrying trend. Some jurisdictions in the Caribbean have specialized police units comprised of officers trained in the investigation of sexual offences and the interviewing of victims of sexual offences. Jamaica made a very early start in this regard in establishing the Centre for the Investigation of Sexual Offences and Child Abuse ("CISOCA"), a branch of the Jamaica Constabulary Force. Established in 1989, the objectives of CISOCA are: to create an atmosphere which will encourage victims to report incidents of sexual offences and child abuse; to ensure efficient and effective investigation into allegations of abuse; to enhance the rehabilitation of victims through counselling and therapy and to conduct public education programmes on sexual offences and child abuse. In addition, Child Protection Units operating within Caribbean Police Services have been established in some jurisdictions. For example, in Trinidad and Tobago, the Child Protection Unit (an investigative unit) was established in May 2015 and operates within the Police Service with officers specially trained in the investigation of crimes against children. Statistics from the Child Protection Unit for the period May 2015 to July 2016, revealed that there were 2595 reports made to the Child Protection Unit. The majority of those reports were of child sexual abuse.
>
> International organizations have been at the forefront of addressing gender-based violence and child sexual abuse. Among the international conventions

> which have sought to focus on gender-based violence is the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, which was adopted by the General Assembly of the Organization of American States in 1994. Better known as the *Convention of Belém do Pará*, the Convention asserts that violence against women violates fundamental human rights and freedoms based on the unequal power relations between women and men. Of note as well is the *Convention on the Rights of the Child* which at Article 19(1) requires States Parties to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. (footnotes omitted)

As a further response to addressing sexual and gender-based violence, work was undertaken by the Caribbean Association of Judicial Officers (CAJO), UN Women and the Judicial Reform and Institutional Strengthening (JURIST) Project to provide critical tools to judicial officers to better navigate these types of cases. The publication, ***Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers***, a model gender equality protocol developed by the CCJ, CAJO, UN Women and the JURIST Project, is one such tool. This model Gender Equality Protocol is based on the 2014 Mexican Supreme Court's 'Judicial Decision-Making with a Gender Perspective: A Protocol' and provides key information and directions regarding the adjudication of sexual offences. Judiciaries across the region have been encouraged to adapt the model Protocol to their local jurisdictions. The model Gender Equality Protocol has so far been adapted by the judiciaries in Belize (2018) and Trinidad and Tobago (2018).

The JURIST Project also developed model guidelines for managing sexual offence cases (including cases involving children), with the aim of improving the capacity of the courts and other criminal justice institutions to deliver gender-responsive and customer-focused services. In 2017, JURIST Project published ***Model Guidelines for Sexual Offence Cases in the Caribbean Region*** for courts, which have undoubtedly played a key role in building public trust and confidence in the justice system and in promoting the rule of law. Both the model Gender Equality Protocol (and its adaptations) as well as the Model Guidelines for Sexual Offence Cases can also be a useful guide for Bahamian judges.

Statutory Regime

The law on Sexual Offences in The Bahamas is governed under the following:

a. **Sexual Offences Act 1991, Chapter 99**

b. **Sexual Offences Amendment Act 2011**

c. **Sexual Offences Amendment Act 2014**

Chapter 21 – Sexual Offences

The **Criminal Procedure Code Act, Chapter 91** and the **Penal Code, Chapter 84** are also relevant.

Consent

A central tenet as it relates to sexual offences is the issue of consent.

Archbold 2026 at para 20-360 provides guidance on the direction which a trial judge ought to give the jury regarding consent:

> …in summing up a case for rape which involves the issue of consent, the judge should, in dealing with the state of mind of the defendant, direct the jury that before they can convict, the Crown must have proved either that he knew the woman did not consent to sexual intercourse, or that he was reckless as to whether she consented. If the jury are sure he knew she did not consent, they will find him guilty of rape knowing there to be no consent. If they are not sure about that, they will go on to consider reckless rape.

The **Penal Code, Chapter 84** at s15(1) defines the following as it concerns consent:

> 15. In construing any provision of this Code by which it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or by which it is required for a matter of justification or exemption that an act should be done with a person's consent, the following rules shall be observed, namely —
>
> > (1) a consent shall be void if the person giving it is under ten years of age, or is, by reason of insanity, or of immaturity, or of any other permanent or temporary incapacity, whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which he consents;
> > (2) a consent shall be void if it is obtained by means of deceit or of duress;
> > (3) a consent shall be void if it is obtained by the undue exercise of any official, parental, or other authority; and any such authority which is exercised otherwise than in good faith for the purposes for which it is allowed by law, shall be deemed to be unduly exercised;
> > (4) a consent given on behalf of a person by his parent, guardian or any other person authorised by law to give or refuse consent on his behalf, shall be void if it is given otherwise than in good faith for the benefit of the person on whose behalf it is given;
> > (5) a consent shall be of no effect if it is given by reason of a mistake of fact;
> > (6) a consent shall be deemed to have been obtained by means of deceit or of duress, or of the undue exercise of authority, or to have been given

> by reason of a mistake of fact, if it would have been refused but for such deceit, duress, exercise of authority or mistake, as the case may be; and
> (7) for the purposes of this section, exercise of authority is not limited to exercise of authority by way of command, but includes influence or advice purporting to be used or given by virtue of an authority:
>
> Provided that no person shall be prejudiced by the invalidity of any consent if he did not know, and could not by the exercise of reasonable diligence have known, of such invalidity.
>
> *Illustrations*
>
> Para. (i) —A. induces a person in a state of incapacity from idiocy or intoxication, or a child under seven years of age, to consent to his hair being cut off by A. Such consent is void.
>
> Para. (ii) —A., by pretending to have the consent of a girl's father, or under pretense of medical treatment, or by threats of imprisonment, induces a girl to consent to sexual intercourse. Such consent is void.
>
> Para. (iii) —A. cruelly beats a child. It is no defence for A. that the child's father authorised the beating, or that the child's father, by the exercise of his parental authority, induced the child to consent.
>
> Para. (iv) —A. induces a woman to consent to his having carnal knowledge of her by personating her husband. Her consent is void.

It flows from these meanings and descriptions that directions must be given to the jury in relation to consent and the respective case, as in some instances it is not merely an answer of 'yes' or 'no' but the state of parties, amongst other considerations.

In ***Stuart v R*** **BS 1992 CA 1 (The Bahamas CA, Criminal Side No 67 of 1990, 31 January 1992)**, the appellant's Counsel sought to appeal the conviction and sentencing for the rape of a complainant who at the time of the offence was fifteen (15) years old and was known to the convict, on the ground "that the learned trial judge misdirected herself in law and in fact when she failed to properly direct the jury on the question of consent in the circumstances". The Court of Appeal (at pg 3) was:

> …unanimous in deciding that the mens rea in rape was not confined to the act of sexual intercourse but extended to the lack of consent by the woman. We respectfully agree. Accordingly we are of the view that, in failing to tell the jury that the burden lay on the prosecution to prove not only that the complainant did not consent to sexual intercourse but that the accused intended to have that intercourse without her consent, the learned trial judge was in error.

The Court of Appeal went on to say:

> However as Lord Simon of Glaisdale observed in *DPP v Morgan* at p. 218 "proof of the actus reus generally raises a presumption of a corresponding mens rea." In the present case the complainant's evidence clearly indicated that she did not consent and that the appellant must have been aware of this. She remonstrated with him when he failed to drive towards her home. When he told her to pull down her clothes she refused and he did so himself. She tried to push him off but failed — the appellant is 35 years old and some 6 feet tall. If the jury accepted her evidence — as they must have to convict the appellant — it is inconceivable that if directed that the prosecution had to prove mens rea they could have come to any other conclusion than that the appellant had intercourse with the complainant intending to do so without her consent or at best reckless whether or not she was consenting…

As it relates to consent, Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024) has provided detailed considerations and a sample direction on consent that can assist the jury (see pgs 20-20 – 20-22). Note however that any directions in this section and throughout must be tailored to the specific case.

Directions

The judge provides directions to the jury which can occur at the outset of the trial and, most importantly, during the summing up. Throughout the trial, the court must ensure impartiality to both parties. These directions assist the jury in comprehending the legalities alongside their role as judges of the facts. While there may be numerous directions that can be used during a sexual offences trial, it is important to recognize that each trial is unique. The specific directions given by the judge must be tailored to the facts in that particular trial. As the trial judge, it is imperative to provide every pertinent and relevant direction to the jury to ensure that justice for the defendant and the victim is done.

This section will highlight the various directions that can be issued to jurors. However, the paramount consideration is to ensure a comprehensive review of the particular matter, in order to determine the applicable directions to be used in a fair and equitable manner for all concerned.

The England and Wales Judicial College's ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** **(2024),** has provided a comprehensive checklist at pgs 20-4 and 20-5, which may be helpful when determining what directions to give to the jury. It is adapted below.

Chapter 21 – Sexual Offences

Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant.	
Of untruthfulness	• Delay in making a complaint. • Complaint made for the first time when giving evidence. • Inconsistent accounts given by the complainant. • Lack of emotion/distress when giving evidence.
Of truthfulness	• A consistent account given by the complainant. • Emotion/distress when giving evidence.
Of consent and/or belief in consent	• Clothing worn by the complainant said to be revealing or provocative. • Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others. • Previous knowledge of, or friendship/sexual relationship between the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent. • Some consensual sexual activity on the occasion of the alleged offence. • Lack of any use or threat of force, physical struggle and/or signs of injury. Again, it may be necessary to alert the jury to the distinction between submission and consent.
Background of defendant	• A defendant who is in an established sexual relationship. • Sexual orientation if that has the potential to be an issue.
Reliance on images that may cause the jury to reach a conclusion about the age of the person depicted	• As to the true age of the person in the image as at the time it was taken, if known. • If that is unknown that they must not speculate. • Any other relevant factor pertaining to the provenance of the image.

For example, we can look at the issue of inconsistencies and the Judge's direction in ***Clarke v R* (The Bahamas CA, SCCrApp No 101 of 2010, 9 May 2011)**, which concerned an appeal against conviction for the offence of rape, where a police officer was accused of sexually assaulting a driver during a traffic stop. The appellant alleged misdirection in the judge's summing up to the jury and argued that the conviction was unreasonable and

unsafe, noting at ground 4 of the appeal, "The main thrust of counsel's submission was that, firstly, the learned trial judge failed to identify the several inconsistencies in the matter and to point out to the jury the material inconsistencies".

The Court of Appeal in ***Clarke***, in finding "no merit in the complaint", stated at pg 4:

> We have looked at the summation and we are satisfied that the judge identified the inconsistencies and, in fact, explained to the jury how to deal with such inconsistencies: they must determine whether the inconsistency is of a material nature or whether it is something minute.

As the trial judge, a comprehensive list of directions is essential for the proper adjudication of the trial and to ensure justice and fairness for both the defendant and the victim. While this does not guarantee a safeguard against appeal, including all the requisite directions such as the list above should mitigate any concerns.

The ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (2024)**, gives further examples of how such directions can be given to jurors and these can be adapted to your respective case. Also, guidance can be obtained from the **Evidence Act, Chapter 65** and its respective amendments.

Children and the Vulnerable

There is no doubt that at times it will be necessary to provide guidance to the Jury on the evidence of a child or other vulnerable person. This direction is not to sway the jury in any particular way but provides guidance on how their evidence should be assessed.

For example, as it related to the sexual history of the child complainant, the Court of Appeal in ***Bethel v R* (The Bahamas CA, SCCrimApp No 58 of 2015, 6 April 2017)**, per Isaacs, JA at paras 21 and 23 (also summarised at pg 1), determined that:

> There were two hurdles the appellant had to surmount before he could be allowed to ask the virtual complainant questions related to her sexual encounters with anyone other than the appellant. First, were the questions relevant to the issues joined in the trial between the Crown's case and the appellant's case? Second, would it be unfair to deny him the opportunity to ask the questions. The exchange between Mr. Rolle and Watkins, J. shows quite clearly that the two questions Mr. Rolle proposed to ask of the virtual complainant were of no relevance to the issues joined between the Crown's case and the appellant's case. He failed, therefore, to surmount the first hurdle. There was no need for the judge to consider whether he had surmounted the second hurdle although she did do so.
>
> [R]egrettably, I must disagree with my brother's analysis of Section 34 of the Evidence Act. It is clear that it was Parliament's intention to provide protection to victims of unlawful sexual intercourse. Unlawful Sexual Intercourse is in

> essence a rape offence as it is sexual intercourse with a minor who by law cannot consent to the act. To conclude that unlawful sexual intercourse is not "a rape offence", especially in light of Parliament's decision not to define the same within the Act, makes, in my view, a mockery of the provision.

The importance of giving comprehensive and concise directions as it relates to a sexual offence against a child was also seen in the case ***Bain v DPP*** **(The Bahamas CA, SCCrApp No 51 of 2022, 15 November 2022)**, where the defendant turned appellant sought to appeal his conviction and sentence on the following grounds (at para 2):

> 1. That the learned judge failed to give a good character direction.
>
> 2. That the learned judge erred in law and in fact when she failed to give a Vye Direction.
>
> 3. The verdict is unsafe as the failure of the judge to give a good character direction did affect the safety of the verdict.
>
> 4. That the learned judge erred in law and in fact when she failed to give a Mushtaq Direction.
>
> 5. That the learned judge erred when she rejected the appellant's no case submission.
>
> 6. The learned Judge erred when she failed to adequately direct and assist the jury in relation to the medical evidence, which amounted to hearsay, where this was the primary evidence of the prosecution.
>
> 7. The Learned Judge erred in the fact and law by not removing count 1 from the Jury.
>
> 8. The verdict is unsafe and unsatisfactory having regard to the circumstances of the case.
>
> 9. Whether the learned judge erred in law and in fact when he failed to give a Turnbull Warning.
>
> 10. The learned judge erred in law and in fact when she failed to direct the jury in regards to the confession.
>
> 11. The sentence is unduly harsh and/or severe.

In this matter, the Court of Appeal dismissed the appeal and affirmed the convictions and sentences. Their reasons for their determination are summarised as follows (see pg 2) :

A defendant must distinctly raise his good character either through his own evidence, on oath or affirmation, or by witnesses called on his own behalf; and that evidence must disclose that he has a good character in the "legal sense". The Court is satisfied that the appellant was not entitled to a good character direction on both limbs of credibility and propensity even though he went into the witness box and testified during the trial.

In relation to the complaint on the Mushtaq direction, in the Court's view, the Judge gave an adequate direction on the issue of voluntariness of the record of interview.

The Court is satisfied that the Judge did not err when she did not accede to the no case to answer submission made on the appellant's behalf; nor did she err when she did not remove the first count, incest, from the jury's consideration because evidence had been adduced sufficient for the jury to consider.

Regarding the appellant's claim of admission of hearsay evidence, the Court is of the view that Dr. Carroll used her report merely as an aide memoire.

Relative to the Turnbull warning, there was evidence that the appellant admitted to placing his penis on the virtual complainant's belly and leg. This was sufficient evidence for the jury to conclude that the appellant was the person who had done acts to the virtual complainant. Further, the appellant did not challenge the identification of himself as the "uncle" mentioned by the virtual complainant as being mistakenly made.

Considering the appellant's complaint on sentence, the Court is of the view that the Judge did not take into consideration anything she ought not to have, nor did she fail to consider anything she should have. It cannot be said that the appellant's sentences are unduly severe or harsh.

Outside Influence and Assumptions

Undoubtedly, sexual offences are unequivocally regarded as among the most egregious of crimes, leaving an indelible impact on the victim, their families, and the broader community. When an individual faces charges related to such offences, it becomes imperative to impress upon the jury the fundamental principle of the presumption of innocence accorded to the defendant. This presumption must be upheld even in the face of external influences emanating from various sources, including but not limited to print media, social media, digital media, conversations, and the perspectives of third parties concerning the case at hand. In the discharge of their civic duty, it is incumbent upon the jury to rigorously insulate themselves from such external influences, thereby ensuring a fair and impartial assessment of each defendant's innocence or guilt.

Chapter 21 – Sexual Offences

Sample Direction

The Late Hon Senior Justice Stephen Isaacs, in the Supreme Court of The Bahamas, In-House Orientation dated February 2016 at pages 2 – 5, provided an example of such a direction, that is quoted below:

> And as for the evidence and facts in this case you are collectively the judge thereof. You are the eyes and ears that listens to the evidence. You must decide what evidence you will accept, what evidence you will reject and what conclusion from that evidence you can draw…
>
> Now I must tell you that you can only have regard to the facts and the evidence that has been adduced to you in this trial. Pay no attention whatsoever to anything you may have heard outside the court or read outside the court, in the newspapers and seen on television. You apply the facts that you so find from the evidence that has been given from the witness box under oath.
>
> Now you are not to be swayed in dealing with this matter by the temper of times and seek to impress upon this case any of the feelings that you may naturally have about the prevalence of murder or any other criminal activity [sexual offences in this regard] in our community. You are not to allow sympathy or prejudice for who may be the alleged victim or the alleged persons charged with the offences to affect your assessment of the evidence. You must be detached, objective and cynical.

In ***R v D (JA)*** **[2008] EWCA Crim 2557, [2009] Crim LR 591**, the Court of Appeal of England and Wales accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct (see paras 9 and 11). In short, these directions should include that:

a. experience shows that people react differently to the trauma of a serious sexual assault, so there is no one classic response;

b. some may complain immediately whilst others may feel shame and shock and not complain for some time; and

c. a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.

There may be cases where guidance on myths and stereotypes may be appropriate to benefit a defendant.

The approach in ***R v D (JA)*** has been endorsed on numerous occasions by the Court of Appeal of England and Wales, as explained in ***Miller v R*** **[2010] EWCA Crim 1578, [2011] Crim LR 79** at para 23:

> In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, *R v. MM* [2007] EWCA Crim 1558, *R v. D* [2008] EWCA Crim 2557 and *R v. Breeze* [2009] EWCA Crim 255).

Also in ***Miller***, the Court of Appeal, at para 23, endorsed the following passage from the 2010 Judicial Studies Board Bench Book, now cited in ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (2024)*** at para 3 of pg 20-1:

> The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

It is essential that advice from the trial judge does not implant in the jury's minds any contrary assumption. It is not the responsibility of the judge to appear to support any particular conclusion, but to warn the jury against the unfairness of approaching the evidence with any preconceived notions or assumptions. The judge should take the opportunity to formulate their words carefully, having received the views of the parties, the object being to ensure there is no straying from the commonplace to the controversial and thus, appearing to be endorsing argument for one side at the expense of the other.

Judicial advice should be crafted and expressed in a fair and balanced way. The trial judge should not be, or be seen to be, endorsing the arguments deployed by the Prosecution, but rather ensuring that the jury is approaching the evidence without being hampered by any unwarranted assumptions.

Chapter 21 – Sexual Offences

Delayed Complaints

Another consideration is that of complainants who bring a claim sometime after the alleged offence. It is of note that there is no statute of limitations for indictable offences such as Rape and Incest, as compared to summary offences as outlined in s 213 of the **Criminal Procedure Code**, **Chapter 91** (as amended) and same should be included as a part of the directions to the Jury along with its meaning.

Case Law Illustration

An example of such delay was seen in the case of ***R v PS* [2013] EWCA Crim 992** on the question of "the adequacy of the judge's direction to the jury on the approach they should take to the very considerable delay – 34 years – before these alleged events were brought to trial".

The facts of the case concerned a woman who said she was sexually assaulted and raped by a Buddhist monk on four separate occasions, three in his bedroom and one in the shrine at the Temple. Sweets/candies were said to be used as an inducement along with threats of secrecy. The defendant was found guilty on four counts of indecent assault; he was sentenced to 7 years imprisonment and acquitted of the offence of rape. He appealed his convictions on these four counts, "with the leave of the single judge who determined that Ground 2 alone of the appellant's various written arguments had merit sufficient to grant leave, and in the event the other grounds have been abandoned."

The issue submitted by the appellant at paras 17 and 18 was that:

> The Appellant submitted in the court below that V's delay in telling the police about these alleged events had prejudiced his trial. In particular, contemporaneous medical records relevant to the allegation of rape might have been available closer in time to the events in question; the Appellant no longer had access to photographs of his bedroom at the temple and the other monks could not be called as witnesses. As already indicated, the sole point on this appeal is the Appellant's argument that the judge failed to give an adequate direction to the jury in relation to the issue of delay (34 years by the time of the trial). An element of this ground of appeal is the contention that the judge improperly narrowed the issues in the case to identity alone.
>
> On 26 April 2012, the Thursday before the summing up began on Monday 16 April 2012, Mr Stone who appeared for the Appellant at trial, addressed the judge on certain factors relevant to delay. He drew the judge's attention to the authority of *Percival* (to which we will turn in some detail in a moment) and he encouraged the judge to give a tailored direction that would reflect the impact of the delay in this case, in order to ensure the jury understood the approach they needed to take on this issue, given the circumstances of the case. He invited the judge not to dilute the direction because the defence had been carefully researched and presented.

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The Judge's directions, which are set out extensively at para 19, were as follows:

> "There has been a delay in the matters coming to light and you're entitled to consider why these matters didn't come to light sooner. The defence in relation to ['V'] do not challenge her assertion, her broad assertion, that she was sexually assaulted on at least one occasion by an adult male in the [. . .] temple in 1978, although they challenge the assertion that she was raped. The central issue in her case, the rape apart you may think, is the identity of her attacker. I will come on to that in more detail shortly. So delay in her case, delay as I say in reporting the allegations is limited, you may think, to the question of the accuracy of her identification of the Defendant as her attacker. In relation to [the other Complainant] the defence say that she hasn't told the truth about being sexually assaulted in around 1984, 1985. Now when children are abused they are often confused about what has been going on and why it's been going on. They are, of course, children. Questions may be going through their mind at the time. Is this wrong, or is this normal adult behaviour? If it's wrong am I to blame? Who is going to believe me if I say something to anyone? What will happen if I do speak out? Children subject to sexual abuse may be subject to mixed emotions. In this case both girls were members of Sri Lankan families where the adults in the family, the parents and possibly grandparents, were devout Buddhists, they were part of a Sri Lankan diaspora in the United Kingdom where attendance at the temple was a important part of their life, sufficiently important in the case of ['V']'s family to travel to [west London] from Birmingham on weekends to attend services at the temple. Central to the temple life were the priests, powerful figures perhaps in the mind of a young child. In ['V']'s case she says to you she was told by the Defendant not to say anything to her parents, it would kill your father was the phrase she used, she said that she was told by the Defendant. Although she spoke to others from about 1987 onwards, she was conscious that twenty years or more had passed since the events and she recalls that line from the novel to Kill a Mockingbird, that it needed the evidence of two children to equal that of one adult. The actual trigger for reporting the matters to the police in 2010 in her case appears to have been her pregnancy the previous year [. . .] You will want to consider these and no doubt other matters when assessing the reasons for the delay in this case and whether that delay in any way affects the credibility of these two central prosecution witnesses. Now you must decide a case as I have repeated on more than one occasion only on the evidence that you have heard, not on speculation. About what evidence there might have been. There won't be any more. It's important, perhaps, to remember the nature of this trial, it's what we call adversarial. I don't decide, you don't decide what evidence is going to be called. That's decided on the part of the prosecution by the prosecution and by the defence on their part, they decide what evidence it is that they want to put before you. As a result, of course, necessarily they are bound to be selective. There it is, that's the evidence, so you consider in each case, that's again the case of each witness, whether he or she has been telling the truth whether he or she has been accurate in what they have said to you, decide who is reliable

and who is unreliable. There is also another way in which delay can affect matters. The passage of time affects the memories of us all. In this case in excess of some thirty years has passed since the matters alleged by ['V'] took place, in excess of twenty-five years in relation to the matters alleged by [the other Complainant]. You should give careful consideration of the effect, if any, the passage of time has had on a witness's recollection in this case. The principle witnesses, for the Crown, of course, were ['V'] and [the other Complainant] and the Defendant also gave evidence. One thing that is not in dispute, you may think, is all three of those persons are highly educated and intelligent. ['V'] told you that she had never forgotten the events in the [. . .] temple and her account, you may think, contained a great deal of detail. In her case the fact that it is accepted that she was sexually assaulted at the [. . .] temple by an adult male meant that her account of the detail of what happened was subject to less scrutiny by the defence than otherwise might have been the case and the delay factor in her case, perhaps, is less problematic, it's a matter for you. [. . .] The Defendant was also able to recall a number of events in some detail. The precise date of his arrival at the [. . .] temple the weather at the time, his state of health at the time, the names of other priests who were either resident or visiting the [. . .] temple in 1978, the trip to Calais including his recall that it was ['V'] who came and sat next to him and not the other way around. Another way in which the passage of time may act to disadvantage the Defendant is that lines of enquiry which might otherwise have been open to him have been closed and complaint is made on his behalf about the absence of medical evidence following the alleged rape of ['V']. It is submitted to you, on his behalf, that if she had reported the matter at the time the medical evidence might have undermined her assertions that there was semen and blood in her knickers. On the other hand, of course, it may have supported her assertions and in any event you may think, again it's a matter for you, it would have been necessary for ['V'], aged nine at the time, to have reported the matter immediately in order for the knickers containing semen and blood or not as the case may have been to have been preserved. The defence submit also that they have been hampered by the lack of photographs of the Defendant's bedroom [. . .]. There are exhibited, as you have, as you know, plans of both the temples produced by the defence, plans drawn up by the Defendant in his interview, plans drawn by ['V'] as part of her witness statement and by [the other Complainant] as part of her statement. Evidence has been given by both prosecution and defence witnesses of the dimensions of those rooms at both the temples and indeed the activities which an observer in 1978 in relation to [a temple] or 1984 and 1985 in relation to [another temple] might have expected to have seen. The defence submit that they have lost the ability to call the monks who were also present at [the] temples at the relevant times, who may have been able to throw further light on such issues as the Defendant's length of hair in 1978 and his movements at any particular time in 1978 and 1984 and '85. The evidence of the Defendant was that the head priest and certainly one other who were at [the temple] in 1978 have died, the whereabouts of others who may have been at either [of the temples] is not so clear in terms

> of the evidence. In any event the defence, as Mr Stone reminded you, called a very large number of witnesses, many of whom were able to give first hand evidence of the temple and its activities and indeed the Defendant at the relevant times. So the question of delay in so as it affects memories and possible loss of lines of enquiry you must consider, and consider the respective submissions made by prosecution and defence counsel on that topic and consider whether the Defendant has been placed at a material disadvantage. Make your own assessment and bear that in mind when considering the ultimate question which you have to decide which is whether on all the evidence the prosecution has made you sure of the Defendant's guilt. So when it comes to the facts it is your judgment alone which counts. My role is to see that the trial is conducted fairly and to tell you what the law is and how to apply it to the issues of fact that you have to decide and to remind you of the important evidence on those issues."

The Court thereafter stated at para 35 that the direction, having regard to the facts of the case, should have included the following elements:

> i) delay can place a Defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence is essentially a simple denial (the Defendant was saying that he had not acted as alleged);
>
> ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available — indeed, it may be unclear what has been lost;
>
> iii) when considering the central question whether the prosecution has proved the Defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and
>
> iv) a summary of the main elements of prejudice that were identified during the trial.

The Court concluded at para 37 that,

> Although viewed globally the judge's direction contained all of the essential elements he needed to include when directing the jury on this issue …we do not consider it was necessarily structured in the most appropriate way, given the circumstances of this case. As with the direction on the burden and standard of proof, the direction regarding delay – *as it affects the Defendant* — is designed to ensure his criminal trial is fair. The courts have decided that even very considerable delays in bringing prosecutions can, save exceptionally, be managed in the trial process. But this is often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the

> Defendant rather than amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principle means of protecting the Defendant, is diluted and its force is diminished.

In determining the conviction to be safe and therefore dismissing the appeal against it, the Court opined:

> [38] …although we would have favoured a different approach to this aspect of the summing up, we do not consider what the judge said amounted to a misdirection. As we have already observed, the judge addressed all the matters relevant to this issue and he made it clear that the problems consequent on delay were directly relevant to the burden and standard and proof. This case turned on the central question of the reliability of V's identification of the Appellant 34 years after the events in question, and it is inconceivable that the jury did not understand the potential difficulties this posed for the defence. Moreover, this jury carefully discharged its duties, acquitting the Appellant of the charges relating to the other complainant and the charge of rape based on V's evidence.

Being mindful, therefore, of why some complainants may delay in bringing a claim may assist our guidance in directing the jury. See discussion on ***R v D (JA)*** above. As it relates to hearsay evidence and complaints made to others: see the section on Hearsay.

Corroboration

In the case of ***Eugene v AG*** **(The Bahamas CA, SCCrApp No 221 of 2015, 17 May 2018)**, the issue of corroboration was highlighted. In this matter, the facts are (as summarised on pgs 1-2) that:

> The appellant and the virtual complainant (the VC) were in anintimate relationship from May 2012 up until the time of the alleged commission of the offence of rape in July 2012. On the 25th July, 2012, desirous of resolving a family dispute, the VC agreed to meet the appellant at his house. They spoke on the couch for about 30 to 40 minutes at which time, according to the VC, the appellant began harassing her to have sex with him but she told him no. Thereafter she began to walk home but noticed the appellant following her; she testified that he grabbed her, pulled her into the bush and raped her by inserting his penis into her vagina. Afterwards the VC stated that the appellant threatened to kill her and her family if she told anyone. Nevertheless she ran home and told her mother and sister and the police were contacted.

> The appellant's version of events diverges from the VC's in that he states that while they were on the couch talking he was "feeling her up in her vagina and kissing her at the same time." He says that when the VC left his home he walked half way with her and then turned back and went home.
>
> The appellant was charged with the VC's rape in August 2012. Following a trial before a judge and jury the appellant was convicted on the 1st April, 2015 and sentenced to 12 years imprisonment on the 10th September, 2015.

The Court of Appeal's determination, following analysis of the evidence, summarised on pg 2, is as follows:

> The evidence of the DNA expert to the effect that she found semen on the vaginal swab, the crutch of the panty and the jeans of the VC was not corroboration in the proper sense as the evidence was that there was insufficient data to conclude that the semen came from the appellant. Further, the evidence of the mother of the VC of the distraught appearance of the VC at around 10:00pm crying, with prickles all over her clothes; as well as the evidence of the DNA expert of the plant debris on the clothes of the VC, which she says, as an expert, in her opinion, is indicative of a struggle, that occurred outdoor was also not corroboration in the proper sense. It was therefore an error for the trial judge to describe them as corroboration as neither bits of evidence could be said to support a finding that the appellant was the person who committed the crime.
>
> A close review of the passages of the summation as a whole which dealt with corroboration reveals that the learned judge conflated the evidence which supports the crime of rape with corroborative evidence. He combined three sets of evidence to conclude that there is corroboration. However, in its proper sense, for any bit of evidence to be properly termed corroborative evidence it must be evidence, that does not come from the complainant, which confirms in some important respect, not only evidence that the crime has been committed, but that it was the accused, who committed the crime.

The Court thereafter determined that:

> The question to be decided is whether the judge's mischaracterization of certain evidence as corroboration was a fatal error as contended by counsel for the appellant. The reality is that there was in fact evidence in the form of the DNA from the appellant's skin cells on the vaginal swab of the VC. The VC's evidence was that she did not consent to sex. This evidence, if believed, was sufficient to satisfy the jury that the appellant had non-consensual sexual intercourse as defined by the statute with the VC on the night in question whether it was by penile or finger penetration. It must also be remembered that there is no prohibition on the jury accepting the evidence of the VC, even

> if they did not accept that there was evidence to corroborate her version of what transpired.
>
> Finally, having regard to the cogency of the evidence I am satisfied that the jury, properly directed, would, in any event, have convicted the appellant. In the circumstances I have no lurking doubt as to the safety of the verdict.

See further guidance in the section concerning Corroboration.

Useful Cases

Some useful cases which provide further guidance, generally, on the trial of sexual offences are:

a. ***DE v DPP*** **(The Bahamas CA, SCCrApp No 215 of 2023, 16 October 2024)**

b. ***Ingraham v R*** **(The Bahamas CA, SCCrApp No 309 of 2016, 27 July 2017)**

c. ***BM v DPP*** **(The Bahamas CA, SCCrApp No 39 of 2023, 22 February 2024)**

d. ***Birbal (No 2) v R*** **(The Bahamas CA, SCCrApp No 114 of 2014, 30 August 2017)**

e. ***Birbal v R*** **(The Bahamas CA, SCCrApp No 18 of 2011, 13 December 2012)**

Chapter 22 – Jury Management

In this Chapter: **General Scope | Empanelling the Jury | Challenges of Jurors | Number of Jurors | Swearing in of the Jury | Directions to the Jury Prior to the Commencement of Trial | Discharge of the Jury or a Juror**

Jurors are the cornerstone of criminal trials. A jury trial is one manner of determining the guilt or innocence of a person accused of an offence. Juries are constituted of randomly selected individuals from the community who hear the matter without any vested interest. Their verdicts are considered to be representative of the governing social mores and norms of the society in which they are situated.

General Scope

The right to trial by jury is enshrined in the **Constitution of the Commonwealth of The Bahamas**, specifically at Articles 20(1) and 20(2)(g) which state:

> 20. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> …
>
> (g) Every person who is charged with a criminal offence shall, when charged on information in the Supreme Court, have the right to trial by jury.

Further, the **Juries Act, Chapter 59** provides the law that governs the area.

Moore J in ***Clarke v AG*** **[2002] BHS J No 156 (The Bahamas SC, Criminal Side 168A/9 of 1997, 15 March 2002)** at para 83, praised Bahamians who sat as past jurors, stating:

> And so, just so the English judges have saluted the jurors of England, so do I too, salute the jurors of The Bahamas. It is because of the outstanding conduct and excellent service of jurors that the jury system has survived over the centuries in so many parts of the Common Law World, despite many challenges, and bodes to continue to endure for generations and even millennia to come.

Empanelling The Jury

After the jurors are selected from the approved list they are divided into several groups, with each group being assigned to each individual court for a two-month period. However, during empanelling, if after the selection process there are insufficient waiting jurors available, the Court has the discretion to find other individuals to act as jurors in the vicinity of the Court to make up a panel (see ss 8, 10, and 17 of the **Juries Act, Chapter**

59. See also ***Stubbs v R*** **[2016] 1 BHS J No 110 (The Bahamas CA, SCCrApp Nos 203 and 280 of 2013, 106 and 8 of 2014, 8 July 2016**).

The empanelling of the jury is considered to be a part of the proceeding that requires solemnity. According to **Criminal Practice Directions 2015 Amendment No 10 [2020] EWCA 605, [2020] All ER (D) 62 (May)** issued by the Lord Chief Justice of England and Wales, Lord Burnett of Maldon, the empanelling and swearing in of the jury is listed among the proceedings with respect to which a judge may restrict movement within the public gallery. Practice Direction 6E.3 provides that:

> During criminal proceedings in a Crown Court there are some specific parts of proceedings whereby it may be appropriate for a judge to restrict movement in the public gallery. As observed by Bean LJ in *R (on the application of Ewing) v Isleworth Crown Court* [2019] EWHC 288 9Admin) this is to ensure that during "these sensitive moments, generally of brief duration, it is necessary for the court to be still so that the process can take place without distraction and in a manner which preserves the dignity and solemnity of the proceedings". It is expected that during the following parts of the proceedings, access may be restricted to prevent comings and goings in the public gallery…

While s 3 of the **Juries Act, Chapter 59** makes every person over the age of twenty-one and under seventy years eligible to sit as a juror, a juror must have sufficient command of English in order to comply with the juror's oath and try the case on the evidence, as was held in ***R v Frew*** **[2020] EWCA Crim 305**. Notwithstanding, any person specified in the First Schedule of the Act is exempt from jury service and any person specified in the Second Schedule of the Act is disqualified from jury service.

Court's Duty During Empanelling of the Jury

At the start of a trial, the sitting judge shall inform the potential jurors of the nature of the case, the parties involved and the likely length of the trial. This is to give the juror an opportunity to state whether they know any of the parties involved and whether they would be available to sit as a juror for that length of time.

When the jury panel has entered the courtroom, it is advisable to:

a. Apologize for any delay, giving an explanation if it is possible to do so without prejudice to the case which is to be tried.

b. Give the panel, in neutral terms, brief details about the case that they are going to try e.g. the date, location and general nature of the incident.

c. Explain that the jurors who are to try the case will do so on evidence that will be presented to them in court and that, for this reason, it is essential that none of them has any personal connection with it. To this end:

i. Tell the panel D's name and ask them to look at D to ensure that no one knows D personally. Allow them time, and ensure that all members of the panel can actually see D.

ii. Tell the panel that they are about to hear a list of names of all potential witnesses and any other person connected with the case including, in the case of police or expert witnesses, their occupations, and ask the panel whether any of them know anyone on the list.

iii. Ask the Prosecution to read the list: Prosecution and Defence witnesses should all be in a single list, already agreed by the advocates and approved by the judge.

iv. Ask the panel if any of them recognise any of the names which have been given.

v. Explain that if, at any later stage of the case, a juror recognises someone connected with it, for example a witness, notwithstanding that the juror did not recognise a name at this stage, the juror should write a note and hand it to the usher or the clerk.

vi. If applicable, ask the panel if any of them have any connection with a particular place, business or organisation (as previously identified in discussion with the advocates.

vii. If applicable, ask the panel if any of them are aware of any publicity that the case has received in the local or national media.

If any member of the panel gives an affirmative answer, or one which is equivocal (e.g. the person is not sure whether they know one or more of the names which have been read out), it will usually be necessary to find out more from this person. This should be done carefully to ensure that nothing is revealed that might prejudice the rest of the panel or the trial itself. A safe course is to get the person to provide details in writing (e.g. as to how the person knows/thinks they know a particular named individual), if necessary, in the absence of the rest of the panel. This process can be cumbersome but is likely to save time in the long run if the alternative is to start again from the very beginning.

If a member of the panel is unsure about their knowledge of a witness, steps should be taken to identify the witness, either by description or if practicable, by asking the witness to come into the courtroom. Depending on the answer/s given by any member of the panel, the judge may have to exercise their discretion to exclude the person from serving on the jury, and possibly from serving on any jury until the case has been concluded (see Judicial College, ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** (2024)).

A juror who is unable to serve in such capacity will be required to state the reason. In ***Bain v R*** **(The Bahamas CA, CrimConst Appeal No 6 of 2006, 31 October 2006)**, Sawyer P discussed the practice of trial judges towards empanelled but unsworn jurors:

> 7. However, because of the small size of the population in The Bahamas and the interconnectedness of persons in the community, together with the expansion of the categories of persons who are now eligible to serve on juries, it has recently become the practice of trial judges, to ask jurors empanelled but not yet sworn, if there is any ground on which they think they should not sit to judge a particular case either because of direct relationship or affinity to the alleged victim of crime, the accused person/s, or prosecution witnesses. In this case, the learned judge did just that on more than one occasion before the jurors were sworn and also later when one juror raised an issue about affinity of that juror to a witness. In addition, in response to the inquiry by the learned judge before the panel was sworn, several jurors who had been selected without challenge by either side disclosed their knowledge of, and/or affinity to various persons involved in the case and were excused from serving on that jury.

Aside from a juror being familiar with any of the parties involved in a particular trial, a judge does not have to automatically discharge a juror after hearing of their reason for wishing to be excused (see s 13 of the **Juries Act, Chapter 59**).

The parties are then given the opportunity to challenge the sitting of a juror, with and without cause (see ***Roberts v R; Brangman v R; Smith-Williams v R*** **(2021) 99 WIR 224, [2022] 4 LRC 1**).

Challenges of Jurors

The right to peremptory challenges is a statutory right (s 19 of the Juries Act) and not a constitutional right (see ***Rolle v AG*** **[2015] 3 BHS J No 4 (The Bahamas SC, Constitutional Side CRI/CON/00005/2015, 16 February 2015)**, per Jones J).

A 2014 amendment to the **Juries Act, Chapter 59** reduced the number of challenges made available in a murder or treason trial to four. In ***Yustare v R*** **(The Bahamas CA, SCCrimApp No 23 of 2015, 20 April 2015)**, Isaacs JA held that this amendment affected the procedure and not the vested right of a defendant.

If there is more than one defendant in a trial, they would each be allowed the four peremptory challenges: ***R v Davis*** **[1989] BHS J No 137 (The Bahamas SC, Criminal Side No 73/4 of 1989, 22 November 1989)**; ***R v Laing*** **[1989] BHS J No 49 (The Bahamas SC, Criminal Side No 119 of 1988, 8 May 1989)**.

The raison d'etre of peremptory challenges is that each party to a jury trial is to have an unfettered opportunity to screen the jury chosen to serve and be able to reject some of them. Gonsalves-Sabola J at paras 2 – 3 and 5 – 6 in ***R v Laing***, where he gave an oral ruling, noted as follows:

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> When the jury was being empaneled at the commencement of the trial of the four accused jointly charged with murder, counsel who appeared for the prosecution, after exhausting the ten peremptory challenges allowed by section 20 of the Juries Act, Ch. 47, claimed a further right of peremptory challenge under that very section.
>
> His contention was straightforward. There were four persons on trial. In considering the case against them the law required that the jury consider separately the case against each. For the purposes of challenge of jurors by the prosecutor, counsel submitted that a construction of section 20 which limited the prosecution to ten challenges as against a total of forty for the four accused, was patently inequitable. Counsel for each of the four accused contested that interpretation of the section.
>
> …
>
> It was unarguable and was not disputed that an accused's right of peremptory challenge of ten jurors was unaffected by the circumstance of the joinder of other accused with him in the same information. The reason is clearly that, on a construction of section 20, the right of peremptory challenge of ten jurors attaches to the person of each accused on his trial. Likewise, on my reading of the section, the prosecutor has a corresponding right in respect of the trial. That right attaches to the prosecutor not in respect of each accused on trial - the section does not say so - but in respect of the trial itself, the joint trial, for which one jury would be empaneled to try all the accused simultaneously. It is as a matter of procedural convenience that a prosecutor proceeds against several co-accused on a joint information. The raison d'etre of peremptory challenges is that each party to a jury trial is to have an unfettered opportunity to screen the jury chosen to serve and be able to reject such of them (up to the number of ten) as are not acceptable to that party. For more than ten, cause has to be shown. A party looks at the panel struck and directs his challenge to that panel.
>
> No authority was cited in support of the construction of section 20 to give the prosecutor more than ten peremptory challenges. I ruled that he was restricted to ten in a joint trial under the clear terms of the section.

Challenges with cause are limited to the following as set out in s 20(a)-(g) of the **Juries Act**:

a. A juror's name not being on the jury list. However, no misnomer or misdescription in the jury list shall be a ground of challenge if it appears to the judge that the description given in the jury list sufficiently designates the person referred to.

b. A juror is not indifferent between the Queen or other prosecutor and the defendant or between the parties.

c. A juror has been convicted of any offence for which they were sentenced to death or to any term of imprisonment with hard labour exceeding one year.

d. A juror is disqualified as an alien under the law in force for the time being.

e. A juror cannot speak, read or write English.

f. A juror was returned to serve as a juryman contrary to the provisions for the time being in force for the returning of jurors in rotation.

g. A juror is not, as the judge deems, a fit and proper person to serve as a juror in the proceedings.

The challenges shall be made at any time before the recital of the words of the oath to any of the jurors.

Generally, it is not the defendant's responsibility to prove that members of the jury were independent and impartial. There is a presumption of independence and impartiality. However, where the defendant seeks to challenge a juror or members of the jury for cause or to challenge the integrity of the jury on the ground that the jury was not independent or impartial, the burden shifts to the defendant to show that the members of the jury were not independent and impartial in line with Article 20 of the Constitution.

The Court must do its best to ensure that the challenges are not too favourable for either the defendant or the Prosecution and that they are not discriminatory (***R v Chouhan*** **(2021) 51 BHRC 699**).

The Court must also ensure that a fair-minded and informed observer could not conclude that there was a real possibility that the jury was biased towards either the Crown or the defendant: ***Trott v DPP*** **(2020) 97 WIR 155**.

Number of Jurors

In every trial of an offence for which the penalty of death is provided by law, the jury shall consist of twelve persons, and in every other trial, the jury shall consist of nine persons unless one juror dies, fails to appear at any adjournment, or falls ill and is unable to continue service (see ss 18 and 28(3) of the **Juries Act, Chapter 59**).

Additionally, in every trial for murder or treason, the court is mandated to direct that three additional jurors be called and empanelled to sit and serve as alternate jurors (see s 18(2) – (5) of the **Juries Act, Chapter 59** and ***Aritis v R; Flowers v R*** **[2014] 1 BHS J No 119 (The Bahamas CA, SCCrApp Nos 174 and 178 of 2010, 30 April 2014**)).

In a case where a defendant is found guilty of an offence to which the death penalty is affixed by law, the juror's verdict must be unanimous.

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Swearing in of the Jury

A juror chosen shall be sworn in or allowed to make a solemn declaration and thereafter a foreman shall be chosen. The foreman can be of any gender.

When a full jury has been sworn, the Registrar or clerk of the court shall call the prisoner to the bar and, address the members of the jury by informing them of the substance of the offences in the information and shall say "to this information the accused has pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not guilty" (see s 164 of the **Criminal Procedure Code Act, Chapter 91**).

Any charge of a previous conviction of an offence shall be charged at the end of the information by means of a statement that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, provided that in reading such information to the jury, regard shall be had to s 152 of the **Criminal Procedure Code Act, Chapter 91** (see also s 12 of the Second Schedule of the **Criminal Procedure Code Act, Chapter 91**).

Directions to the Jury Prior to the Commencement of Trial

The jury will always need clear guidance on the following:

a. The need to try the case only on the evidence and remain faithful to their oath or affirmation.

b. The prohibition on internet searches for matters related to the trial, issues arising or the parties.

c. The importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way.

d. The importance of taking no account of any media reports about the case.

e. The collective responsibility of the jury. As the Lord Chief Justice made clear in ***R v Thompson and Others*** **[2010] EWCA Crim 1623, [2011] 1 WLR 200**:

> [T]here is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed.... The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.

f. The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge at the time, and not to wait until the case is

concluded. The point should be made that, unless that is done while the case is continuing, it may not be possible to deal with the problem at all.

Discharge of The Jury or a Juror

At common law, a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from Counsel, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness.

Section 28 of the **Juries Act, Chapter 59** vests the Court with a discretion to direct the new empanelment of a jury as follows:

> **28. Discharge of jury in certain circumstances**
>
> (1) The judge may, in his discretion, in case of any emergency or casualty rendering it, in his opinion, expedient for the ends of justice so to do, discharge the jury without their giving a verdict, and direct a new jury to be empanelled during the sitting or may postpone the trial on such terms as justice may require.
>
> (2) If the judge becomes incapable of trying the case or directing the jury to be discharged, the Registrar shall discharge the jury.
>
> (3) Without prejudice to the power of the judge to discharge the jury under the provisions of subsection (1), whenever a juror dies or fails to appear at any adjournment of the trial or becomes too ill to continue to serve then in any such case the judge may in his discretion proceed with the trial with the remaining eight jurors, and take their verdict which shall then have the same effect as the verdict of the whole number.

If the judge becomes incapable of trying the case or directing the jury to be discharged, the Registrar shall discharge the jury: s 28 (2) **Juries Act, Chapter 59**.

The test for discharging the jury is whether there was real danger that the defendant's position had been prejudiced (see ***Brown v R*** **[2008] 4 BHS J No 67 (The Bahamas CA, SCCrApp No 19 of 2006, 14 October 2008)**, where Dame Sawyer P cited Lord Ackner in ***R v Spencer; R v Smails*** **[1987] AC 128, [1986] 3 WLR 348**). The Court may discharge one juror or the entire jury panel.

The reasons for discharging a jury provided in Sections 18(2) – (5) of the **Juries Act, Chapter 59** are not to be considered as exhaustive (see ***R v Moss*** **[1991] BHS J No 98**

(The Bahamas SC, Criminal Side, 17 May 1991)). A jury may be discharged, if after the expiration of a reasonable time from the conclusion of the summing up and before a verdict is given, they state that they are not likely to agree.

Once a jury has been discharged it is functus officio and cannot be reconvened (see ***Blackstone's Criminal Practice 2026***, D13.50).

The reasons for discharging a jury will depend on the circumstances of the case. The judge's overriding duty in this context is to ensure that proceedings are fair and to do justice in the particular case. Examples of situations in which it may be necessary to discharge the jury include where inadmissible material has become known to the jury, or there is a risk that improper information known to one juror has been shared with others. Sometimes it may be necessary to discharge a jury for other reasons, but where a juror has heard some evidence in the case (as opposed to a Prosecution opening) it is not appropriate for that juror to form part of a new jury panel. Care will need to be exercised if a juror or jurors must be discharged but the trial is going to continue or be immediately restarted. Directions may have to be given in order to ensure that the risk of contamination as between the sitting jury and those who have been discharged is addressed (see ***R v Carter*** **[2010] EWCA Crim 201, [2010] 1 WLR 1577**; ***R v Weaver*** **[1968] 1 QB 353 79, [1967] 2 WLR 1244**; ***R v S*** **[2005] EWCA Crim 1988, [2006] Crim LR 247**; ***R v F*** **[2009] EWCA Crim 805**; ***R v Grant*** **[2017] EWCA Crim 414, [2018] 4 WLR 115**).

The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.

Procedure For the Discharge of a Juror for Personal Reasons

A request will normally be brought to the attention of the judge, either by a note or a message from the juror via a bailiff or the Clerk of the Court. The first priority is to ensure that all relevant information has been provided. This can be done by the usher asking any necessary further questions of the juror and writing down the answers (see ***R v KK*** **[2019] EWCA Crim 1634, [2020] 4 WLR 63**; ***R v Eaton*** **[2020] EWCA Crim 595**).

Counsel for the Defence and Prosecution should also be informed. In most cases they may be shown the note or told in detail of the juror's difficulty. If the juror's problem is very personal, it is appropriate to indicate to Counsel the general nature of the problem without going into detail. A judge may be assisted by submissions from Counsel, but whether a juror is discharged or not is a matter for the discretion of the judge. If the juror is at court rather than absent through illness or other cause, the juror should be asked to come into court without the other jurors, told that the request has been considered, and either indicate the arrangements to be made to enable him/her to continue sitting or thank the juror for his/her services to date, formally discharge the juror and give instructions as to future service.

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Complaint of Counsel

If the discharge is as a result of something that has happened within the trial, the matter will be subject to submissions from the Defence and Prosecution Counsel. The decision whether or not to discharge will take into account the nature and seriousness of the irregularity and also that juries are expected to abide by their oath/affirmation to try the case according to the evidence.

If the decision is not to discharge, consideration must be given to what, if anything, the jury should be told. In many cases a rehearsal of the inadmissible material draws unnecessary attention to a matter which may have appeared insignificant to the jury.

If the jury must be discharged, consideration has to be given to what they should be told. If the matter is to be retried before another jury, it is generally prudent to tell them no more than that something has arisen which makes it impossible for the case to proceed. They should be thanked for their work to date and if a retrial is to commence immediately, consideration must be given to releasing the jurors from further service until the trial is complete.

There are many reasons for a juror or jury being discharged. In ***Bowe v* R [2001] UKPC 19, (2001) 58 WIR 1**, the jury was discharged after the defendant allegedly contacted a juror.

In ***Todd v R* [2008] UKPC 22, (2008) 72 WIR 15**, the Board held that it was impossible to conclude that the appellant's trial was unfair or that the verdict was unsafe, where the trial judge made the decision to direct the jury to disregard inadmissible evidence instead of discharging the jury.

A juror who is discharged cannot be cited for and convicted of contempt. In ***Bain v R* (The Bahamas CA, CrimConst Appeal No 6 of 2006, 31 October 2006)**, the Court allowed the appeal of the appellant who was a juror in a criminal trial in the Supreme Court and set aside her sentence of 14 days imprisonment. The juror was cited for and convicted of contempt for failing to disclose to the trial judge that she had an affinity to a half-brother of two of the defendants in the trial in which she served as a juror. Some three weeks into the trial it was brought to the attention of the judge that the juror knew the half-brother. In the absence of the jury (including the appellant), the learned judge took evidence from the supervisor of both the appellant and the defendant's half-brother and after taking that evidence, the learned judge decided to discharge the jury under s 29 of the **Juries Act, Chapter 59** and to summon the appellant to show cause why she should not be committed to prison for her contempt of the court by interfering with the administration of justice.

That evidence was taken in the absence of the appellant, but there is nothing inherently unfair in that, if the appellant is subsequently given an opportunity to cross-examine such witness. The learned judge found the appellant guilty of "a gross interference with the course of justice", a contempt in the "cognizance of the Court which is the same as a contempt in the face of the court". The learned judge sentenced the appellant to 14 days' imprisonment for that contempt. In effect, the learned judge must have found either that

the appellant had the intention to render a perverse verdict because of her affinity to Beneby, or that the appellant lacked the integrity to return "a true verdict" according to the evidence.

The Court of Appeal went on to discuss the rarity of a juror not only being discharged, but also imprisoned for perceived bias in favour of the defendant and made the following findings at paras 52 and 53:

> As far as we are aware, that decision has not been overruled.
>
> If a jury cannot be committed to prison for contempt by returning a perceived perverse verdict, then it seems to us that a juror cannot be committed for contempt for not disclosing that a person with whom that juror works and who is known to the juror by first name only and who, in any case, has a different surname from the accused person, had an intention of being forsworn.

The Court also noted at para 56, "The immunity of jurors falls under the general principle that no prosecution or action will lie for words written or spoken in the course of any judicial proceeding - R v Skinner (1774) Lofft 54 at page 56 per Lord Mansfield, C.J."

In ***Knowles v DPP*** **(The Bahamas HC, Information No 150/7/2019, 10 December 2020)**, the Court made the decision to discharge a juror who worked at the Criminal Records Office to avoid the appearance of bias and proceeded with the trial with the remaining eight (8) jurors. The Court took into consideration the fact that the juror was under the same oath since the trial's commencement, that the juror had a truthful demeanour and that she looked pained at the suggestion that she could have shared the information with her fellow jurors. The Court was satisfied that the remaining jurors were not contaminated by the 'juror' as restrictions imposed by COVID-19 severely limited the congregation of the jury. Additionally, the Court examined the provisions of the Juries Act and made a finding that it did not prohibit a person sitting as a juror who worked at the Criminal Records Office. However, out of an abundance of caution and to avoid the very appearance of bias, the Court discharged the juror. The defendant was later convicted and sentenced to imprisonment. He appealed both his conviction and sentence by way of ***Knowles Jr v DPP*** **(The Bahamas CA, SCCrApp No 97 of 2021, 30 May 2022)**. The Court dismissed the appellant's appeal and confirmed his convictions and sentence. One of the grounds of the appellant's appeal was that the judge should have dismissed the entire jury and not just the single juror who worked at the Criminal Records Office.

Barnett P, in delivering the Court's judgment stated (at paras 27, 29, and 35 – 37 which are summarised on pg 2):

> Whether to discharge a juror or an entire panel is within the discretion of the trial judge. It is also settled law that an appellate court cannot interfere with the judgment of the trial judge on an issue such as the discharge of a juror unless it concludes that the decision was outside the range of reasonable response to the issue which the judge was facing.

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> It is clear from the judge's ruling that she was satisfied that the juror had not discussed the case with other members of the jury and that any knowledge that juror had of the police witnesses was not communicated to the other members of the panel. Jury deliberations had not yet started and it would have been unreasonable to discharge the entire jury on the basis that they may have been infected with that jurors knowledge when there juror made it clear that she had no discussed the case with her colleagues on the jury panel. There is simply no basis for finding that the verdict is unsafe because the entire jury panel was not discharged.

If a juror is discharged part way through the trial, the juror's discharge should be from current jury service altogether or until the case the juror has been trying is complete; the juror should be given a clear warning not to speak to the remaining jurors about this case.

Chapter 23 – Verdicts

In this Chapter: **Directions to the Jury | Unanimous and Majority Verdicts | Special Verdicts | Inconsistent Verdicts | Alternative and Partial Verdicts | Deadlock/Watson Direction | The Jury Room, Deliberation, and Adjournments | Bringing the Verdict**

A verdict is the decision made by the jury of the defendant's innocence or guilt after sitting through and considering the factual evidence presented during a trial. The Court assists the jury with arriving at a verdict in its summing-up (see s 180 **Criminal Procedure Code Act, Chapter 91**). In some jurisdictions written directions are allowed, however in The Bahamas it is the norm for the directions to be given orally during a judge's summing-up.

A judge may also, after discussions with the Prosecution and the Defence, provide further directions to the jury if they request clarification on a particular piece of evidence. If the jury, however, raises an issue unconnected to the trial, the judge may address it without any reference to Counsel (see ***R v Gorman*** **[1987] 2 All ER 435, [1987] 1 WLR 545**). Importantly, a judge does not have the jurisdiction to question the jury on the basis for the verdict.

Directions to the Jury

The first direction the Court must give to a jury before they retire to consider their verdict, is that the foreman is the moderator of the jury who will speak on their behalf to deliver the verdict upon their return to the court. While the foreman is the moderator or the "voice" of the jury, their views do not hold greater weight than that of any other juror. There should be encouragement of healthy discussions and analysis of the evidence which was led in trial, but the foreman must also be mindful of the views of their fellow jurors. Jurors should also be advised that they are not to separate during deliberation of the verdict. They are also admonished that if there are any questions or ambiguities about any aspect of the case, to forward same to the Judge who would provide a response in open court.

While it is the practice of trial judges in the jurisdiction to provide oral directions to the jury, the Privy Council in its recent decision of ***Bastian v R*** **[2024] UKPC 14, [2024] 5 LRC 222**, recommends providing written directions to the jury; a practice which has become the norm in most criminal trials in Crown Courts in England and Wales. The Board recommended providing written directions to Counsel and hearing and responding to any submissions prior to presenting the written directions to the jury. The Board explained at para 57 that:

> The trial before Charles J in these proceedings raised complicated issues of law and fact, including complex issues of joint enterprise, alternative verdicts, cross-admissibility of evidence and inculpatory and exculpatory statements in interview. In the Board's view the jury would have been assisted and clarity would have been promoted had the judge reduced the necessary directions of

> law to writing and, after hearing (and where appropriate responding to) any submissions about them from counsel, provided copies to the jury during the summing up. This procedure has now become the norm in most criminal trials in Crown Courts in England and Wales. This course has the advantage of allowing counsel to make submissions in advance of delivery of the summing up on what may be disputed points of law. It encourages clear and concise explanation of complex issues. It is likely to reduce the risk of repetition or contradiction in directions. It assists the jury in understanding and retaining the legal directions and can provide a sound basis for discussion when they retire to consider their verdict. The Court of Appeal may wish to consider whether such a procedure should be followed in The Bahamas.

Unanimous & Majority Verdicts

The jury must be directed that:

a. their verdict must be unanimous (in respect of each count and each defendant); and

b. they may have heard of majority verdicts, but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict, the jury would be invited to come back into the court room and be given further directions. This would only happen if the judge were to decide that it is an appropriate course to take.

Section 24 of the **Juries Act, Chapter 59** as amended by the **Juries Amendment Act 2020,** provides when a jury should return a unanimous verdict:

> 24. (1) In every case in the criminal jurisdiction of the court in which the prisoner is arraigned for and found guilty of an offence to which the penalty of death is provided by law the verdict of guilty shall be the verdict of all the jurors.
>
> (2) In every other case in the criminal jurisdiction of the court and in all civil cases, the verdict may be found, given and returned by six jurors empanelled and any verdict so found, given and returned shall have the same force, validity and effect as if the same was found, given and returned by the unanimous voice of such jury.

The Court of Appeal of Trinidad & Tobago affirmed a trial judge's direction with respect to the definition of the word "unanimous" in the case of ***La Vende v The State*** **(1979) 30 WIR 460**. The definition was stated as follows:

> One final word. You cannot, assuming that you retire to consider your verdict, return to give your verdict before three hours unless all of you are agreed upon a verdict one way or the other. That is the meaning of the word "unanimous",

> I give you this reminder so that you will bear it in mind. All of you must be unanimous one way or the other before you can come out here within three hours to give your verdict.

In ***Suer v R* (The Bahamas CA, SCCrApp No 318 of 2014, 17 May 2016)**, the Court of Appeal held that a judge's direction to return a majority verdict if one could not be achieved unanimously was not erroneous. Crane-Scott JA in delivering the judgment of the Court held at para 58, "As unanimity is the desired goal in a jury trial, we find nothing inherently erroneous or unfair about the learned judge in this case having urged the jury to strive for unanimity in relation to the Second Count, before returning a majority verdict, if unanimity could not be achieved."

In ***Robinson v R* (The Bahamas CA, SCCrApp No 93 of 2013, 3 December 2014)**, the Court of Appeal condemned the acceptance of a majority verdict by the jury, where they determined (at para 29) that there was "simply no evidence to ground a conviction on the lesser charge of manslaughter which the jury, by their majority verdict, returned."

Special Verdicts

A special verdict is one where the judge obtains the opinion of the jury on the facts, but would ultimately decide the general question with respect to the particular facts. Special verdicts are allowed if a defendant has pled autrefois acquit or autrefois convict and where the defendant could possibly be insane.

Special verdicts ought to be found only in the most exceptional cases. Where a special verdict is returned, it is for the court to act upon it and to direct a verdict of guilty or not guilty to be entered. The judge may not ask the members of the jury whether they believe the evidence for the Prosecution and, on their saying that they do, enter a verdict of guilty. If, after the jury has given a special verdict, the court enters a general verdict of guilt, an appeal lies to the Court of Appeal. If the finding of the jury is ambiguous or inconsistent, and a verdict of guilty has been entered on it, the conviction will be quashed (see ***Halsbury's Laws of England*** (5th edn, 2021) vol 27 at para 425).

Section 158(3) of the **Criminal Procedure Code, Chapter 91** addresses the jury's requirement to return a special verdict when the defence of autrefois acquit or autrefois convict arises:

> Upon the trial of an issue to which this section refers, the judge shall determine whether in law the accused was convicted or liable to be convicted of any offence of which he stands charged or may be convicted on the count to which he has pleaded *autrefois* acquit or *autrefois* convict; but any issue of fact arising in relation thereto shall be for determination by the jury and the judge may, if he shall think fit, require the jury to return a special verdict in relation thereto.

Section 191 of the **Criminal Procedure Code, Chapter 91** addresses when a judge should direct a jury to return a special verdict, when the defendant is found to be insane before or upon arraignment for the offence:

> Where in any information any act or omission is charged against any person as an offence and it is given in evidence on his trial for that offence that he was insane so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom he is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

Inconsistent Verdicts

Where verdicts are so inconsistent that no reasonable jury could have reached the conclusion that the verdicts could stand together, an appellate Court will quash the conviction against the defendant (see ***R v Durante*** **[1972] 3 ALL ER 962, [1972] 1 WLR 1612**; ***R v Fanning; R v Kerner; R v Osianikovas*** **[2016] EWCA Crim 550, [2016] 1 WLR 4175**).

In the case of ***R v Shirley*** **(1964) 6 WIR 561**, the Jamaican Court of Appeal allowed the appeal and ordered a new trial where the jury delivered an inconsistent verdict. The headnote summarises the case, including the Court of Appeal's decision at pgs 561 – 562, as follows:

> On the trial of the appellant on a charge of murder the defence raised was diminished responsibility, and evidence was given on behalf of the defence by a mental specialist. When the jury came to give their verdict they were asked to say whether or not the prisoner was guilty of murder, to which they replied that he was guilty. They were then asked to say whether or not the prisoner was guilty of manslaughter, to which they replied that he was not guilty.
>
> On appeal, [it was held that], The two verdicts were mutually inconsistent for the reason that a verdict of not guilty of manslaughter must of necessity negative an unlawful killing which is an essential element in the offence of murder which is an unlawful killing with the added element of malice aforethought. The verdicts being mutually inconsistent there had been no true verdict and the entire trial had been vitiated and was a nullity.
>
> Appeal allowed; new trial ordered.

Alternative and Partial Verdicts

An alternative verdict is returned by the jury where a defendant is convicted of a lesser offence than the one they are charged with. The case of ***R v Foster*** **[2007] EWCA Crim 2869, [2008] 1 WLR 1615** provides the guiding authority on alternative verdicts. The Court, at para 61, held that:

> Accordingly, not every alternative verdict mustbe left to the jury. In addition to any specific issues of fairness, there is what we shall describe as a proportionality consideration. The judge is not in error if he decides that a lesser alternative verdict should not be left to the jury, if that verdict can property be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case. He must, of course, reconsider any decision he may have reached about alternative verdicts in the light of any question which the jury may see fit to ask, as they did in *R v Fairbanks* [1986] 1 WLR 1202 and *R v Maxwell* [1990] 1 WLR 401. However when the defence to a specific charge amounts to the admission or assertion of a lesser offence, the primary obligation of the judge is to ensure that the defence is left to the jury. If it is not, on elementary principles, the summing up will be seriously defective and the conviction will almost inevitably be unsafe. The judgment whether a "lesser alternative verdict" should be left to the jury involves an examination of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise. Within that case specific framework the judge must examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the judge enjoys "the feel of the case" which this court lacks. On appeal the problem which arises is not whether a direction in relation to a lesser alternative verdict was omitted, and whether its omission was erroneous, but whether the safety of the conviction is undermined.

In ***R v Saunders*** **[1987] 2 All ER 973, [1987] 3 WLR 355** the appellant was charged with murder. At his trial the jury were initially unable to agree on a verdict and were directed by the judge that if at least ten of them were agreed that all the ingredients of manslaughter were made out he would be prepared to discharge the jury from returning a verdict of murder and would accept a verdict of manslaughter. After further deliberation the foreman stated that the jury was unable to reach a verdict on the charge of murder but had unanimously found the appellant guilty of manslaughter. The appellant was convicted of manslaughter. An appeal was made and the basis of the appeal was that by reason of s 6(2) of the **Criminal Law Act 1967,** the jury could return a verdict of manslaughter where a person was charged with murder only if he was 'found not guilty of murder' and that therefore an alternative verdict of manslaughter was not open to the jury when they could not agree on a verdict of murder. The Court of Appeal dismissed the appeal.

The determination by the House of Lords on the appeal from the Court of Appeal's decision, summarised in the headnote at pg 973, was that:

> On its true construction s 6(2) of the 1967 Act provided specifically for a particular situation, namely where the jury had acquitted of murder, and did not apply where the jury had never been able to reach a verdict of not guilty of murder because they could not agree. In the latter situation the common

> law applied and accordingly where on an indictment charging murder the jury could not agree that murder had been proved and were discharged from returning a verdict on that charge, but were agreed that all the elements of manslaughter had been proved, they could properly return a verdict of manslaughter. The appeal would therefore be dismissed.

The Trinidad and Tobago ***Criminal Bench Book 2015*** also highlighted the principles of alternative verdicts at pg 306 where it was noted, "It is a preferable practice that the issue of whether an alternative verdict is available should be dealt with at least prior to closing addresses in order to avoid possible unfairness to the defence". This is different to what was seen in ***R v Saunders*** above, but it is of note that the Judge consulted with both Counsel before liaising with the Jury to curb any unfairness.

The ***Criminal Bench Book 2015*** continued, at pg 306:

> The jury must be specifically warned not to return an alternative verdict as a compromise.
>
> There may be the need to consult with counsel. Alternative verdicts are available for the following offences:
>
> 1. Attempted murder/wounding with intent.
> 2. Wounding with intent/unlawful wounding.
> 3. Murder/manslaughter.
> 4. Larceny/receiving.
> 5. Rape/indecent assault.
>
> The alternative verdict does not need to be on the indictment. It must be made clear to the jury that they can only convict on one or the other. It is necessary to go through the process step by step.

The ***Criminal Bench Book 2015*** suggests that the issue of whether an alternative verdict is available should be addressed before closing speeches to avoid possible unfairness to the defence.

Deadlock/Watson Direction

When the jury is unable to reach a verdict, the Court has the discretion to discharge them. This discretion is a statutory one pursuant to s 25 of the **Juries Act, Chapter 59** which states, "If, after the expiration of a reasonable time from the conclusion of the summing up, the jury are not agreed and state that they are not likely to agree, the court may, but shall not be bound to, discharge them."

Chapter 23 – Verdicts

At the commencement of the trial, the jury will usually be advised by the trial judge that it will be their joint responsibility, in due course, to make an assessment of the evidence, but that they should defer judgment until all the evidence has been heard. If the jury has received a majority verdict direction, they would have been informed that it is desirable, if possible, for the jury to be unanimous in their decision but, if that is not possible, the judge can accept such a majority verdict as the circumstances allow. It may not be appropriate to give the jury any further direction about the desirability of reaching a verdict, because the majority verdict direction would have concentrated the jury's mind in that direction.

It is a matter for the trial judge whether to say anything further. If anything further is said, it is essential that no undue pressure is exerted on the jury. In the case of ***R v Watson*** **(1988) QB 690, [1988] 2 WLR 1156**, which would become known as the **Watson Direction**, a majority verdict was encouraged by jurors. In ***Watson,*** Lord Lane CJ at pg 700 formulated a further direction which might be given, as follows:

> Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily [10 of] you cannot reach agreement, you must say so.

However, there has since been mixed views on such a direction and in recent times cases such as ***R v Logo*** **[2015] 2 Cr App R 17, [2015] All ER (D) 143 (Apr)** at paras 20 and 25 reiterated that such a direction:

> …should only be given after the majority direction has been given and after some time has elapsed or a further direction is sought from the judge by the jury….while the decision is one for the Judge's discretion, he or she would normally invite submissions from Counsel as to the way in which the discretion is exercised ……trial judges may wish to think long and hard before exercising their discretion to do so….

Essentially the aim is not for jurors to be pressured into rushing a verdict but to reach a majority verdict where possible.

In ***Clayton v South Yorkshire (East District) Coroner*** **[2005] EWHC 1196 (Admin), [2005] All ER (D) 108 (Jun)**, the Court held at paras 15 and 16 that:

> The standard form in which deadlocked juries may be helped to break the deadlock is known as the Watson direction…

> Decided cases also make it clear that, beyond this limited form of encouragement, no pressure, especially of time, must be applied – typically by telling the jury that if they do not bring in a verdict by or within a specified time they will be discharged (*R v Rose* [1982] AC 822, [1982] 2 All ER 731). The vice, as the Privy Council said in *De Four v The State* [1999] 1 WLR 1731, is that one or more of the jurors may be induced by such pressure to agree to a verdict to which they would not otherwise have subscribed.

The Jury Room, Deliberation, and Adjournments

By s 26 of the **Juries Act, Chapter 59**, when a jury retires no one other than the bailiff responsible for the jury should communicate with the jury. This includes a judge and any member of the judge's staff. Section 26 states:

> (1) If the jury retires to consider their verdict no person other than the officer of the court who has charge of them, shall be permitted to speak or to communicate in any way with any of the jury without the leave of the judge.
> (2) Disobedience to the directions of this section shall not affect the validity of the proceedings: Provided that if the disobedience is discovered before the verdict of the jury is returned, the judge may, if he is of opinion that it has produced substantial mischief, discharge the jury and direct a new jury to be sworn or empaneled during the sitting or may postpone the trial on such terms as justice may require.

A jury also should not be rushed when deliberating (see ***Clayton v South Yorkshire (East District) Coroner***).

It is also important for jurors to focus on the evidence presented before them and that alone, as any outside interference raises cause for concern and could create grounds of appeal.

In ***R v Ferguson (aka Goodman)*** **[2016] 2 BHS J No 105, (2016) 89 WIR 27**, the Bahamian Court of Appeal allowed an appeal and ordered a new trial where, inter alia, there was an altercation between two jurors. The headnote at pg 28 summarises the Court's reasoning (at paras 26 – 28, 50, 78, 91) on that issue:

> Where there was an altercation between jurors, the role of the judge was to ascertain, within the limits of the common law prohibition against inquiring into events in the jury room, the capacity of the jurors in question to fulfil their oath or affirmation to give a good verdict. While it was up to the trial judge to take whatever course he or she considered was best suited to the circumstances of the case, the extent of the inquiry made in the instant case was insufficient because the judge had made inquiries of only one of the jurors involved in the altercation, namely the forewoman, had not given the other juror an opportunity to respond and had not given all the members of the

> jury time to consider whether they were able to render a verdict and return an answer, which, at the very least, included the views of the other juror.

In ***R v Young*** **[1995] QB 324, [1995] 2 WLR 430**, the Court of Appeal of England and Wales quashed a conviction where it was discovered that a number of jurors had consulted a Ouija board while in retirement. The Court took the view that there was a real danger that some jurors may have been influenced by it and that the defendant was prejudiced.

In ***R v K*** **[2005] EWCA Crim 346, [2005] Cr App R 77**, the Court of Appeal also quashed a conviction where a juror had downloaded material from the internet which prejudiced the defendant as it concerned matters to which the Prosecution would not have been able to refer.

Bringing the Verdict

Upon the pronouncement of the verdict by the foreman of the jury, the Court is required to inform the Registrar, who must enter the verdict on the back of the information or on a sheet of paper annexed thereto (s 181 of the **Criminal Procedure Code, Chapter 91**).

Thereafter, the jury should be immediately discharged (s 182 of the **Criminal Procedure Code, Chapter 91**).

After the jury has reached and pronounced its verdict, it is customary for Judges to thank the Jurors for their service. Depending on the nature of the case, the Judicial College's ***The Crown Court Compendium Part I: Jury and Trial Management and Summing Up*** **(2024)** at pg 21-13, provides that a judge may direct the jury as follows, once:

> …no longer serving…can discuss the case with anyone, save that they must never reveal what was said or done while the jury was in the deliberating room trying to reach a verdict…if the case has involved a sexual allegation then the jury should also be reminded that the complainant is entitled to lifelong anonymity.

See also s 272 of the **Criminal Procedure Code, Chapter 91**: "Anonymity of complainants in rape, etc.", for further guidelines on non-disclosure during and post-trial.

Once a jury is discharged, it is *functus officio* and cannot be recalled for any purpose: ***R v Russell*** **[1984] Crim LR 425**.

Chapter 24 – Criminal Case Management

In this Chapter: **Overarching Considerations | Performance Standards | Some Best Practices | Judges' Model Checklist for Case Management and Preparation of Decisions**

Overarching Considerations

In The Bahamas, the Constitution is the supreme law. Section 2 of the **Constitution of the Commonwealth of The Bahamas** provides that:

> This Constitution is the supreme law of the Commonwealth of The Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Thus, the minimum expectation is that core constitutional values and principles must influence and be applied by all public bodies, agencies, and authorities. This has been emphasised by the courts in The Bahamas.

Similarly, across the Caribbean, the CCJ, in its Appellate Jurisdiction, has consistently confirmed that this is so (see the judgments of ***Attorney General v Joseph*** **[2006] CCJ 1 (AJ) (BB)**; ***The Maya Leaders Alliance v AG of Belize*** **[2015] CCJ 15 (AJ) BZ**; ***Nervais v R*** **[2018] CCJ 19 (AJ) (BB)**; ***McEwan and others v AG Guyana*** **[2018] CCJ 30 (AJ) (GY)**; ***Belize International Services Limited v AG of Belize*** **[2020] CCJ 9 (AJ) BZ**; ***Marin Jr v R*** **[2021] CCJ 6 (AJ) BZ**; ***Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY**).

The judiciary is not an exception, and the expectation is that in the discharge of its core functions it will integrate and uphold these principles, while bearing in mind relevant and applicable international fundamental obligations and principles: ***AG of Guyana v Thomas*** **[2022] CCJ 15 (AJ) GY**. In this way, the courts become and remain rule of law compliant.

Two fundamental constitutional values are the 'protection of the law' and 'fair hearing' principles: ss 15(a) and 20(8) and 18 of the **Constitution of the Commonwealth of The Bahamas.** In regard to these, in the context of criminal proceedings and under the guarantee of the protection of the law, specifically provide for an entitlement to 'a fair hearing within a reasonable time'. This demands that judiciaries, judicial officers, staff, and other state agencies that support court systems and the criminal justice system must, as a constitutional imperative, ensure both: (i) timeliness, and (ii) fairness throughout the criminal processes, from inception to final disposition.

Chapter 24 – Criminal Case Management

Performance Standards

These two constitutional standards impose (i) quantitative, and (ii) qualitative performance standards on judiciaries, courts, court administrators, and judicial officers. In relation to the qualitative performance standards, these speak to matters such as procedural fairness, therapeutic justice principles, and competence. Procedural fairness and therapeutic justice principles are addressed at Chapters 26 and 27 respectively. Competence is assured and sustained through continuing judicial education that is well funded, supported as essential to the core functions of judicial work, understood as integral to sustainable judicial reform and continuing improvement, and judge led. It is not limited to substantive legal competence, and includes the full range of judicial, inter-personal, administrative, and management skills competencies that are needed by judicial officers to meet constitutional standards of fairness and timeliness.

Quantitative performance standards are quintessentially the province of case and caseflow management, though qualitative standards are also essential. These quantitative standards are constitutional, non-negotiable performance standards, for which judiciaries as state institutions, and judicial officers as public officers, are to be held accountable. Indeed, at a secondary level, these are internationally recognised minimum ethical standards for judicial officers, that are also reflected in territorial judicial codes of conduct. See the Judicial Integrity Group's ***Bangalore Principles of Judicial Conduct*** (2002).

Some Best Practices

These practices are built on and adapted from the National Centre for State Courts' Models for Court Caseflow Management and Effective Criminal Case Management Project (ECCM).

1. Management Principles

a. Judicial offices control the judicial process and are required to responsibly demonstrate leadership in doing so (from filing to final disposition).

b. All cases are equally deserving of individual attention from beginning to end (sufficient to enable a fair and just outcome).

c. For each case, attention and resource allocation are determined proportionately on the bases of need and capacity (caseloads, time, resources).

d. All court users, parties, witnesses, attorneys etc are to be equally treated according to the norms and standards of procedural fairness (to maximize institutional and individual judicial legitimacy and systemic public trust and confidence).

e. Performance standards must be set, known, and met consistently.

f. Both qualitative and quantitative performance standards must be established.

g. Timeliness is a constitutional standard and essential for courts of excellence (which satisfies both protection of the law and due process rights).

h. Judicial officers and court officials are responsible and accountable for meeting the performance standards set.

i. Regular reviews of and shared feedback on judicial and court performance, based on predictable and measurable standards, must be implemented and consistently conducted and distributed.

j. Continuous judicial education is critical to effective and efficient case and caseflow management.

Note: Case and caseflow management are to be considered constitutional imperatives, as well as essential for establishing and sustaining high performing courts of excellence that meet societal needs and expectations. Judicial education and training are necessary supports, as is an underpinning statistical and institutional data collection and analytical capacity. The deployment of sufficient resources for case and caseflow management is required.

2. Establishing Performance Standards

a. Develop and design case process flow charts for the life cycles of matters, by identifying sequentially key events in the life cycle and activities relevant to each event.

b. Develop time-based caseflow performance measures and indicators (benchmarks) based on say, typology, e.g., murders, sexual offences, kidnappings, drug offences, arms and ammunition offences, larceny etc.

c. These time-based measures are to be linked to key procedural events (beginning with the first event in the life cycle) and would indicate the expected time that it should take to move from one event to another, continuously to final disposition. For example, for the assizes, the first event may be the date the indictment is filed, then the date of arraignment, then the date(s) for case management hearings (to plan the case and schedule interlocutory applications etc), then the time for determining all interlocutory matters, then the commencement of trial, then the time for verdict (and for a sentencing hearing if required), then a time for the delivery of reasons – final disposition.

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Provided below is an example of a Model Case Life Cycle Event Process Time Flows (time standard to the next following event):

Event	Indictment Filing Date	Date Of Arraignment	First Case Management	Completion Interlocutory Matters	Trial	Verdict	Sentencing	Reasons	Total Time
Time for Completion	A days No. of days from Indictment to Arraignment	B days	C days	D days	E days	F days	G days	H days (Set outer limit time standards, e.g. 1 mth for standard; 3 mths for complex cases)	Y days

d. Establish clear, overall, time-based standards for the completion of the different categories of matters (based say on typology), from inception (the first event) to completion (the last event). The case life cycle event process time flows (above) must fit within these overall case completion time standards. Provided below is a Model Case Completion Time Standards by Typology:

		Time to Disposition/Case Volume			
		50%	**75%**	**90%**	**100%**
Case Type	Murder	12 mths	18 mths	24 mths	24+ X-mths
	Sexual offences	6 mths	12 mths	18 mths	18+ Y-mths
	Drug offences	8 mths	14 mths	20 mths	20+ Z-mths

e. Establish **Differentiated Case Management (DCM)** performance standards. Account must be taken of the fact that cases differ substantially from each other in their complexity and in the time required for a fair and timely disposition. Some may be disposed of expeditiously, with very few intermediary events. Others may require extensive court supervision over a myriad of pre-trial process and activities. The fact is that all cases do not make the same demands on judicial system resources. Each case is unique. Case management requires Judges to pay greater attention to methods for reducing delay, making the courts more accessible to the public, and improving predictability and certainty in calendar management. This concept has developed into systems of Differentiated Case Management (DCM), a technique courts can use to tailor the case management process and the allocation of judicial system resources to the needs of individual cases. A characteristic of this system is the development of different tracks that define procedures and events for disposing of different categories of cases (e.g. simple, standard, complex; or based on typology; or special circumstances). Differentiated case management will enable the court to prioritize cases for disposition based on case specific priorities, even for example the age or physical condition of the parties or witnesses. For the purposes of classification, e.g., 'Simple' may refer to the completion of a hearing in 1 day, 'Standard' may refer

to the completion of a hearing in 2 – 3 days, and 'Complex' may refer to the completion of a hearing in 4 days or more. Provided below is a Model Case Completion Time Standards by Classification

		Time to Disposition/Classification (DCM)		
		Simple	**Standard**	**Complex**
Case Type	Murder	x mths	y mths	z mths
	Sexual offences	x mths	y mths	z mths
	Drug offences	x mths	y mths	z mths

Note: Case life cycle timeframes and standards are an essential part of any effective and efficient case and caseflow management system. It is essential to set and enforce intermediate life cycle time standards as part of an effective case management strategy. It is also necessary to set and enforce completion time standards. Simply put, timeliness is integral for courts that aspire to perform at sustainable levels of high performance. Performance standards ought to be established as early as possible. They ought to be developed and reviewed periodically, and in a collaborative and iterative process, and should include judicial officers, registry staff, and court administrators. It is recommended that these performance standards be shared judiciary-wide and also made public, in satisfaction of transparency and accountability standards.

3. Measurement and Evaluation

Having identified, worked out, and specified (i) the main process occurring events and activities in the life cycle of a case, (ii) the relevant performance standards for time flows between events from filing to disposition, as well as (iii) overall case completion time standards, it is important that a process of measurement and evaluation be coupled with this information gathering tool.

Analysing and presenting to judicial and court officers and court administrators, performance results in an interpretable and compelling way by following the same process, allow courts and judicial officers to actively manage criminal cases to achieve their caseflow management goals. This data should be compiled, analysed, and represented periodically, e.g., annually, and shared publicly in annual reports and other publicly assessable spaces.

The development and deployment of measurement and evaluation tools and techniques ought to be managed and overseen by court administration, and in collaboration with judicial officers and the registry.

Outlined below are four key recommendations for continuous monitoring, measurement, and evaluation:

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a. Clearance Rates

It is recommended that the court take action to ensure that they clear/dispose of at least as many cases as have been filed /reopened/reactivated in a period by having a clearance rate of 100% or higher.

Clearance Rate: the clearance rate is a measure of the files disposed as against the files commenced. It is a good measure of how many matters have been disposed of during a particular period of time. Expressed as a percentage, the higher the percentage the more matters have been disposed of.

The calculation is performed as follows:

$$\text{\% Clearance Rate} = \frac{\text{Files Disposed}}{\text{Files Started}} \text{ X 100}$$

b. Number of Hearings to Disposition

It is recommended that the court take steps to address any existing culture of adjournment which is contributing to the low clearance rates.

Average number of hearings per disposition: this is a measure of the number of hearings as compared to the number of matters disposed. Although this is not an indicator for specific files, it may be used as an indicator of the overall ratio of hearings to dispositions. It may also be used as an indicator of how efficiently court time is being utilized. The lower the average number of hearings to dispositions, the greater the efficiency in the use of court time.

It is calculated as follows:

$$\text{Average No. of Hearings per Disposition} = \frac{\text{No. of Hearings}}{\text{No. of Matters Disposed}}$$

c. Time to Disposition

Time to Disposition answers the question: "What percentage of the cases disposed of were disposed of within the agreed and established performance time standards?" It calculates the length of time passed from case filing to case resolution, with the recommendation that the result be compared to some stipulated or agreed upon case-processing time standard.

This measure is used together with the Clearance Rates and the Age of Active/Pending Caseload and is a useful tool to assess the length of time it takes a court to process cases. This measure can be used to compare a court's performance to its own standards, as well as the national guidelines for timely case processing.

d. Trial **Date Certainty/Credibility**

The Trial Date Certainty Rate (also called Trial Date Credibility Rate) is calculated using the total number of Trial Dates and the number of Trail Dates which have been adjourned to calculate the ratio of trials which have been adjourned.

To calculate the certainty/credibility rate, subtract the number of adjourned trial dates (x) from the number of trial dates set down (y), then divide the result (z) by the number of trial dates set down.

Y – X = Z, then Z ÷ Y = Certainty/Credibility Rate
or
(Y-X) ÷ Y = Certainty/Credibility Rate

Certainty/credibility trial date (no adjournments) = a certainty/credibility rate of 1

A number less than 1 indicates that trials have been adjourned. The lower the number the lower the trial date certainty/credibility. If the result is a negative number, it means there are more adjournments than trial dates set; this is the worst-case scenario.

For the qualitative performance standards, a similar approach can be taken, and the chapter on Procedural Fairness describes some measurement and evaluation tools. See also, Peter Jamadar and Elron Elahie, ***Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago*** (2018) and Judicial Education Institute, ***Procedural Fairness: A Manual- A Guide to the Implementation of Procedural Fairness in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago*** (2018).

Judges' Model Checklist for Case Management and Preparation of Decisions

As an aid to facilitating the effective and efficient management and timely delivery of judgments in criminal matters, the following checklist template is offered for consideration. It was developed by the Caribbean Association of Judicial Officers, after consultation with select regional judicial officers who are subject matter experts, and after reflecting on and incorporating feedback from a regional workshop that explained and demonstrated its intent and use.

This generic template is intended to facilitate structure, organization of materials, accuracy of the record, clarity around facts and law, and general efficiency and effectiveness in the management of judge alone proceedings, and the writing of reasons/ judgments in a

timely manner. The aspiration is to ensure compliance with constitutional, ethical, and institutional qualitative and quantitative performance standards in the conduct of judge alone trials. Fulfilment of these standards can eradicate delay, improve case disposition rates, increase respect, regard, and belief in the authority of courts, judicial officers, and the rule of law, and as well enhance public trust and confidence in criminal justice systems.

It must be emphasised that this template is a generic one and should be adapted to suit the particular laws and needs of your jurisdiction. Statements of principle are not authoritative and are only intended as prompts to trigger inquiry. Please confirm the legal correctness of all formulations for your jurisdiction.

Explanatory Note

The intention and purpose of this checklist template is to help judges and their teams manage judge alone criminal trials effectively and efficiently, and as well to support the timely delivery of decisions. It tries to do so in several ways. Organizationally, it creates fourteen discreet sections which follow, generally, the sequential unfolding of a criminal trial, and a fifteenth which has general application. In this way, it serves as a practical checklist of best practices and relevant considerations. It allows for case specific information to be extracted and placed in the template prior to, during, and at the end of a matter, and for this information to be easily and readily accessible and available.

Strategically, it facilitates effective and efficient case and caseflow management, as all relevant steps are easily identifiable, as well as relevant observations and notes. It also facilitates timeliness in the hearing and disposition of matters, as the information recorded addresses issues that commonly arise in cases and encourages preliminary assessments of relevant considerations, facilitating efficient decision making. Professionally, it supports competence and public trust and confidence.

Having a checklist and a single template that organizes all relevant information both sequentially and in an issue-driven manner, allows for improved thoroughness and accuracy in both case management and disposition. All these considerations support the fair hearing and timely disposition constitutional benchmarks and standards. Finally, this checklist template may be used in electronic or hard copy formats.

Checklist Contents

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SECTION A: CASE MANAGEMENT DETAILS		
	PARTICULARS	**NOTES**
Case Number		
Name of Defendant		
Offence/Charge		
Special Circumstances of the Defendant		Examples: Disabilities, vulnerabilities, age, interpretation needed etc. Considerations of whether the defendant may be a victim-survivor of sexual exploitation, forced labour, domestic servitude, human trafficking, other forms of modern slavery.
Special Trial Needs		Examples: Open court, in-camera, screens, victim support
Format of Trial		Examples: In-person, Virtual, Hybrid/Blended
Visit to the locus in quo		
Interlocutory Applications or Motions		Examples: Motion to Quash, Amendment to the Information
Voir dire		
Plea Discussions		
Trial Commencement Date		
Goodyear/ SI/ MSI See Sentencing Exercise		

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION B: CHRONOLOGY		
	PARTICULARS	**NOTES**
Date of Incident/ Allegation/ Offence		
Date of Arrest		
Date of Charge		
Date Indictment Filed		
Date of Arraignment		
Plea	☐ Not Guilty ☐ Guilty See Sentencing Exercise	
Bail Details		
Interlocutory Applications or Motions		Details and outcome, e.g. Bad Character, Amendment of Information/Complaint, Severance, Fitness to Plead.
Commencement of Trial		Example: Note whether there was an opening address etc.
Order of Prosecution Witnesses		List names of witnesses and dates of testimony
Close of Prosecution Case		
No Case Submission		
Case for Defence		List names of witnesses and dates of testimony
Close of Defence Case		
Verdict		
Disposition date		

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION C: THE OFFENCE (LAW)		
	PARTICULARS	**NOTES**
Statement of Offence		
Particulars of Offence		
Applicable Law		Examples: Statute, common law.
Actus reus The voluntary act or omission that comprises the physical element of the offence		Identify relevant witnesses and exhibits
Mens rea The mental element of the offence, which may involve intent, or (less culpably) negligence or recklessness.		Identify relevant witnesses and exhibits

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION D: GENERAL DIRECTIONS IN LAW		
	PARTICULARS	**NOTES**
Burden of Proof		The general rule is that the burden of proof rests on the Prosecution.
Standard of Proof		The general rule is that the Prosecution must make the fact-finder sure of the guilt of the/each defendant.
Reverse Burden and Standard of Proof		Example 1: Where statute or circumstance reverses the legal burden as an exception to the general rule (e.g. a negative averment or a matter peculiarly within their knowledge), the standard of proof is on a balance of probabilities (it is more likely than not). Example 2: Where the defendant raises certain defences, the burden of disproving them to the criminal standard remains on the Prosecution.
Assessing Credibility		Determine if the evidence is credible/believable and reliable and if so, what weight is to be attached. Consider consistent and corroborating evidence which supports veracity and reliability, as well as conflicting and contradictory evidence which cause doubt about veracity and reliability. Resolve all conflicts. Be fair and even-handed and clearly state why you believe/disbelieve a witness/part of their evidence.

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SECTION D: GENERAL DIRECTIONS IN LAW		
	PARTICULARS	**NOTES**
Drawing Inferences		This is the process by which you draw a conclusion of fact from some evidence you regard as reliable. (Guard against speculation.)
Documentary Evidence		
Expert Opinion Evidence		These are intended to be objective, unbiased opinions of a technical or scientific nature, from a witness with specialist knowledge, experience, and skills within their area of expertise, whether paid/not. While you cannot substitute your own views, you can still, after careful consideration, choose whether to accept the expert's opinions in whole/part, and what weight to attach, if any.
Warning Against Speculation and Assumptions		You must be cautious against making unwarranted, uninformed, or biased assumptions about the behaviour or demeanour of the complainant, defendant, or witnesses.
Impact of Delay		Allowances should be made for the fact that generally, the longer the time since an alleged incident, the more difficult it may be for accurate recollection.

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SECTION D: GENERAL DIRECTIONS IN LAW		
	PARTICULARS	**NOTES**
Silence		The defendant is entitled to remain silent and call no witnesses, without adverse inference or consequence. They remain innocent until proven guilty. They do not have to prove their innocence. This is subject to statutory or other exceptions which permit adverse inferences to be drawn in the face of silence.
Other Factors		

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION E: EVIDENCE						
Matters Not in Dispute						
	YES/ NO	**PROSECUTION CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
	Yes ☐ No ☐					Example: Formal Admissions
	Yes ☐ No ☐					
Matters In Dispute						
	YES/ NO	**PROSECUTION CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
1. Identification (see Identification below for details)	Yes ☐ No ☐	Eyewitness	Yes ☐ No ☐			Example: Identify the witnesses
		ID Parade	Yes ☐ No ☐			
		Confrontation	Yes ☐ No ☐			
		DNA	Yes ☐ No ☐			
		Voice Identification	Yes ☐ No ☐			
		CCTV Footage	Yes ☐ No ☐			

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SECTION E: EVIDENCE						
Matters In Dispute						
	YES/ NO	**PROSECUTION CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
		Visual/ Photograph	Yes ☐ No ☐			
		Other	Yes ☐ No ☐			
2. Out of Court Statements (see Section F below for details)	Yes ☐ No ☐					
	YES/ NO	**PROSECUTION CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
3. Direct	Yes ☐ No ☐	• Witness 1				
		• Witness 2				
		• Witness 3				
4. Circumstantial	Yes ☐ No ☐					Prosecution seeks to prove separate events and circumstances which can, together with other facts, only be reasonably explained by the guilt of the defendant. Identify the specific events and circumstances, indicate if you accept them, consider evidence which may rebut them. Attach weight, if any, only if accepted.

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SECTION E: EVIDENCE					
	YES/ NO	**PROSECUTION CASE**	**STRENGTHS**	**WEAKNESSES**	**NOTES**
5. Expert/ Scientific	Yes ☐ No ☐				
6. Exhibits	Yes ☐ No ☐				Identify relevant witness
7. Other	Yes ☐ No ☐				Explain
Material Inconsistencies on the Prosecution Case					
	STRENGTHS		**WEAKNESSES**	**NOTES** How has the inconsistency been resolved?	

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION F: OUT OF COURT STATEMENTS					
	CHECK	**PARTICULARS**	**ADMISSIBILITY**	**RELIABILITY**	**NOTES**
Indicate which of the below the State/ Prosecution is relying on		*Name of Witness* *Exhibit Label* *Inculpatory/ Exculpatory/Mixed*	*Voluntariness* *Breaches of Judges' Rules* *Fairness*	*Contents of the statement can be relied upon if accepted as true*	*Was the admission made?* *Is it true?* *What weight attaches, if any?*
Written Statement Under Caution	Yes ☐ No ☐				
Interview Notes	Yes ☐ No ☐				
Electronic Interview	Yes ☐ No ☐				
Oral Utterances to Police	Yes ☐ No ☐				
Admission to Other Persons	Yes ☐ No ☐				
Other	Yes ☐ No ☐				
Mushtaq Direction?	Yes ☐ No ☐				Where you believe that the statement was made, that it is true, but you conclude that it was or may have been obtained or was induced by oppression or in consequence of something said or done to render it unreliable, you must disregard it.

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SECTION F: OUT OF COURT STATEMENTS	
	NOTES
Ruling: Reasons required at time of ruling on a voir dire.	Exercise care in relation to the extent to which reasons given can create the impression of prejudgment, prejudice, or bias. Consider whether it is necessary to give reasons at all, or to reserve until the final determination of the matter. Consider whether to accept the statement conditionally and reserve decision as to admissibility until the determination of the matter. Consider whether another judge should continue the hearing of the matter.

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION G: IDENTIFICATION					
	CHECK	**EVIDENCE**	**STRENGTHS**	**SPECIFIC WEAKNESSES**	**NOTES**
Nature of Identification Evidence		*Name of Witness Summary*			
Identification of a Stranger (See Turnbull Assessment)	Yes ☐ No ☐				It is possible for an honest, even very convincing witness to be mistaken. Mistakes in identification are a human possibility and sometimes, quite innocently so.
Recognition (See Turnbull Assessment)	Yes ☐ No ☐				Recognition of someone you know is more reliable than identification of a stranger. However, even then, it is possible to be honestly mistaken about someone you have known for years and quite well.
Visual/ Photographs	Yes ☐ No ☐				Are they helpful in understanding the evidence of the witnesses? What weight attaches, if any?
CCTV/Video	Yes ☐ No ☐				Is it helpful in understanding and strengthening the evidence of the witnesses? What weight attaches, if any?
Voice	Yes ☐ No ☐				Lay listeners, scientific acoustic opinion, familiarity, duration of speech

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SECTION G: IDENTIFICATION					
	CHECK	**EVIDENCE**	**STRENGTHS**	**SPECIFIC WEAKNESSES**	**NOTES**
DNA	Yes ☐ No ☐				Scientific terms, match probability, prosecutor's fallacy.
Fingerprints	Yes ☐ No ☐				Ridge similarities, clarity, expert opinion
Other	Yes ☐ No ☐				Examples: use of social media, facial mapping
Turnbull Assessment					
	PARTICULARS			**NOTES**	
	Opportunity to register and record features *Reliability of recall*			*Fleeting glance, good quality, poor quality*	
How long was the period of observation?					
At what distance?					
In what light?					
Was the observation impeded?					
Has the witness ever seen the defendant before?					
How often?					
If only occasionally, had there been any special reason for recall?					
Time elapsed between original observation and subsequent identification					

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SECTION G: IDENTIFICATION					
	CHECK	**EVIDENCE**	**STRENGTHS**	**SPECIFIC WEAKNESSES**	**NOTES**
Any material discrepancy between first description and actual appearance?					
Is it supported/corroborated by any other evidence?					
	PARTICULARS			**NOTES**	

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION H: NO CASE SUBMISSION				
	DEFENCE ARGUMENTS	**PROSECUTION REPLY**	**RULINGS/ REASONS**	**NOTES**
First Limb of Galbraith				There is no evidence to prove an essential element of the offence.
Second Limb of Galbraith				The evidence adduced by the Prosecution has been so manifestly discredited or is so weak that it cannot conceivably support a guilty verdict. Credibility issues do not normally result in a finding that there is no case to answer.

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION I: SPECIAL CONSIDERATIONS OR DIRECTIONS		
	PARTICULARS	**NOTES**
Corroboration Warning		Relevant, admissible, and credible evidence which is independent of the source requiring the corroboration and which implicates the defendant.
Joint Enterprise		Principal and Accessory liability. Considerations of joint participation and joint principals. Considerations also of aiding, abetting, counselling, procurement.
Accomplice		Do the circumstances of the case, issues raised, and the content and quality of the witness's evidence require a special care/ caution warning?
Lucas Direction		Is it necessary? If yes: 1. the lie must be deliberate; 2. the lie must relate to a material issue; 3. the motive for the lie must be a realisation of guilt and a fear of the truth; and 4. the statement must be clearly shown to be a lie by admission or by evidence from an independent witness.
Post-offence Conduct		1. Is it relevant? 2. Did the defendant actually do or say those things? 3. If you are sure they did, consider any explanation in the context of all the evidence, because they may have done so for a reason other than guilt. 4. If you are sure that it is not for some other reason, then you can consider it together with all the other evidence in deciding its weight and whether the defendant is guilty.

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SECTION I: SPECIAL CONSIDERATIONS OR DIRECTIONS		
	PARTICULARS	**NOTES**
Evidence of Children		The law regards children as being particularly vulnerable. Their evidence must be approached in a careful fashion. In assessing the evidence of a child, have regard to the age and maturity of the child; the child's capacity to observe, recollect, understand, answer intelligently; and the child's sense of moral responsibility.
Persons with Disabilities and Vulnerabilities		
Sexual Offences		General caution against bias, stereotypes and behavioural assumptions e.g., the ideal victim.
Any Others		

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION J: DEFENCE CASE					
	CHECK	**PARTICULARS**	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Did the Defendant					
Remain Silent	Yes ☐ No ☐				Right to remain silent – in principle, no adverse inferences
Give Sworn Testimony	Yes ☐ No ☐				The defendant must be assessed for credibility by the same standard as any other witness who gives sworn evidence.
Adopt Out of Court Statement (or exculpatory parts)	Yes ☐ No ☐				Consider the statement as a whole. Note that it is usually assumed that the incriminating parts are likely to be true, otherwise, why say them, whereas denials and explanations may not have the same weight.
Special Defence (See section on Special Defences)	Yes ☐ No ☐				Consider Burden of Proof and Standard of Proof.
Call any Witnesses	Yes ☐ No ☐				Consider overall credibility, relevance, and support for the Defence's case in raising reasonable doubt, or disproving material aspects of the Prosecution's case.
Put their case during Cross Examination	Yes ☐ No ☐				What is put to a witness is not evidence; rather, it is the witness's answer that is the evidence.

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SECTION J: DEFENCE CASE				
Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Duress				Once the Defence raises duress, it is for the Prosecution to disprove it. a) Was the defendant threatened? b) Was the defendant threatened in a way that they believed that they, or their immediate family, or someone for whom they felt responsible, would be subject to immediate (or almost immediate) death or serious violence and there was no reasonable avenue open to the defendant to avoid the threat/s? c) Was/Were the threat/s the direct cause of the defendant's actions? and d) Would a sober person of reasonable firmness of the defendant's age, sex, gender, and character have been driven to act as the defendant did?

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SECTION J: DEFENCE CASE				
Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Self-defence				a) Was the defendant under attack or honestly believe that they were under attack? b) Did the defendant do no more than was reasonably necessary to repel the attack or presumed attack? Or, Was the response disproportionate to the attack or presumed attack? c) Note that a defendant may do what they honestly and instinctively consider to be necessary, and is not required to weigh to a nicety, with precision, the extent of the response. d) An intent to kill or cause grievous bodily harm is not inconsistent with an intent to defend oneself.

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SECTION J: DEFENCE CASE				
Special Defences				
	PARTICULARS	STRENGTHS	WEAKNESSES	NOTES
Provocation				a) Was the defendant provoked into losing their self-control? And b) Would a reasonable person have reacted to the same provocation in the same way as the defendant did?
Alibi				There is no burden on a defendant to prove that they were elsewhere. Rather, it is the Prosecution which must prove their case beyond reasonable doubt. Disbelief in or rejection of an alibi does not lead to an assumption of guilt.
Insanity				Was the defendant labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the acts they were doing, or that what they were doing was wrong?

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SECTION J: DEFENCE CASE				
Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Diminished Responsibility				a) Did the defendant, at the time of the commission of the offence, suffer from an abnormality of mind? b) Did the abnormality of the mind stem from either a condition of arrested or retarded development of the mind, or any inherent cause, or was it induced by disease or injury? and c) Did the abnormality of mind substantially impair their mental responsibility for what they did (i.e. the acts or omissions which caused the death)?
Accident				In offences which require an intent to produce a certain consequence to be established in order to prove guilt, 'accident' that negates the requisite intentionality may be raised as a defence in some circumstances.

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SECTION J: DEFENCE CASE				
Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Others				
Aspects of the Prosecution Case that Support or Corroborate Defence Case				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION K: GOOD CHARACTER				
	CHECK	**PARTICULARS**	**WEIGHT**	**NOTES**
Is the Defendant entitled to a Good Character Direction?	Yes ☐ No ☐ If Yes ☐ Full ☐ Modified			No obligation to give absurd or meaningless directions. Notwithstanding good character a person can still commit a crime.
Credibility Limb				A person of good character is more likely to be truthful.
Propensity Limb				A person of good character is less likely to commit a crime, especially of the nature charged.

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION L: BAD CHARACTER					
	CHECK	**PARTICULARS**	**ADMISSIBILITY** Is it admissible? Reasons on the record.	**EFFECT/ WEIGHT**	**NOTES**
Does an issue of Bad Character arise in the proceedings?	Yes ☐ No ☐				
In relation to the Defendant?	Yes ☐ No ☐				
Does the evidence amount to bad character?	Yes ☐ No ☐				
Which Gateway?					
Credibility Limb	Yes ☐ No ☐				
Propensity Limb	Yes ☐ No ☐				
Is it in relation to a Non-defendant?	Yes ☐ No ☐				
Which Gateway?					Note the Enhanced Relevance Test. Avoid satellite issues. Consider the reputation of the dead.

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION M: VERDICT	
	PARTICULARS/REASONS
Guilty	
Guilty of a Lesser Count	
Not Guilty	

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION N: SENTENCING EXERCISE			
	PARTICULARS		**NOTES**
Charge/Count	Name of Charge		Maximum Penalty:
Separate Hearing			Consider what evidence and information is needed to conduct a fair and just sentencing hearing.
Range/Starting Point (relative to offence only)	Aggravating Factors 1. 2.	Mitigating Factors 1. 2.	Relevant precedents: Range: Starting Point:
Factors Relevant to Offender (upward/ downward or no adjustment)	Aggravating Factors 1. 2.	Mitigating Factors 1. 2.	Adjustment:
Guilty Plea Discount (justify if more or less than one third)			
Discount for Time Spent			
Pre-sentencing Reports			Examples: Probation Reports, Psychosocial Reports
Victim Impact Statements			Consider whether a victim impact statement is useful, both to the sentencing process and decision, and from a therapeutic justice perspective.
Other Relevant Considerations			

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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SECTION O: SENTENCE		
	PARTICULARS	**NOTES**
Count 1		Custodial – Concurrent/Consecutive. Non-custodial - Default
Count 2		
Ancillary Orders		Examples: Compensation, counselling, anger management, community service, referrals to specialist, Restorative Justice courts, tribunals such as Drug Treatment Courts.

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

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RE-VICTIMISATION AND NON-PUNISHMENT Relevant throughout the entire process, with both procedural and substantive implications					
	CHECK	**PARTICULARS**	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Consider whether the defendant may be a victim/ survivor of Human Trafficking, Modern Slavery, Sexual Exploitation, Domestic Servitude, or Forced Labour	Yes ☐ No ☐				
Re-victimisation Possibilities	Yes ☐ No ☐				
Non-punishment Applicability	Yes No				

Case Management Details | Chronology | The Offence (Law) | General Directions in Law | Evidence | Out of Court Statements | Identification | No Case Submission | Special Considerations or Directions | Defence Case | Good Character | Bad Character | Verdict | Sentencing Exercise | Sentence | Re-victimisation and Non-punishment

Chapter 25 – Judge Alone Trials

In this Chapter: **Introduction | Statutory Regime | Burden and Standard of Proof | Fact Finding | Impartiality and Fairness | Approach to be Taken by Appellate Courts | Elements Required in a Judgment | Voir Dires | Incorporating Voir Dire Evidence in the Main Trial | No Case Submissions | Case Management and Judgment Writing Checklist Template**

Introduction

The introduction of judge alone trials for criminal matters in the High Courts of the Common Law Caribbean jurisdictions has been incremental, both in terms of jurisdictions which have done so, and as well as within jurisdictions in relation to the types of matters for which they are available, either as an option or compulsorily. The following Caribbean states have all introduced judge alone trials in some form: Jamaica; Belize; Trinidad and Tobago; Cayman Islands; Turks and Caicos Islands; Antigua and Barbuda. The Bahamas is now among the countries in which such trials are now available with the introduction of the **Trial by Judge Alone (Miscellaneous Provisions) Act, 2024**, which was assented to by the Governor General on 19 June 2024 and came into force on 31 March 2025.

Before the advent of trials by jury, English criminal courts engaged in trial by ordeal, in which the guilt or innocence of the defendant was determined by subjection to dangerous or painful tests (such as ordeal by hot water, by hot iron, by submersion in water) believed to be under divine control. In June 1215, the Magna Carta was promulgated, and it provided for trial by juries and judgment by peers in England. In November 1215, Pope Innocent III convoked the Fourth Council of the Lateran, which among other things, banned trial by ordeals. However, even before the Magna Carta, juries were known in England under King Henry II (1154-1189). Some scholars believe that the jury system may likely have had some originating sources in Islamic law practiced in Sicily, which at the time was a Norman Kingdom with strong relations between its Kings and Henry II (see John A Makdisi, ***The Islamic Origins of the Common Law*** (1999) 77 NC L Rev 1635).

Juries in those days were witnesses who had knowledge of the committed crime. They informed a travelling judge of the facts, and the judge decided the law. This was an economical system which did not require many judicial officers. This jury of witnesses evolved into the jury systems that we know today.

Many Commonwealth countries have introduced trials without juries. There are several states in the civil law that do not have any form of jury trial. Other states use a collaborative court model of lay adjudicators, a jury, sitting alongside professional judges in criminal matters. At this time in our region, six Commonwealth Caribbean countries have to a certain extent introduced judge alone trials. St Lucia is in the process of drafting legislation to introduce judge alone trials. However, the approaches to judge alone trials in the Caribbean vary. In Belize, for example, judge alone trials are mandatory with regard to

certain offences and discretionary in relation to some others, whereas in other countries such as Trinidad and Tobago, it is available for all indictable offences provided that the defendant elects to choose a judge alone trial.

The shift to judge alone trials is prompted by many factors, including challenges faced in jury trials. In 2020, Saunders PCCJ highlighted some of these challenges in the Belizean case of ***R v Flowers [2020*] CCJ 16 (AJ) (BZ), [2020] 5 LRC 628** at para 58, where he opined:

> Jury trials have actually become somewhat fraught. Many Commonwealth countries have abolished this mode of trial. That jurors are absolved from giving reasons for their verdicts does not sit well with society's increasing emphasis on transparency. Today, all manner of information is easily and readily available to jurors. It is impossible to ensure that at least some of them will not be improperly influenced by material they access, whether inadvertently or otherwise, that is pertinent to the trial or the accused. Jury management is expensive and onerous. And jury tampering and juror intimidation have been a problem in some States.

In fact, some forty years ago in 1980, a High Court judge in Bermuda, in a bold and courageous innovation, attempted to hear a criminal matter without a jury because of the difficulty in assembling an impartial jury in a small island state. However, the Court of Appeal in ***Re Palmer* BM 1980 CA 21 (Bermuda CA, Criminal Appeal No 4 of 1980, 1 January 1980)** at pg 7**,** discussed in Dr Ramesh Deosaran's ***Trial by Jury in a Post-Colonial Multiracial Society*** (1981) 1(6) The Lawyer 5 at pg 9, was unequivocal in denouncing this initiative: 'there has been, and there is now, only one method of trying persons committed for trial at the Supreme Court and that is by a judge sitting with a jury.'

Yet the concerns of the Bermudian judge were clearly prescient. As long ago as 1937, the American jurist, Oppenheimer, in ***Trial by Jury*** (1937) 11 U Cin L Rev 119, at pg 142, had this to say:

> We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their numbers coerce the others into submission or drive them into open revolt.

Some Essential Guidelines

In a criminal judge alone trial, judges no longer sum up to a jury but instead must produce a written reasoned judgment. There are seminal differences in jury trials and judge alone trials that affect the practice, procedure, and process of case management and judgment writing. In the High Court case from Antigua and Barbuda, ***R v Powell*** **[2022] ECSC J0112-1, (ECSC HC (Antigua and Barbuda), Case No ANUHCR 2019/0081, 12**

January 2022), at para 7, Williams J stated: "In a Judge-alone trial, or a 'Bench Trial', a Judge sits without a jury. The Judge is both the Judge of the law and the forum of fact".

Judge alone trials are still a relatively recent phenomenon in Caribbean criminal courts, though there are exceptions, as for example, the Jamaican Gun Court. The law is constantly evolving in this area, as is to be expected whenever a new process is introduced. What follows the Legislative Framework section below is a summary of the available and accessible case law developments with a focus on appellate decisions. Care needs to be taken to ensure compliance with any jurisdictionally prescribed requirements, particularly those set out under the **Trial by Judge Alone (Miscellaneous Provisions) Act, 2024**. This caution is necessary, as the jurisdiction for judge alone trials has been established regionally based on statutory underpinnings.

Statutory Regime

The **Trial by Judge Alone (Miscellaneous Provisions) Act, 2024 ('the Act')** represents a significant procedural reform in The Bahamas, establishing the process for a defendant waive their right to a jury trial and to elect to be tried by a judge sitting alone. Pursuant to s 3(1), the Act applies to all indictments brought under the **Criminal Procedure Code Act, Chapter 91**, but does not operate retrospectively (see s 3(2)).

In judge alone trials, the judge assumes the dual roles of arbiter of law and trier of fact. The trial judge therefore retains the "power, authority, and jurisdiction" ordinarily possessed in a trial where the judge sits with a jury and is, by virtue of s 5 of the Act, also seized with, "the power to determine any question and to make any finding which would have been required to be determined or made by a jury."

Ordering a Judge Alone Trial

Trial by jury remains the default mode of trial for indictable offenses heard before the Supreme Court. However, pursuant to s 4(1) of the Act, a defendant may through their express and voluntary election opt to be tried by a judge alone. The cornerstone of the Bahamian legislative model for judge alone trials is therefore the concept of election.

A defendant has two primary opportunities to make their election to be tried by a judge alone:

a. **At Arraignment:** A defendant who appears before the Supreme Court on arraignment on a voluntary bill of indictment and who does not indicate an intention to plead guilty, may elect for a judge alone trial during the arraignment hearing. The Act places a positive duty on the presiding judge to inform the defendant in those circumstances that they "may waive [their] right to a trial by jury and elect to be tried by judge alone" (see s 4(2) of the Act).

b. **Post-Arraignment:** Where no election is made at the arraignment, the defendant may, under s 4(3) of the Act, subsequently file their election with the Registrar of

the Supreme Court. This must be done within sixty (60) days of the adjournment of the arraignment hearing or by a later date, if so ordered by the judge. A copy of the election must be served on the prosecution.

While judge alone trials are at the defendant's option, the court is vested with a statutory safeguarding function under s 4(4) and (5) of the Act. Under these provisions, the judge must be satisfied that the defendant's choice is fully informed before making the order giving effect to the defendant's election for a judge alone trial. The process will differ based on whether the defendant obtains legal advice, in which case s 4(4) applies, or chooses not to seek advice, in which case s 4(5) applies. In either case, the defendant must formally certify their decision to the court.

Before a judge can make an order for the defendant to be tried by judge alone, under s 4(4) of the Act, the judge must be satisfied of two conditions:

a. that the defendant has sought and received legal advice in relation to trial by judge alone; and

b. that the defendant has filed a **Certificate of Confirmation of Legal Advice on Electing Trial by Judge Alone** (**Form A** in the Schedule to the Act) with the Registrar of the Supreme Court. This Certificate formally documents that the election was made with the benefit of legal advice from an attorney and must be signed by both the defendant and the advising attorney. Through the Certificate, the defendant confirms:

    i. the receipt of legal advice on their rights, possible defences, penalties, consequences, and implications of electing to be tried by judge alone;

    ii. that they have had sufficient time to confer with the attorney about this mode of trial and understand the implications of their election; and

    iii. their agreement, ***without reservation, voluntarily and of their free will***, to be tried by judge alone and that their agreement was not secured by "promise, inducement, threat, coercion or force of any kind".

Where the defendant does not wish to consult with an attorney and seek legal advice concerning their election, s 4(5) of the Act permits the judge to order a jugdge alone trial only if satisfied of the following:

a. The defendant is **competent** to elect a trial by judge alone and has waived their right to consult an attorney for advice;

b. The defendant **understands the effect** of their election;

c. The election has been made **clearly and unequivocally**; and

d. The defendant has filed a **Certificate of Waiver of Legal Advice on Electing Trial by Judge Alone (Form B** in the Schedule to the Act) with the Registrar of the Supreme Court. The Certificate, which must be signed by the defendant.

It is important to also note that **a defendant** whose trial is set to be heard by a jury, having not elected to be tried by judge alone, may, up to 60 days before the commencement of the trial, apply to the court to be tried by judge alone (see s 4(8) of the Act). However, the court's power to grant this application is discretionary ("the court *may* make an order granting the application" (emphasis added); see s 4(10)(b)).

Special Conditions: Joint Trials and Multiple Charges

Joint Trials

Section 4(6)(a) of the Act sets out the requirements for a judge alone trial to be ordered in a case involving multiple defendants. Under the provision, a judge alone trial cannot be ordered in such a case unless the judge is satisfied that **all** of the defendants have elected for this mode of trial and have each filed the requisite Certificate of Confirmation or Waiver, as the case may be, (**Form A or Form B**) (s 4(6)(a) of the Act). Thus, the refusal of a single co-defendant prevents trial by judge alone for all.

Multiple Charges

If an indictment contains multiple charges to be tried together, s 4(6)(b) of the Act requires that the defendant must elect for a judge alone trial in respect of **all** the charges. Hybrid trials, where some charges are heard by a judge alone and others by a jury, are therefore not permitted where an indictment/information contains multiple charges to be tried together.

Reverting to a Jury Trial

Where a defendant elects and the court orders a judge alone trial, the defendant retains the right to reconsider their waiver of a jury trial and to apply for the proceedings to be reverted to a trial before a jury. Pursuant to s 4(7) of the Act, such a defendant may, at any point up to sixty (60) days **before** the trial's commencement, apply to change their election back to a trial by jury. In such a case, the Court has no discretion in acceding to the defendant's request as under s 4(10) of the Act, "the court **shall** make an order granting the application [made under s 4(7)]" (emphasis added).

The Duty to Give Reasons

A fundamental distinction between a jury verdict and a judicial verdict is the requirement to provide reasons. Section 7 of the Act prescribed the approach for a judge sitting alone in giving reasons for their decision.

The judge must deliver a verdict at the close of the cases for the Prosecution and Defence. Where the verdict is to convict, s 7(1) mandates the judge to give a written judgment

"stating the reasons for [the] verdict, at the time of conviction." Where the verdict is to acquit, the judge generally ***may*** give reasons for the acquittal (s 7(4)), save that where the Prosecution requests reasons for the acquittal the judge ***shall*** give reasons within 7 days of the request or at a later time which the judge must inform the parties of (s 7(5) and (6)).

This judgment must include "the principles of law applied by the judge and the findings of fact on which the judge relied" (s 7(2)). The Act explicitly requires, at s 7(3), that, if "any law requires a warning to be given to a jury in any case, a judge sitting alone **shall take the requirement for a warning into account**" (s 7(3)) (emphasis added). This ensures that the underlying principles of caution (e.g., in relation to identification evidence) are preserved and applied in the judge's deliberative process.

Burden and Standard of Proof

Both judge alone trials and jury trials have the same burden and standard of proof requirements. Williams J in the Antigua and Barbuda High Court case of ***R v Blanchette*** **[2021] ECSC J0715-1 (ECSC HC (Antigua and Barbuda), Case No ANUHCR 2018/0053, 15 July 2021**) stated at para 28:

> Even though this was a 'Bench Trial', conducted by a Judge-alone, sitting without a jury…the burden of proof and the standard of proof remain the same as they were and are in every criminal case. It is the Crown that has the responsibility of satisfying the forum of fact that it was the Defendant who committed the offence as alleged; and the Crown can only do so by making the forum of fact feel sure of the Defendant's guilt.

Fact Finding

The CCJ in ***Salazar v R*** **[2019] CCJ 15 (AJ)**, at para 35, explained in summary the process of fact finding in a judge alone trial:

> As a rule, the judge will consider the prosecution's evidence first. If that evidence seems strong enough to carry a conviction, the judge will consider the evidence of the defence. The judge will then look at the totality of the evidence to reach a final decision. It is there where the intercommunication and overlapping take place. It is after this polymorphic process that the judge needs to arrange his or her judgment in a logical order which will not always be able to reflect the complicated thinking process as such.

Impartiality and Fairness

In judge alone trials, a judge has to be aware of guarding against the appearance of bias and being able to demonstrate that they are keeping an open mind. The Caribbean Court of Justice ('CCJ') decision in the Belizean case of ***Manzanero v R*** **[2020] CCJ 17 (AJ) BZ**, was concerned with the trial judge's role and the importance of fairness in judge alone trials. The Court, at para 18, stated: "Attention should therefore be given to ensuring that

defendants receive from a judge sitting alone a trial that appears to be no less fair than they would have received at a jury trial."

Duty to Give Reasons

Unlike juries, a judge conducting a trial without a jury must give reasons for their decision, whether it results in a conviction or an acquittal. In a jury trial, the safeguards for the lack of reasons are found in the strict rules of admissibility and in the summation to the jurors, which provide them with 'clear, precise, sometimes even detailed directions on the legal issues and on the (rules of) evidence. It is to be assumed that jurors usually understand and follow these directions and will do their level best to reach a fair decision, thus satisfying the relevant constitutional requirements: ***Salazar***, at para 26.

In ***Public Service Board of NSW v Osmond*** **(1986) 159 CLR 656**, it was explained that reasons are important, as justice must not only be done but also be seen to be done. The extent of the duty to give reasons varies according to the nature and circumstances of the case and decision. The CCJ in ***Salazar***, at para 27, quoted the case of ***Taxquet v Belgium*** **App No 926/05 (ECtHR, 16 November 2010)**, at para 91, to provide the following useful clarification:

> In accordance with the European Court of Human Rights, reasoned judgments oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case… While courts are not obliged to give a detailed answer to every argument raised … it must be clear from the decision that the essential issues of the case have been addressed (citations omitted).

The Court of Appeal of Northern Ireland in ***R v Thain*** **[1985] NI 457**, at 478, provided the following useful guidance on the extent of a judge's duty to give reasons:

> Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning carried out in sealed compartments with no intercommunication or overlapping, even if the need to arrange a judgment in a logical order may give that impression. It can safely be inferred that, when deliberating on a question of fact with many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognise the issues and (b) view in its entirety a case where one issue is interwoven with another.

With respect to the duty of the judge giving judgment in a bench trial, the Court of Appeal of Northern Ireland in ***R v Thompson*** **[1977] NI 74**, at para 83, also stated:

> He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side.

> His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts.

The Court of Appeal of the Cayman Islands in ***Richards v R*** **(2001) CILR 496**, stated at para 32:

> When a trial judge sitting alone has advised himself of the applicable principles of law and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind and therefore heeded his own warning. No specific form of words is necessary for this demonstration, "what is necessary is that the Judge's mind upon the matter should be clearly revealed" (citations omitted).

See also ***R v Simpson; R v Powell*** **[1993] 3 LRC 631** at 641, per Downer JA.

In ***Megrahi v HM Advocate*** **2002 JC 99, 2002 SCCR 509**, the High Court of Justiciary in Scotland concluded at para 18:

> In our view these observations are relevant to a written judgment under article 5 (6) of the Order in Council by which, in similar language, the trial court is required to state "the reasons for the conviction". It is plain that reasons do not require to be detailed; that the trial court does not have to review every fact and argument on either side; and that reasons do not require to be given for every stage in the decision-making process.

Similarly, in the case ***Chiu Nang Hong v Public Prosecutor*** **[1964] 1 WLR 1279**, the Court stated at pg 1285:

> For in such a case a judge, sitting alone, should, in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed.

Therefore, where a court does not address its mind to a specific fact or matter may not be fatal to the court's conclusion. In the case ***Bekoe v Broomes*** **[2005] UKPC 39, (2005) 67 WIR 301**, the Privy Council quoted with approval, Jones JA, at para 14: "While he [the trial judge] had not stated in his reason that he had given consideration to the matters raised in this appeal by attorney for the Appellant, it cannot be said that they were so

compelling that his failure to detail his view on them was fatal to the conclusion to which he came." The Board commented further at para 14, saying:

> Their Lordships regard this expression of opinion as quite supportable and would add in parenthesis that a judge sitting without a jury does not necessarily have to review every fact and argument presented to him. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury: cf *R v Thompson* [1977] NI 74 at 83, per Lowry CJ.

These principles were approved in the Cayman Islands case of ***Martin v R* (Cayman Islands CA, Criminal App No 2 of 2010)**. In this case, the appellant appealed against conviction, alleging that the trial judge sitting without a jury only made brief reference to the evidence of one of the witnesses, in the context of a very short precis of the appellant's submission. It was further contended that the judge made no further finding of fact in relation to any of the evidence of another witness and for this reason, the conviction should be set aside. The court, at para 31, summarised the guiding principles as follows:

> A judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding, is not required to review every fact and to detail each argument on which the prosecution and defence rely as if her were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at the conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law have in anyway impacted the conclusion that he has reached.

Applying these principles, the court dismissed the appeal, as the reasons of the judge showed that he clearly appreciated the significance of the evidence relating to the witnesses and the submissions but was convinced that the Prosecution had proved beyond reasonable doubt that the appellant was guilty.

Similarly, in ***Whittaker v R* [2010] (1) CILR 29**, the Court of Appeal of the Cayman Islands, in a case concerning burglary and aggravated burglary, had to consider whether the trial judge's failure to explicitly warn herself of why there was a need for caution when dealing with identification evidence and that a mistaken witness could be a convincing witness, could render reasons flawed. The Court of Appeal held that in the circumstances of the case, the omission was irrelevant, as a judge sitting alone with no jury to direct, was under no obligation when giving judgment to state explicitly every proposition of law and review every fact or argument but should set out their conclusion and supporting reasoning. The court also noted that the judge generally directed herself on the need for special caution, because identification was made in difficult circumstances, and she had closely examined the quality of each identification.

In ***Salazar***, at para 29, the CCJ stated:

> Equally, a judge sitting alone and without a jury is under no duty to "instruct", "direct" or "remind" him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand.

Approach to be Taken by Appellate Courts

In ***R v Murray*** **[2015] NICA 54**, the Court of Appeal of Northern Ireland, at para 25, summarised the differences between jury and judge alone trials, and the appropriate approach of an appellate court to the reasons of a trial judge:

> …He [the trial judge] is not obliged to state every relevant legal proposition or review every fact or argument on either side. His task is to reach conclusions and to give reasons to support them view and to notice any difficult or unusual points of law. In general terms his obligation is to demonstrate how his view of the law informed his approach to the facts (R v Thompson [1977] NI 74). The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury were summarised in four points by Lord Lowry LCJ in R v Thain [1985] NI 457 at 474, [1985] 11 NIJB 31, based on earlier observations by Lord Lowry in the Court of Appeal in Northern Ireland Railways v Tweed [1982] 15 NIJB.
>
> > "1. The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.
> >
> > 2. The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusion.
> >
> > 3. The trial judge can be more readily reversed if he had misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose his judgement may be analysed in a way which is not possible with a jury's verdict.
> >
> > 4. The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusion."

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Elements Required in a Judgment

The following statements of opinion are informed by both general principles and statutory provisions. Care needs to be taken to ensure compliance with any jurisdictionally prescribed requirements. The cases cited are mainly from Jamaica, where the Court of Appeal has been clear that a trial judge in a judge alone criminal trial, has an obligation to demonstrate that they have sufficiently addressed their minds to the legal principles and warnings that are relevant and applicable to the case under consideration.

The court in ***R v Simpson; R v Powell*** **[1993] 3 LRC 631**, outlines that the written reasons following a judge alone trial should include:

a. the applicable legal principles which govern the conduct of the particular case.

b. the applicable warnings in relation to the special category of evidence.

c. the evidence relied upon for the decision.

d. the findings of fact and the inferences drawn.

A judge sitting without a jury ought to use plain words to indicate the applicable legal principles. It was pointed out in ***R v Balasal*** **(1990) 27 JLR 507**, at para 10, that it is "the duty of a judge [sitting without a jury] in his summation in the Gun Court to indicate the principles applicable to the particular facts and demonstrate his application of those principles". The failure to do this could result in the sentence being set aside and a new trial being ordered.

It is imperative that a judge sitting without a jury, in the reasons for the decision of the court, use words to illustrate that the relevant cautions and warnings were applied. Failure to do so may result in a conviction not being upheld on appeal. In the case of ***R v Cameron*** **(1989) 26 JLR 453**, it was held, at pg 457, that a judge sitting without a jury must 'demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the defendant he has acted with the requisite caution in mind'.

In ***R v Donaldson*** **(1988) 25 JLR 274**, in dealing with the question of what was required of a judge sitting alone in the High Court Division of the Gun Court, trying a rape case in which there was no corroboration, the court said at pg 280:

> It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one.

This issue again arose in ***R v Carroll*** **(1990) 27 JLR 259**, where it was said at pg 265:

> We hold that given the development of the law on visual identification evidence since the decision in R v Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold that there should be no difference in trial judge and jury and trial judge alone.

In ***R v Simpson; R v Powell***, the court confronted with the same issue, stated at para 6:

> It is against this background of the requirement of a warning in clear terms, that the duties of a Supreme Court judge conducting a trial as judge of law and fact in the High Court Division of the Gun Court must be determined. That he must give reasons for his decisions is not in dispute. Just as the reasons delivered by a judge in civil proceedings differ from his summing-up to the jury, modifications also apply in the reasons for judgment in criminal proceedings. Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside.

In ***Stewart v R*** **(1990) 27 JLR 19**, the court had to consider what was required of the resident magistrate in stating his findings of facts in a case dealing with the uncorroborated testimony of a child. The Court concluded at pg 22:

> Section 256 of the Judicature Resident Magistrates Act requires that the resident magistrate gives a brief summary of the facts found. It does not require otherwise, but the authorities indicate that where the decision of the tribunal is governed by the application of settled legal principles, e.g., the desirability of corroboration, it must appear that the tribunals mind was adverted to it – *R. v. Donaldson* (supra). Even if there is a presumption that the judge knows the law there is no presumption as to its application.

In ***R v Campbell*** **(1992) 29 JLR 256**, the Court said at pg 261:

> It is always important to view evidence of identification with caution. It is not enough for a trial judge or a resident magistrate to say that he or she is aware of the caution required in dealing with this particular type of evidence. It is as important to demonstrate that caution.

In ***R v Craigie*** **JM 1993 CA 54 (Jamaica CA, Criminal Appeal 9 of 1993, 29 July 1993)**, it was stated at para 30:

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> It is important to make the point that in all of the cited cases the trial judges or the resident magistrate stated that they appreciated the need for the tribunal to warn itself of the dangers which were involved in dealing with evidence which fall within the category of special evidence. Notwithstanding this warning, the decisions clearly laid down that merely chanting the need for the warning, to proceed with caution was insufficient. The tribunal was required to go further and demonstrate in a reasoned way the application of the legal principles by a careful analysis and assessment of the evidence.

In ***R v Cross JM* 1994 CA 28 (Jamaica CA, Criminal Appeal 81 of 1993, 24 May 1994)**, Wolfe JA sitting in the Court of Appeal of Jamaica emphasised, at pg 2:

> The sole purpose of putting our reasons in writing is to re-emphasise, once again, the absolute necessity for judges sitting alone to demonstrate in their summing-up that they appreciate the need to warn themselves of the dangers associated with evidence of visual identification and, therefore, in the assessment of the evidence to approach it with caution.

The Court of Appeal in this case on appeal from the Gun Court, found that the judge sitting in the Gun Court did not do this and so the conviction was quashed, and verdicts of acquittal entered.

Failure to give a corroboration warning where required could also result in the conviction being quashed and the sentence set aside. In the case of ***R v Donaldson* (1988) 25 JLR 274**, the Court of Appeal of Jamaica, on appeal from the Gun Court, quashed the convictions for illegal possession of firearm and rape. The sentences were set aside.

In ***Richards v R* [2001] CILR 496**, the Cayman Islands Court of Appeal held that the trial judge was entitled to reject the exculpatory statements of the defendant by determining same as self-serving; to assign different weight to the evidence as deemed appropriate in the circumstances of the case; and to determine the truth of evidence before the court i.e., make findings of fact. To do this, the court must address its mind to the legal principles and warnings applicable to the evidence and to the relevant standards and burden of proof.

In Trinidad and Tobago, there is a statutory basis underpinning this obligation of a trial judge in a judge alone criminal trial, to demonstrate that they have sufficiently addressed their minds to the legal principles and warnings that are relevant and applicable.Section 42B of the **Criminal Procedure Act, Chapter 12:02, as amended by Act No 10 of 2017** (TT), specifies as follows:

> (1) When the case on both sides is closed in a trial by Judge alone, the Judge shall, as soon as reasonably practicable and in any event before the expiration of fourteen days, deliver his verdict and, in the case of a conviction, he shall give a written judgment stating the reasons for his verdict at the time of conviction.

(2) A judgment by a Judge in any such case shall include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any other law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

The CCJ in ***Salazar***, suggests that the judge need not traverse every piece of evidence in detail as if summing up for a jury. The judge may just highlight the salient evidence relied upon. The judge must therefore take care to set out the findings of fact, the inconsistencies, how these inconsistencies were resolved, and the facts relied on in support of the verdict.

Although some regional jurisprudence emphasises that the trial judges in a bench trial must show the fact that they are aware of and follow up on certain necessary warnings, cautions etc, a question arises whether to impose a formulaic obligation on a judge in a judge alone trial 'to warn, caution, instruct, direct, or remind' themselves, is apposite. ***Salazar*** suggests that this may be language that properly belongs in a jury trial and not to a bench trial. For example, consider whether instead of being expected to write, 'I warn myself of the dangers of acting upon uncorroborated evidence of visual identification', a judge could write, 'This court is fully aware of the dangers of acting upon uncorroborated evidence of visual identification'.

The jurisprudence also seems to make it clear that convictions require fulsome reasoning. In the case of acquittals however, except in those jurisdictions where the law allows an appeal against an acquittal, such as Belize, it may be less necessary to give very detailed reasoning. For example, consider if the offence on the indictment consists of five elements of which only one cannot be proven, whether it is necessary to fully set out the evidence of the other four and whether it would be enough to briefly indicate why the judge found that these elements were proven. The judge would then focus on the single element that could not be proven and that resulted in an acquittal and give a more elaborate reasoning for that.

Voir Dires

A *voir dire* is a preliminary examination and assessment of the admissibility of certain evidence. In a jury trial, this is conducted by a judge in the absence of a jury, since the jury is the determiner of facts, and to avoid undermining impartiality in this regard.

ln ***Manzanero***, the CCJ accepted that there was no reason why a judge sitting in a judge alone criminal trial in Belize should be considered automatically incompetent to hear the main matter if they hear a *voir dire*. However, the judge should be careful to exclude the evidence given at the *voir dire* when considering the guilt or innocence of the defendant.

In ***R v Thurton*** **[2017] 91 WIR 141**, at para 41, the court in Belize stated:

> There is no rule that, in a trial by a judge without jury the judge should not hold a voir dire. It is a matter for the discretion of the judge. It has not been shown to us that, the Chief Justice exercised his discretion wrongly, or that

> the exercise of the discretion resulted in an unsafe conviction. Given that the judge is both judge of law and fact, there may well be less value in holding a voir dire in a judge alone trial

In ***Craigie***, the Jamaican Court of Appeal opined that as the Resident Magistrate is judge of the law and tribunal of fact, a preliminary test of admissibility by way of a *voir dire* was impractical and unnecessary. See also ***Brown v R; Litwin v R*** **[2015] JMCA Crim 30 (Jamaica CA, Resident Magistrate's Criminal Appeal No 35/1997, 27 November 2015)** and ***R v Cargil*** **JM 1987 CA 95 (Jamaica CA, Criminal Appeal No 130 & 131/84, 5 June 1987)**.

This principle was again emphasised by Panton JA (as he then was) in ***Paharsingh v R*** **(Jamaica CA, Resident Magistrate's Criminal Appeal No 32/05, 10 February 2006)**. This approach was informed by the following statement of Lord Lane CJ in ***SJF (an infant) v Chief Constable of Kent, ex p Margate Juvenile Court*** **(1982) Times, 17 June, DC**, which was quoted in ***R v Liverpool Juvenile Court, ex parte R*** **[1988] QB 1, [1987] 2 All ER 668** at pg 9:

> …But where the matter is being conducted by the magistrates' court, then there is no question of having a trial within a trial, because the [magistrates] are the judges both of fact and of law. They are the people who not only have to determine the question of admissibility, but also the question of guilt or innocence, namely the main issue of the trial.

However, there may be a practical reason for the use of *voir dires* in judge alone trials. A defendant can still maintain their right to remain silent in the main trial, whilst having to give evidence in challenging the admissibility of an out of court statement, based on say, voluntariness. In a *voir dire*, the prosecutor and the court must focus only on the admissibility issue and not on issues of innocence or guilt.

The defendant would be able to freely give evidence to support their claim, and in so far as that evidence is relevant in that context, it is inadmissible in the main trial: ***R v Brophy*** **[1982] AC 476, [1981] 3 WLR 103**.

The *voir dire* isolates the evidence given by the defendant and therefore provides protection, as the defendant can still maintain their right of silence at the main trial. That protection is not absolute. For example, if the defendant would boast of having committed the crimes with which they are charged, or if they use the witness box as a platform for political speech, such evidence could be irrelevant to the issue at the *voir dire*: ***Brophy***. If it is irrelevant to the admissibility issue at the *voir dire*, this means it could well be admitted in the main trial.

As the judge is both judge of fact and law, special precaution must be taken to treat with *voir dires* in a practical and appropriate manner. For example, a judge should not allow questions as to the truth of the impugned statement: ***Wong Kam-Ming v R*** **[1980] AC 247, [1979] 2 WLR 81** (HK).

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On the other hand, judges should avoid a rigid approach with respect to ring fencing this part of the criminal procedure.

The duty to provide reasons in judge alone trials also applies to decisions on *voir dires*. Where there is no jury and the same judge has to rule on both the admissibility of the evidence (in a *voir dire*) and then on its probative value (if the evidence was admitted at the *voir dire*):

a. the judge in ruling on the *voir dire* must necessarily withhold their conclusion on the latter until the end of the trial, and

b. after hearing the entire case, the judge must decide on the probative worth of the evidence.

The judge must also be careful in commenting on the evidence given at the *voir dire* when giving the final decision. Consider whether it may be appropriate in certain circumstances to conditionally admit the impugned statement and make a decision on its admissibility much later, or at the end of the trial *(de bene esse)*.

In Trinidad and Tobago, at the High Court, there have been some developments with respect to *voir dires*. In a joint ruling on *voire dires* in ***The State v Mitchell*** **(Trinidad and Tobago HC, CRS 046/2009**, **19 April 2021**), the dicta of the Privy Council in ***R v Wallace and Fuller*** **(1996) 50 WIR 387, [1997] 1 Cr App R 396**, was endorsed at para 3:

> In **Wallace and Fuller v R**, the Privy Council noted that it really is for the judge to decide whether the interest of justice demands that reasons be given and in such a case, with what degree of particularity. Indeed, it is settled law that where the only question is whether the judge preferred one set of witnesses over another, that is where the conflict turns on credibility, then there is no strict requirement for reasons. A ruling which announces that the judge accepts one version leaves no room for doubt. However, where principles of law arise, requiring the exercise of a discretion, reasons with sufficient particularity are required. And yet, even so, these are mixed questions of law and fact and involve some fact finding in order to apply the discretion afforded by the application of law.

In ***R v Mitchell***, at para 4, the court opined that a judge in a judge alone trial should say no more than is strictly necessary on factual considerations, citing ***Wallace and Fuller*** as justification:

> In a case hinging on confessions the tasks of the judge and of the jury, although technically distinct, are in reality very much the same. The decision of the jury is announced in a non-speaking verdict at the end of the trial. For the judge to expound in detail almost at the beginning of the trial his reasons for preferring one story to the other would wholly unbalance the proceedings. His reasons,

> which would be given in the presence of the public, the advocates and the defendants would inevitably leave their mark not only on the future conduct of the trial but also on its atmosphere.

Incorporating Voir Dire Evidence in the Main Trial

In ***Mitchell and Chatoo***, the court also suggested that as a practical case management technique, a judge in a judge alone trial should consider and discuss with Counsel, the necessity and usefulness of incorporating evidence given at a *voir dire* into the main trial, to avoid needless repetition. In a judge alone trial, the judge sits as judge of both fact and law, therefore 'Rigid demarcation and ringfencing on issues of admissibility may not always be required': ***The State v Williams*** **TT 2019 HC 236 (Trinidad and Tobago HC, CR T023/2015, 29 July 2019)**, at para 17.

In the court's opinion, where the evidence given in a *voir dire* is identical to the evidence that will be given in the main trial, the transcript of the evidence may be incorporated into the main trial and the witness may return to the witness box for cross examination as required: ***R v Williams*** at paras 17 – 19.

In the judgment of ***The State v Mitchell*** **(Trinidad and Tobago HC, CRS 046/2009, 23 July 2021)**, at para 30, the court explained the procedure that was adopted to incorporate the *voir dire* evidence into the main trial as follows:

> In the case of each witness, the State would apply for the incorporation, noting the agreement of the Defence and where necessary, any further evidence in chief could then be marshalled, to be followed by any further cross-examination. I added one feature in case management. I required Counsel to provide some notice as to which witnesses (both sides) were required to return to the box.

Note: A judge in a judge alone trial in Trinidad and Tobago is required to strictly adhere to the normal procedure with a jury as much as possible, subject to necessary modifications. This strictness is not necessarily to be found in the legislation of other jurisdictions.

No Case Submissions

In 1981, the Court of Appeal of England and Wales in ***R v Galbraith*** **[1981] 2 All ER 1060, [1981] 1 WLR 1039**, set out the general law in respect of no case submissions. This remains applicable throughout the Commonwealth Caribbean (see ***Chaitlal v The State*** **(1985) 39 WIR 295**), and is summarised as follows:

a. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case.

b. The difficulty arises where there is some evidence, but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

c. Where the judge concludes that the Prosecution's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is their duty, on a submission being made, to stop the case.

Where, however, the Prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are, generally speaking, within the province of the jury, and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

Lowry LCJ in ***R v Hassan*** **[1973] NIJB 11**, which is cited in ***Chief Constable v Lo*** **[2006] NICA 3, [2006] NI 261** at para 12, expressed his opinion, as follows:

> My own impression is therefore important which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution there can be no justification for allowing the trial to continue.

Kerr LCJ at para 13 of ***Lo***, expressed his view this way:

> Where there is evidence against the defendant, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

Kerr LCJ then went on to state at para 14:

> The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith*. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict.

At para 8 of the Ruling on No Case Submission in ***R v Mitchell*** **(Trinidad and Tobago HC, CRS 046/2009, 21 June 2021)**, the High Court of Trinidad and Tobago summarised the law into eight discrete principles, as follows:

(1) There is no case to answer only if the evidence is not capable of supporting a conviction;

(2) In a circumstantial case, that implies that even if all the evidence for the Prosecution were accepted and all inferences most favourable to the Prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, a reasonable mind could not exclude all hypotheses consistent with innocence as being unreasonable;

(3) The correct test is whether a reasonable tribunal of fact properly directed would be entitled to draw an adverse inference;

(4) If there are no positive proved facts from which the inference can be made the method of inference fails and what is left is mere speculation and conjecture

(5) Even where the case against the accused is thin, if there is evidence upon which a tribunal of fact is open to accept as truthful or reliable upon which it could be satisfied of guilt without irrationality, then the judge is not only entitled but is required to allow the case to proceed;

(6) The proper approach of a judge or a magistrate sitting without a jury does not involve a different test from that in Galbraith, but the exercise the judge must engage in is suitably adjusted to reflect that she is the tribunal of fact;

(7) In a judge alone trial on a no case submission, the question to be asked is not, "Do I have reasonable doubt?" Rather, it is whether I am convinced that there are no circumstances in which I can properly convict; and

(8) Even in judge alone trials, the close of the Prosecution's case does not mark the appropriate point for the weighing up of evidence and inferences to determine which deducement is the more or most reasonable.

In the CCJ case of ***Bennett v R*** **[2018] CCJ 29 (AJ) (BZ)**, hearsay evidence in the nature of a previous inconsistent statement was admitted for the jury's consideration. At the close of the Prosecution's case, the defendant made a submission of no case to answer which was dismissed. The defendant was convicted and appealed, challenging his conviction on the grounds that the trial judge had erred, first, in admitting M's previous inconsistent statement and second, in dismissing the no case submission. This case raised the issue as to the proper approach of the judge to evaluating and assessing hearsay evidence, whether it should be left to the jury, and whether the test to be applied should be the same at both the admission stage and the no case submission stage.

The CCJ in ***Bennett*** held that the proper approach was not to require the judge to make a finding on the reliability of the hearsay evidence, but to limit themselves to the question of whether the hearsay evidence could safely be held to be reliable. That test did not go to the reliability of the evidence as such, which would be for the jury to assess, but to the

pre-condition of the quality of the evidence. The test was not the same at the admission stage and the no case submission stage. At the admission stage, the judge had to decide whether to admit it. At the no case submission stage, the judge had to decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, was clear in their mind that the hearsay evidence could not in reason safely ever be held to be reliable, they had to exclude it, and where the Prosecution's case wholly or substantially rested on that evidence, they should stop the trial and direct the jury to acquit the defendant. If, however, there was a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge, given which the hearsay evidence could in the end safely be held to be reliable, the judge should, in principle, admit the evidence. That would be more so if at that stage, it was already clear that that test was or would be met. Where at the close of the Prosecution's case a no case submission was made, the final test was whether the evidence thus far produced could safely be held to be reliable, as it was for the jury to decide whether in fact the evidence was reliable or not. If that test was met, the judge would leave the evidence for the jury, after having given them the necessary directions, to consider its ultimate reliability. If it was not met, the judge should conclude that the evidence was inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge would uphold the submission and direct the jury to acquit the defendant.

Further, the CCJ highlighted that the second limb of the ***Galbraith*** test allows the judge room to achieve procedural fairness. At paras 13 – 14, Wit JCCJ stated:

> So far as the power to stop the case upon a no case submission is concerned, the trial judge in Belize must rely on the *Galbraith* tests because a 'safety valve' similar to s 125 CJA has not been adopted by the Belize legislature. It appears to us, however, that the second limb of *Galbraith* allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy.
>
> We note in passing that these common law powers and discretions of the judge have an even stronger foundation in Belize because they directly flow from, and give further content to, the judge's constitutional duty to ensure a fair trial. We also note that the very fact that the right to a fair trial (including the judge's corresponding duty to ensure it) is a fundamental constitutional right in Belize not only means that the judge needs to conduct himself fairly in accordance with his common law duties, but also that if the common law would not sufficiently allow the judge to do what basically needs to be done from a perspective of fairness in the broader sense as set out in [4], above, the common law could, and depending on the circumstances should, be recalibrated or incrementally adapted in order to enable the judge to comply with his constitutional mandate

Even though the reasoning in ***Bennett*** dealt with jury trials, consider whether there is any logical reason why this principle ought not to extend to judge alone trials.

Chapter 25 – Judge Alone Trials

Case Management and Judgment Writing Checklist Template

Chapter 24, Criminal Case Management, contains a model checklist intended to facilitate structure, organization of materials, accuracy of the record, clarity around facts and law, general efficiency and effectiveness in the management of judge alone proceedings and the writing of reasons/ judgments in a timely manner. The aspiration is to ensure compliance with constitutional, ethical, and institutional qualitative and quantitative performance standards in the conduct of judge alone trials. Fulfilment of these standards can eradicate delay, improve case disposition rates, increase respect, regard, and belief in the authority of courts, judicial officers, and the rule of law, and as well, enhance public trust and confidence in criminal justice systems.

Chapter 26 – Procedural Fairness

In this Chapter: **Introduction | Defining Procedural Fairness | Caribbean Courts' Recognition of Procedural Fairness | The Principles of Equality and Non-Discrimination | Best Practices: General Guidelines | Special Concerns**

Introduction

Procedural fairness, also referred to as procedural justice, encompasses attitudinal, behavioural, and systemic/structural approaches by judicial officers, court officials and court offices, that have shown significant evidence of enhancing public trust and confidence in the administration of justice, as well as legitimizing legal authority, improving compliance with court orders and directions, and reducing recidivism. There has been a lot of international research establishing this, and regionally, at least one research project that confirms it (a list of these resources has been provided at the end of this chapter).

Simply put, people's responses to legal authorities, which include court systems and judicial officers, are directly linked to their experiences, assessments, and perceptions of the fairness of the processes by which these legal authorities both make decisions and, in the case of court systems and judicial officers, treat court users. Thus, people are more willing to accept court decisions and comply with court orders and directions if they regard and/or perceive them to be made fairly and if they are fairly treated in the process. This pragmatic reality places a responsibility on legal authorities, including judicial officers, as to the manner in which legal decision-making power is exercised, not only in relation to final decisions, but throughout the entire legal process. Indeed, it places an onus on legal authorities to ensure that the processes and systems and personnel that exist and the way in which these are operated and behave, are objectively fair and experienced as such.

All these insights have been confirmed regionally, through research done in Trinidad and Tobago in 2018, in relation to court systems (see Peter Jamadar and Elron Elahie, ***Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago*** (Judicial Education Institute of Trinidad and Tobago 2018)). This research discovered and articulated nine core elements of procedural fairness, building on internationally established elements, that constitute court users' experiences and perceptions of fairness. These nine elements are listed with brief explanations below.

a. **Voice:** The ability to meaningfully participate in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and by having them valued and duly considered ('heard') before decisions are made.

b. **Understanding:** The need to have explained clearly, carefully, and in plain language, court protocols, procedures, directions given, and actions taken by decision makers and court personnel, ensuring that there is full understanding and comprehension.

c. **Respectful Treatment:** The treatment of all persons with dignity and respect, with full protection for the plenitude of their rights, ensuring that they experience their concerns and problems as being considered seriously and sincerely, and having due regard for the value of their time and commitments.

d. **Neutrality:** The independent, fair, and consistent application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel, without discrimination.

e. **Trustworthy Authorities:** Decision makers, judicial personnel, and court systems that have earned legitimacy by demonstrating that they are competent and capable of duly fulfilling their functions, responsibilities and duties in an efficient, effective, timely, fair, and transparent manner; and by demonstrating to all court users, compassion, caring, and a willingness to sincerely attend to their justifiable needs and to assist them throughout the court process.

f. **Accountability:** The need for decision makers and judicial personnel to fulfil their duties, to reasonably justify and explain their actions and inactions, decisions, and judgments and to be held responsible and accountable for them, particularly in relation to decisions, delays, and poor service.

g. **Availability of Amenities:** The need for all court buildings to be equipped with the necessary infrastructure (both structural and systemic) to enable court users full and free access to court buildings, efficient information systems, relevant operational systems, and the enjoyment of functionally and culturally adequate amenities.

h. **Access to Information:** The timely availability of all relevant and accurate information, adequately and effectively communicated in clear, coherent language, through open, receptive, courteous, and easily accessible decision makers, judicial personnel and systems, particularly in relation to each stage of court proceedings.

i. **Inclusivity:** The need for court users to feel that they are, and experience themselves as, an important part of the entire court process, rather than outside of or peripheral to it; non-alienation, by being made to feel welcomed and included in court proceedings and to actively, easily, and effectively participate throughout the process.

The Trinidad and Tobago research report explains at pg 89:

> One of the interesting revelations … is the potential for the practise of Procedural Fairness to create a flow of mutual respect between [court users] (and the public at large) and court systems … (and Judicial Officers). This may be described as the flow of 'giving and receiving' respect. **As litigants and [court users] are treated fairly and with dignity and respect, are given relevant and appropriate information in a timely manner, and feel included**

> **and valued; they give in return respect, legitimacy to and bestow moral authority upon the court systems and Judicial Officers.** The result can be a spiralling and mutually reciprocating and fortifying trust and confidence in the administration of justice.

Improving procedural fairness in court processes and decision making is eminently possible. The need for doing so is also unavoidable. It is imperative. Court systems will operate more effectively and efficiently with procedural fairness protocols and provisions built in, operationalised, and monitored.

Arising out of the research in Trinidad and Tobago, a procedural fairness manual was developed that was intended to function as a guide to the implementation of procedural fairness in court systems: Judicial Education Institute of Trinidad and Tobago, ***Procedural Fairness: A Manual – A Guide to the Implementation of Procedural Fairness in the Court Systems of the Judiciary of The Republic of Trinidad and Tobago*** (Judicial Education Institute of Trinidad and Tobago 2018). The guidelines that follow in this bench book draw on this research-based manual.

Defining Procedural Fairness

The ***Procedural Fairness: A Manual*** offers a formal definition of procedural fairness in the following terms at pg 8:

> Procedural Fairness describes the kinds of behaviours and systems that inspire trust in, confer legitimacy on, and bestow authority upon court systems, and internal actors within these systems. It prescribes core, non-negotiable values and standards that are necessary for the legitimate and trustworthy exercise of legal authority within a community and society.
>
> Procedural Fairness therefore demands integrity of actions, behaviours, and systems in relation to its constitutive elements; an integrity that must be consistently experienced and perceived by all stakeholders in the court systems, [court users, potential court users] and the general public. Integrity [here, means] consistency between behaviour/actions and declared values and regulatory frameworks—on personal and institutional levels—in all circumstances, in a way that is transparent and accountable.

Caribbean Courts' Recognition of Procedural Fairness

The CCJ in 2022, in ***Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY**, at paras 80 – 81, and writing in the context of the desirability of separate sentencing hearings in criminal proceedings, opined:

> Judges must ensure procedural fairness in all aspects of the sentencing process. Procedural fairness, or procedural justice, is a necessity. In Caribbean judicial spheres facilitating the nine elements of procedural justice is apposite in

> a sentencing hearing. That is, facilitating: (i) voice, (ii) understanding, (iii) respectful treatment, (iv) neutrality, (v) trust, (vi) accountability, (vii) access to information, (viii) inclusivity, and (ix) access to necessary amenities.
>
> In Caribbean judicial spheres these elements can help mitigate against the still present and inherited colonial anti-therapeutic ethos that all too often prevails in the criminal justice systems. The research is clear that when court processes are imbued with procedural fairness throughout, there is an increase in overall public trust and confidence in the administration of justice, and increased compliance with court orders and directives. As well, the research indicates that there is reduced recidivism (citations omitted).

And earlier, in 2015, the Court of Appeal of Trinidad and Tobago in ***Ayers-Caesar v BS*** (**Trinidad and Tobago CA**, **Civ App No P 252 of 2015, 18 December 2015)** (a judicial review appeal involving young persons), opined at para 37:

> It is important to also point out, that … consistent with the constitutional values of equality, fairness, respect and dignity, the new role of the judge … includes keen attention to procedural fairness. Thus, respect, equality of treatment and fairness must now colour all aspects of judicial behaviour both in court and throughout the management and hearing of all aspects of a matter. In concrete terms, there are four cardinal principles to be adhered to: (i) judges must be fair and experienced as such in all aspects of interaction with litigants and their attorneys; (ii) judges must treat all litigants and their witnesses (including attorneys and court staff) with utmost respect, having regard to their inviolable human dignity; (iii) judges are obliged to take care to ensure that parties clearly understand both what is to be expected, as well as what is actually happening in court proceedings, and all orders, directions and decisions must be carefully explained so that parties fully understand them and appreciate their consequences; and (iv) judges must permit parties to have a voice, that is to say, a meaningful chance to actually participate in their matter at all stages of the proceedings.

The Principles of Equality and Non-Discrimination

Throughout the Commonwealth Caribbean, independence and post-independence constitutions establish as a core constitutional value, the inherent and inviolable dignity and worth of each human person. These constitutions also declare unequivocally, the right of every person to fundamental and substantive equality, and the right to non-discrimination. This is true for The Bahamas.

Equality and non-discrimination are linked, and are basic underpinnings of the protection, enjoyment and exercise of human rights. Generally speaking, equality requires equal treatment for equals, different treatment for those who are differently circumstanced, and special treatment for those who, though they may be considered equal from certain

perspectives, from other perspectives deserve special treatment: ***C-862/08*** **(Constitutional Court of Colombia, File D-7166, 3 September 2008)**.

To achieve "substantive equality", there must be focus on the effect or impact of the law and actions, and not merely on whether they are applied equally to all who are similarly circumstanced. Non-discrimination prohibits unequal treatment of persons, based on inherent personal or group characteristics and attributes, and by reason of conditions that are inherent and integral to their identity and personhood: ***Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v The AG of Trinidad and Tobago*** **TT 2007 VA 52 (Trinidad and Tobago CA, HCA No Cv S 2065/2004, 26 May 2006)**.

UN Human Rights Committee (UNHRC), ***CCPR General Comment No 18: Non-discrimination*** (10 November 1989) at para 7, states: "'discrimination'... should be understood to imply any distinction, exclusion, restriction or preference...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons ... of all rights and freedoms."

To discern whether there is discrimination and to achieve non-discrimination, the focus must also include the effect or impact of the law and of actions on the affected persons or groups. Therefore, the principles of equality and non-discrimination do not necessarily require identical treatment in all similar circumstances, and affirmative differential treatment may be both necessary and legitimate to achieve either, or both. While unequal or differential treatment may appear to be discriminatory to other parties, it may not in law be so, if the purposes (aims) of the differentiation are legitimate, and the means used to achieve them are proportionate and fair when judged in relation to the aims and as are reasonably justifiable in a democratic society (see ***Procedural Fairness: A Manual*** at pg 18).

These principles of equality and non-discrimination are integral to procedural fairness and inform the best practices associated with it. For the purposes of procedural fairness, equality and non-discrimination include the consistent application of these principles to all relevant procedures and practices, to fairly accommodate court users who have matters in the courts and/or who transact business within court systems. Focus must be placed on the effect or impact of laws, rules, decisions and actions on these individuals and groups, as well as on their legitimate needs.

Best Practices: General Guidelines

For the purposes of this bench book, best practices for the following five elements of procedural fairness will be considered – **voice, understanding, respectful treatment, neutrality, and trustworthy authorities**, as they align with the core internationally proven elements of procedural fairness. However, readers are encouraged to consider and implement the best practices for all nine elements described in the publication ***Procedural Fairness: A Manual***. The content for these five elements is adapted from that publication.

Chapter 26 – Procedural Fairness

Voice

Voice means that court users:

a. ***perceive*** that they have the opportunity to ***have input***;

b. ***actually*** have a meaningful opportunity to ***have input***;

c. ***have*** their ***input considered*** when ***decisions*** are being made and ***outcomes*** decided; and

d. ***perceive*** and ***experience*** that their ***input*** has had an ***impact*** on ***decisions*** and ***outcomes***.

Court users will therefore feel 'heard' in an environment where they know that they can participate in proceedings; are given the opportunity to express opinions and to ask questions; and their input is valued and considered.

Knowing that they have the Ability to Meaningfully Participate

a. Greet court users with courtesy and respect.

b. Introduce yourself to court users before the start of any significant new interaction.

c. Create and maintain spaces in which court users will feel comfortable asking questions and expressing concerns and views. This may be achieved by using attentive and engaging body language and a welcoming tone of voice. If you are unable to do so, explain why you are not engaging e.g. I am not making eye contact because I am taking notes.

d. In the courtroom, court users should be placed so that they can comfortably and meaningfully participate in court processes.

e. Where court users are self-represented, ensure that they have been given sufficient accommodation to facilitate active and meaningful participation.

f. Practice active listening.

The Ability to Express Concerns and Opinions and Ask Questions

a. Actively facilitate enquiries, expressions of concern and feedback from court users. Explain that they will be able to express their concerns and opinions, and to ask questions. This may be qualified by stating that they will be allowed to do so at specified intervals and, where an interaction is with a judicial officer, pursuant to the exercise of judicial discretion. If court users will not be permitted to do so, the reasons for this should be carefully explained.

b. Give court users the permission, and the opportunity, to respectfully express if language or behaviour is offensive or disrespectful to them.

c. Explain to court users what information is needed from them and why.

d. When communicating directly with court users, allow them to finish speaking/explaining themselves, allowing them reasonable time to express their views and thoughts about their matters. If they have to be interrupted, do so respectfully.

e. Paraphrase and seek confirmation about what has been communicated to you by court users, to demonstrate your understanding of what has been conveyed.

f. Answer court users' questions, and address their needs and concerns in clear, concise language. If you are unable to provide an answer, explain why and offer alternatives where appropriate.

g. Instruct court users and attorneys about best practice protocols in relation to courtroom communication and ensure that these protocols are upheld and fairly and equally applied.

h. Specifically enquire of court users if they have understood court processes, what is needed/required of them, and decisions and outcomes. Take the time and care to ensure full understanding.

i. Where court users are represented by attorneys, give them enough space and time to communicate with each other, especially where a specific question has been asked that requires consultation.

Having Input Valued and Duly Considered in the Decision-making Process

a. Sincerely consider court users' input before decisions are made, and find ways to demonstrate that this has been done.

b. Always acknowledge what has been said by court users. If you disagree, explain why (especially in judgments, reasons and rulings). As a general rule, where court users receive any outcome or decision that is not in their favour, take the time and care in all decision-making to address their position.

Understanding

Understanding means that court users always know what is happening and what is going to happen during court processes and why this is so, because the time has been taken to ensure that they are fully informed participants. Effective communication guided by the techniques set out below are critical to ensuring understanding.

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Clear, careful and plain language explanations

a. Use simple, clear, and concise language that can be easily understood, when explaining procedures and decisions to court users.

b. Be careful to speak slowly and clearly, making appropriate eye contact when communicating with court users, especially when delivering routine statements and decisions.

c. Adopt a calm, respectful and polite tone when giving explanations to court users.

Ensuring Full Understanding and Comprehension

a. Do not presume that court users will understand proceedings, procedures, and decisions, or even your initial explanations of them. Be prepared to explain again, as necessary and practicable.

b. Assure court users that they can feel free to ask questions.

c. Do not depend entirely on attorneys to explain proceedings and decisions to court users.

d. Explain the purpose of court processes to court users at the start of any significant new interaction with them, and at the start of each discrete stage of proceedings.

e. Ensure that court users understand what is happening throughout court processes, and periodically enquire to ensure continued understanding, e.g., by asking them to explain in their own words what has been said/decided and what is to be done and/or expected of them, and what, if any areas they are uncertain about.

f. Pay careful attention to court users' explanations for gaps in their understanding.

g. Take the time at the beginning of proceedings and significant new interactions, to explain to court users what information is needed to effectively and efficiently conduct their matters/business e.g., the process for completing forms.

h. Ensure that court users understand the meaning and consequences of the decisions that are made, i.e., the practical implications for them.

i. Note recurring problem areas for court users. It may be that the existing processes or protocols need to be altered to meet court users' needs and concerns.

j. If court users are uncertain or confused, be prepared to address this in a timely fashion to ensure full understanding

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Respectful Treatment

Respectful Treatment means that court users are treated with due regard, as individuals deserving of serious consideration. This means that their concerns and problems are given due weight and that their time and other commitments are valued when they are engaged in court processes. All of their rights are to be honoured and upheld, enjoyed and protected. Utilising the following approaches will help to ensure that court users experience respectful treatment.

Treating all persons with dignity and respect

a. Ensure that you interact with court users, attorneys and fellow Judiciary personnel in a dignified and respectful manner, in keeping with constitutional, international and institutional standards and mandates. Keep in mind that the treatment of others affects how court users perceive that they will be treated.

b. Introduce yourself to court users at the start of significant new interactions, and be welcoming during all interactions.

c. Clearly and briefly set out the expectations of behaviour and the procedures to be followed by court users, and check for understanding.

d. Maintain a calm and fair disposition, polite tone of voice and neutral posture when interacting with court users. This is especially important where you have to be assertive, firm or decisive.

e. Apologise for and explain any delays or defaults that are not the result of court users' actions/inaction.

f. Ask court users if they require any assistance and provide it willingly and as appropriate (if possible and/or permissible).

g. Constantly focus on the needs and concerns of court users.

h. If you are unable to address individual court users' concerns or queries, it is important to explain why. If someone else is better equipped to assist court users, explain who the person is and why their input is necessary and how they can be accessed.

i. Ensure that expectations are clearly set out and understood. Most court users have no, or very limited experience interacting with court systems.

j. Court users, attorneys and Judiciary personnel should all be treated with respect. However, be prepared to give extra guidance on court procedure to court users as necessary.

k. Judiciary personnel in the courtroom should maintain the same high standards of respectful treatment of court users.

Giving all court users full protection for the plenitude of their rights

a. Uphold and apply, generously and purposively, core constitutional values, including respect, equality of treatment, fairness and meaningful participation, to court users.

b. Use non-offensive and culturally appropriate and sensitive language when communicating with court users.

c. Actively identify and address any biases towards court users in interacting with them or making decisions that affect them.

d. Avoid being judgmental (and expressing these judgments) when your opinions are not relevant to the matter at hand. Where it is necessary for an issue to be raised with court users, do so in a manner that is respectful and fair.

e. Be aware of differences in culture and the circumstances of individual court users before making statements, e.g., on what is appropriate behaviour, speech or attire.

f. Give self-represented court users and attorneys an equal opportunity to speak and participate.

g. Court buildings are public buildings in open court systems, and those with legitimate business (including the observation of court matters) should not be barred from entering without good reason and justification.

Ensuring that court users experience their concerns and problems as being considered seriously and sincerely

a. Ensure that individual court users' needs and concerns are treated with care and attention. Although you may have been involved in similar cases/situations before, for individual court users, their matters/ business involve/s important and significant events in their lives.

b. Be open to and assess court users' actual needs and concerns. Sometimes flexibility and creativity in thought and action brings about the best solution, while rigid adherence to strict rules may defeat the ends being sought.

c. Refrain from responding reactively. Engaging a delayed response, e.g., pausing for a few seconds and/or taking some deep breaths can permit an appropriately respectful and just response. Avoid reactions such as gasps, eye-opening, exasperated sighs, and scoffs when interacting with court users and attorneys.

d. Actively listen to court users' queries and concerns and treat each with due regard and importance.

e. Ensure that court users always enjoy the full benefits of a fair hearing and of being dealt with justly.

Due Regard for the value of time and commitments

a. As a general rule, begin your tasks at their scheduled start times.

b. Ideally, court users should only be in court for as long as the process that impacts them should take.

c. Implement a system of consultative scheduling that values court users' time and commitments, e.g., in the courtroom, schedule matters for fixed dates and times and adhere to these times as far as possible. This scheduling should keep in mind the different and particular needs of court users, the available amenities in the court building, the conditions in the courtroom, and the time needed to be spent on each matter.

d. Where there are delays or postponements, notice should be given at the earliest opportunity, and genuine apologies should be made.

e. Give ample notice and explanation if a matter has to be rescheduled. Ideally, rescheduling should be to a date convenient to court users. Multiple postponements that do not advance the progress of the matter to resolution, should be avoided.

f. Every court-scheduled event should advance the progress of a matter to a fair, just, and timely resolution.

g. Utilise available amenities to maximise efficiency, e.g., by using video- and teleconferencing, e-mails and other effective forms of communication.

h. Ensure that court users have a realistic expectation of how long court processes will take. Try to give court users accurate assessments of time.

Neutrality

Neutrality means that court users experience fairness and consistent treatment throughout court processes. If court users experience fairness and see that others are treated fairly, without bias and discrimination, this helps to ensure that there is trust in outcomes. The guidelines in this section offer approaches that, when used, can help demonstrate to, and allow court users to experience, neutrality in their dealings with the court.

Chapter 26 – Procedural Fairness

Independent, Fair and Consistent Application of Legal Principles

a. Discharge all responsibilities conscientiously and according to the law and the constitution, without fear or favour, affection or ill will.

b. Arrive at decisions using only the relevant and admissible facts, determining the merits without regard to personal feelings or extraneous factors and characteristics.

c. Make decisions only on the basis of the relevant law and applicable legal principles, without regard to personal feelings or extraneous factors and characteristics.

d. Give sufficiently detailed explanations for decisions, so that court users are fully aware of the reasoning behind these decisions.

e. Keep abreast of all current developments in the law.

Impartial and Unbiased Decision-Makers

a. Identify unconscious biases that you have, and ensure that these biases do not impact upon – and are not perceived to impact upon – your decision-making and treatment of court users.

b. Consistently apply relevant procedures and practices to fairly accommodate all individuals, keeping in mind that court users come from a variety of backgrounds and circumstances.

c. Treat court users equally. This requires treatment relevant to court users' circumstances and needs, so that individual court users experience equal access to justice and a fair hearing.

d. Make the necessary reasonable accommodations for court users who have different and particular needs, so that they all have equal access to justice and a fair hearing.

e. Ensure that all court users have equal physical access to courtrooms and court buildings.

Non-Discriminatory Behaviour

a. Do not treat court users differently on the basis of personal or group characteristics and attributes, or by reason of conditions that are inherent and integral to identity and personhood, unless justifiable.

b. Address all court users, attorneys and judiciary personnel in an equally respectful manner.

c. Continually monitor your body language, tone of voice and use of language at all times, so that court users are not made to feel discriminated against or disrespected.

d. Ensure that fellow judiciary personnel, including those under your supervision, do not discriminate against court users.

e. Be mindful of your behaviour and use of language in all spaces of the workplace and at all times, and be mindful of and share responsibility for the behaviour and language of fellow judiciary personnel.

f. Adopt neutral language and tones of voice when communicating with court users, judiciary personnel and attorneys.

Trustworthy Authorities

Judiciaries become trustworthy authorities by earning trust when court users experience court processes as being conducted by all judiciary personnel with competence and compassion, in ways that attend to the legitimate needs of court users and are respectful of the significance and value of all matters and business. Competence and compassion can be demonstrated through the adopting the following approaches and attitudes.

Demonstrating Competency

a. Develop and apply the most effective and efficient case flow management, case management and time management practices and protocols.

b. Develop and apply the most effective, efficient, respectful and fair interpersonal and communication skills.

c. Keep abreast of and consistently apply all relevant developments in both procedural and substantive law.

d. Give detailed reasons for all decisions and directions in clear, simple and effective language.

e. Ensure that all court orders and directions are clear and effective.

f. Genuinely and seriously consider all matters/concerns.

g. Ensure that all court users' needs and concerns are dealt with in a reasonable timeframe, and in a way that ensures that they understand what is happening.

h. Keep court users informed, in a timely manner, about all information that may concern or impact them.

i. Where you cannot provide immediate responses to legitimate concerns, explain this to court users, and give them a reasonable timeframe in which to expect a response.

Demonstrating Capability in Fulfilling Functions

a. Make court users the focus of attention and service.

b. Implement skills and techniques gained from engaging in continuous personal and professional education training, to ensure that the best practices are deployed, and the best service is provided to court users.

c. Ensure that judiciary counters, desks, booths and units are adequately staffed to ensure that court users' needs and concerns can be met and addressed.

Efficient, Effective, Timely, Fair and Transparent Actions

a. Discharge all of your responsibilities in efficient, effective, timely, fair and transparent ways, and take responsibility for ensuring that all judiciary personnel do the same.

b. Give reasonable timelines to court users, and if they cannot be met, explain why.

c. Schedule all events in a matter for fixed dates and times, and adhere to these. Explain/Apologise if these timelines are not met.

d. Consult court users if the rescheduling of matters or business has to take place, to agree to a time convenient to all.

e. Periodically enquire of all court users if there is anything that they do not understand, and enquire as to what you can do to clarify any areas of uncertainty.

Compassion, Caring and a Willingness to Attend and Assist

a. At the beginning of each new interaction, explain to court users that you are willing to attend to their legitimate needs, and assist in fulfilling these needs within the parameters of the law and your responsibilities.

b. Consistently welcome and engage court users and seriously consider their queries and concerns.

c. Create a comfortable, safe and welcoming environment for court users, so that they are not intimidated or alienated by court processes or judiciary personnel.

d. Ensure that court users are not met with indifference, disrespect, hostility or discrimination when engaging with court processes and with judiciary personnel.

e. Understand that court users have different needs and come from different backgrounds and seriously consider these when dealing with them and their issues.

f. Render assistance to court users whenever this is possible, and do so in a hospitable and caring manner.

Special Concerns

Self- and Under- Represented Litigants

Both self- and under-represented litigants must be treated no less than all other litigants, in that they must be the beneficiaries of an objective standard of fairness. They are equally entitled to have their matters dealt with justly and certain accommodations may be necessary in order to do so (see Peter Jamadar and Kamla Jo Braithwaite, ***Exploring the Role of the CPR Judge*** (Judicial Education Institute of Trinidad and Tobago 2017)). The content of this section relies on the guidelines stated at pgs 50 – 54.

Some challenges in dealing with self-represented litigants include the following: first, language. Self-represented litigants simply do not write or speak in 'legalese'. They may also not write or speak English (or standard English). The consequence is that their capacity to understand what is happening and to meaningfully participate in the process, as well as to feel included (and not alienated), are all severely compromised. Second, most are quite unaware of, or unpractised in relation to, both procedural and substantive law. The lack of knowledge of practice and procedure, as well as the rules of evidence, make for innumerable challenges for judges in both case management and at a substantive hearing and create a real disadvantage for these litigants. Third, there may be very real resource and power imbalances between self-represented litigants and the other parties.

Under-representation raises the issues of attorney competency and the adequacy of representation, and therefore of the limits of judicial reticence and intervention. Issues include:

a. How far can a judge go in pursuit of fairness, or in explaining procedure, law, and decisions, before they compromise the core value of Impartiality?

b. Where does independence end and partiality begin?

c. What are the limits of a judge's duty where there is under-representation? In general terms, fairness is the most important guideline. Tactfulness and care are required, as is attention to even-handed communication. If procedure or law is being explained, explanations ought to be directed to all parties. Explanations must also be communicated in clear, non-legal language, ensuring that there is understanding. Care must also be taken to give all parties equal voice.

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General Guidelines

The following very general guidelines are offered as a starting point for managing cases involving self- and under-represented litigants (though the guidelines may also be of general use):

a. Begin by introducing yourself, and explaining the court's protocols and expectations (be case specific).

b. Be cordial and courteous at all times, even when being firm and decisive.

c. Ensure equal treatment of all parties, even in the simplest things, such as the way parties, witnesses and attorneys are addressed. Equality of treatment depends on the individuals involved and does not mean that everyone receives the same treatment.

d. Pay attention to courtroom communication: written, verbal, and non-verbal. It should be clear, easily understood by all parties and unbiased.

e. Confirm whether English is a first language or sufficiently understood. If not, find an effective means of communication.

f. Quality focused and clear and decisive pre-trial management will facilitate the adequacy of case management and pre-trial explanations.

g. Information should be given in small amounts at a time. Too much information can result in information overload. Clarification about understanding should constantly be sought.

h. Practice active listening. Avoid the excessive use of legalese, and explain all legal jargon. Check to confirm that there is understanding.

i. Take the time to explain the procedure for each discrete event throughout the entire process.

j. Take the time to explain the purpose of the process, doing so for each discrete event throughout the process.

k. Be clear in explaining what the issues are, explaining what is required to prove and disprove each issue.

l. Explain the necessity for proof and the types of proof that are permissible (e.g. oral testimony, documentary evidence, expert evidence), including what evidence is admissible and inadmissible. Also, explain the difference between facts and opinions and when the latter are of probative value. Do this before disclosure and witness statements/summaries are ordered.

m. Explain before the trial begins, what are the relevant protocols and procedures, and the kinds of questions that can be asked (giving examples of what is and is not permissible).

n. Explain the burden of proof and standard of proof in clear and understandable language. Check to confirm that there is understanding.

o. Be astute to the possibility of a lack of or impaired mental capacity, for the purposes of conducting litigation (a general threshold being the ability to be able to understand what is happening and to meaningfully participate in the proceedings).

p. Give an assurance (and follow through on it) that throughout the proceedings, there will be explanations given and the permission that questions can be asked as and when the need arises.

Effective Communication

Effective communication is central to dealing with cases justly (see ***Exploring the Role of the CPR Judge*** at pgs 56 – 58). Court users must, subjectively and reasonably, experience justice as being done. In this regard, communication is central, because all persons involved in legal proceedings must understand what is taking place. In addition, care must be taken to ensure that everyone involved in the process is properly understood. Understanding is critical to the legitimacy of the legal process, and a core responsibility of a judge. It is the judge's duty to ensure that attorneys, parties, witnesses (and even the public), understand the essential elements of court processes, events, and decisions. Care must therefore be taken to explain matters and check for understanding at all times. Inclusivity is also central to effective communication. Parties, witnesses, attorneys, and court staff who feel alienated, left out or excluded from (or by) the process, experience it as unfair and discriminatory, and consequently as unjust. Therefore, every effort must be made to ensure that there is meaningful participation throughout the court process.

Active listening is a skill that can be learned and developed. In the context of procedural fairness, it has particular value in court proceedings. Practice it at all times during courtroom communication. Be flexible, helpful and considerate when interacting with court users. Although the court or a court department may not be able to deal with a particular issue or provide the relief sought, remember that court users have come for assistance with an issue that is of importance to them.

General Guidelines

Some useful guidelines to aid effective communication are as follows:

a. At the beginning of and throughout proceedings, communicate so as to put participants in the process at ease, creating a safe and trustworthy environment. Use simple language and give clear and concise explanations.

b. Always monitor and confirm understanding.

c. Do not assume that silence indicates understanding.

d. If in doubt, test for understanding by inquiring of the attorney, party or witness, or court staff, if they understand, or if they mean what they appear to have said.

e. Be aware that cultural context shapes and informs communication. Words and phrases can mean entirely different things to different people.

f. Be aware that a perception of partiality or unfairness can be the result of inappropriate language or conduct. Take care to be conscious of both verbal and non-verbal 'messages' that tone, expression, posture and interaction can convey.

g. Demonstrate fairness at all times and in everything that is said and done. Fairness does not require treating everyone in the identical way. Fairness is contextual. Treat like alike. It is fair to treat a self-represented litigant differently from an attorney; equality of treatment permits differential treatment for different situations.

h. Be alive to situations of disadvantage. It is permissible to take steps to address such situations, provided no unnecessary prejudice is caused to another party.

i. Actively listen to attorneys, parties and witnesses. Effective communication is a two-way experience. Active listening requires that the listener hears what the speaker is saying with an open, receptive and non-judgmental attitude (i.e. without pre-judgment) and not merely to wait for a chance to speak/ respond. Active listening is premised on the willingness to discover truth, and the genuine desire to understand and appreciate other points of view.

j. Always render whatever assistance is appropriate, in a respectful and courteous manner.

Securing Access to Justice for All

Justice, as underpinned across Caribbean constitutions, demands equality and fairness of treatment for all persons. The judge is thus duty-bound to ensure that matters are dealt with justly for people whose access to justice may be impeded because of, for example:

a. disability (seen or unseen);

b. mental illness;

c. socio-economic status;

d. communication or any other barrier.

Further, judiciaries and judges ought to ensure that the needs of these court users are meaningfully taken into account and met. The accommodation of the variety of needs is necessary as this is in keeping with the constitutional duty to ensure a fair trial.

The aim of fairness is to ensure that all parties and their witnesses and **all court users** are enabled to participate fully and meaningfully in the entire court process, from start to finish. Accommodating individual circumstances and the needs of persons is necessary for fairness and equality of treatment, and for a fair process, and to ensure that all matters are dealt with justly. Reasonable and proportionate steps can always be taken to balance competing interests and to accommodate parties, so that overall fairness is achieved and therefore justice served throughout the process. Such steps ought not to be considered prejudicial.

General Guidelines

The following general guidelines are suggested:

a. Accommodating special needs permits a judge to be flexible in relation to all aspects of court proceedings, once the steps taken are fair and cause no unnecessary prejudice to other parties.

b. Judges are required to be alert to the special needs of both parties and witnesses who are vulnerable and those who are disabled, including what is required for effective communication.

c. Court procedures can be reasonably adapted to facilitate the effective and meaningful participation of all parties and witnesses. The steps taken ought to be intended to ameliorate and compensate for any barriers which may impede a person's access to justice such as the lack of accommodations for persons with disabilities.

d. Where there are vulnerable witnesses or parties, steps should be taken to safeguard these persons without creating unnecessary or disproportionate unfairness or prejudice.

e. Sensitivity to the variety of needs of all persons, for example, those with disabilities or those who may experience barriers to communication, is important. A judge has a duty to discover and know what these needs are and how they can be addressed in order to deal with cases justly.

f. This duty to know and understand the effects of vulnerabilities and being disabled and how they can create unfairness in the court process, includes the duty to know and understand: a. the impact of physical, psychological, cognitive and sensory impairment; b. the disadvantages and difficulties experienced as a consequence of unaccommodating systems and facilities; and c. the effects of decisions and procedures on court users.

Chapter 27 – Therapeutic Jurisprudence

In this Chapter: **Introduction | What is Therapeutic Jurisprudence | Therapeutic Jurisprudence and Procedural Justice | Therapeutic Jurisprudence and Restorative Justice | Aim of Restorative Justice | Process of Restorative Justice | Therapeutic Jurisprudence and Problem-Solving Courts Approach | Specialized Problem-Solving Approaches | Mainstreaming Therapeutic Jurisprudence and The Problem-Solving Courtroom Approach | Helpful Text Resources**

Introduction

The last decade of the twentieth century saw the beginning of a shift towards a "comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering": Susan Daicoff, ***Law as a Healing Profession: The "Comprehensive Law Movement"*** (2005) 6(1) Pepp Disp Resol LJ 1 at pg 1.

This movement resulted from the combination of several new or alternative methods of practicing law, particularly within the criminal justice system. These methods share two features:

a. A desire to maximize the emotional, psychological and relational well-being of the individuals and communities involved in each legal matter; and

b. A focus on more than just strict legal rights, responsibilities, duties, obligations and entitlements – a focus on "rights plus".

This innovative approach views the law as a vehicle for positive change, such as "healing, wholeness, [and] harmony" in the resolution of legal matters; and it values 'rights plus' factors, which include "needs, resources, goals, morals, values, beliefs, psychological matters, personal wellbeing, human development and growth, interpersonal relations, and community wellbeing" (citations omitted): ***Law as a Healing Profession*** at pg 4.

One significant discipline which propels this movement is therapeutic jurisprudence, which emanates through realms such as procedural fairness, restorative justice and problem-solving courts.

What Is Therapeutic Jurisprudence?

Therapeutic jurisprudence, through the insights of behavioural sciences such as psychiatry, psychology, criminology and social work, explores how the law impacts the mental health and well-being of those involved in legal processes. This is because therapeutic jurisprudence, with interdisciplinary lenses, views the law as a social force that can impact people's emotional lives, with positive or negative consequences.

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Therapeutic jurisprudence is essentially a study of the "law in action", that is, how the law impacts law offices, clients and courtrooms around the world. Therapeutic jurisprudence approaches this study from a remedial perspective. It focusses on how substantive law and legal procedures can be reshaped, in order to result in improvements to the psychological and emotional states of participating parties; in other words, how reform can result in an increase in therapeutic/healing effects and a decrease in anti-therapeutic effects, without the compromise of due process and other significant justice principles.

This perspective should apply across the entire legal spectrum, including health law, criminal law, juvenile law and family law. It also involves consideration of all participants in the judicial process. This particularly implies parties to litigation (as well as their families), victims, offenders, witnesses and jurors. It especially extends to lawyers and judges and how their application of therapeutic jurisprudence can effect progressive social change, which would not only benefit the judicial system, but ultimately the society at large. This is due to the fact that therapeutic jurisprudence "prompts legal actors to 'reach out to explore models of practice that are more relationally engaged, less adversarial, more psychologically beneficial and more capable of producing non-exploitative outcomes'" (citations omitted) (Penelope Weller, ***Mainstreaming TJ in Australia: Challenges and Opportunities*** (2018) 3(1) International Journal of Therapeutic Jurisprudence (Special Edition) at pg 81).

The underlying philosophy and objectives of therapeutic jurisprudence have been embraced in the Caribbean, as reflected through ***Ramcharan v DPP*** **(2022) CCJ 4 (AJ) GY**, at paras 88, 97, 98, and 171, where in the context of sentencing in criminal law it was stated:

> … sentencing is no longer to be viewed in a silo, as an adjudication limited to the interests of the State and the convicted person. Such a view is hopelessly myopic and divorced from lived realities. Arguably the persons most directly affected by a crime are its victims-survivors. Then their families, friends, and communities. And as well the larger society of persons who live in various degrees of relationships with each other. Thus, while the traditional and inherited approach has been to place the convicted person at the centre of the sentencing process, and they are object of sentencing, they alone are not affected by the process and outcomes. A therapeutic approach to sentencing that is fully aligned with all five sentencing objectives requires a more encompassing approach to a sentencing hearing. An approach that includes all relevant evidence to enable the making of informed assessments and decisions, and that at the same time unlocks the law's capacity to be a source of healing and relevance for all persons, institutions, and communities that are affected by it. Indeed, for the entire society.
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> …
>
> A therapeutic approach to sentencing would seek to meet all the objectives of sentencing in ways that promote the care and wellbeing of all persons and

> institutions that are affected, and to do so at every stage in proceedings. It therefore favours a broader more inclusive perspective in relation to how sentencing proceedings are conducted and who is involved. It also favours a multi-disciplinary approach that is open to drawing on all resources and sources of information that are relevant and useful to the sentencing processes and outcomes. …
>
> In sum, therapeutic approaches try to maximize the personal and societal wellbeing of individuals and communities, and so focuses on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. It is what is referred to in the academic literature as a 'Rights Plus' approach to adjudication, that also consciously focuses on the law's potential to have a positive impact on people's lives and on society. In the context of sentencing, human wellbeing and interpersonal relationships also matter.
>
> …
>
> … Maybe it can be imagined as a sentencing hearing in which the traditional judge led decision-making process (hierarchical and pyramidical) is combined or intersects with multiple overlapping circles (interdisciplinary vectors of information and insight), that serve to inform the decision-making process without supplanting or usurping either the process of decision making or the established objectives of sentencing. However, undertaken with a clear intention of minimizing anti-therapeutic effects and maximizing therapeutic and procedurally fair effects in the sentencing process and outcomes. In this way one achieves truly fair and just outcomes for all parties, including victims-survivors, and the society at large.

Therapeutic Jurisprudence and Procedural Justice

Behavioural sciences studies have directed therapeutic jurisprudence proponents to the tenet that, in the context of a court or other legal setting, people are more likely to accept and comply with the legal authority's decision, if they are treated with respect when they present their case, and where they feel that the authority's processes are fair, and its motives are legitimate. Such procedural justice can only impact positively on psychological and emotional well-being, hence the inclusion of procedural fairness research in the field of therapeutic jurisprudence. This natural connection was emphasized by Dylan Kerrigan in ***Therapeutic Jurisprudence in Trinidad and Tobago: Legitimacy, Inclusion, and the Neo-colonialism of Procedural Justice*** in Daniel Nehring, Ole Jacob Madsen, Edgar Cabanas, China Mills and Dylan Kerrigan (eds), *The Routledge International Handbook of Global Therapeutic Cultures* (1st edn, Routledge 2020), when he stated at pg 452 that, "… the major selling point of procedural justice as therapeutic jurisprudence is its desire to enhance the perceived legitimacy of the court process in the eyes of its users."

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'Enhanced perceived legitimacy' of the overall court process – which is the impact of procedural justice – results in the court user's increased trust and confidence in the procedures, their willingness to comply with decisions and ultimately, their general positive assessment and experience. Kerrigan further states, at pg 453, that:

> According to Justice Peter Jamadar…[such] public trust and confidence survives and flourishes [in the context of the judiciary's legitimacy, when, inter alia, the public is satisfied with]…the quality of decision-making and quality of interpersonal treatment… and [it can predict that the judiciary] will do the things that they are tasked to do.

The reshaping of the perception of the legal process afforded by procedural justice, together with the resulting positive court experience and increased psychological satisfaction, rest on four essential factors:

a. Voice: the court participant has the chance to tell their story and explain their concerns;

b. Validation: the feeling of being paid attention to, of being taken seriously and of having arguments being taken into account, even if eventually rejected;

c. Respect: the experience of being listened to attentively, with dignity, respect and courtesy; of being provided with a process administered in good faith, which in turn leads to increased trustworthiness;

d. Voluntariness: being able to choose whether to participate in legal processes.

Voice, validation and respect, which are all clearly consistent with therapeutic jurisprudence philosophy, apply to the criminal justice system; criminal defendants, however, are not 'volunteers' – they can only make limited choices with respect to their case.

Studies conducted by the Australian Human Rights Commission in 2014 (see ***Mainstreaming TJ in Australia***) illustrate that persons who become involved with the criminal justice system usually have a history of poverty, low levels of education, unemployment, high drug or alcohol use, homelessness, domestic violence and poor mental/physical health. This type of court population would have complex, multi-layered needs. If, however, in the context of the criminal justice process, they are afforded voice, validation and respect by judicial officers and the prosecutors – treated with fairness and allowed to participate at all stages - their emotional and psychological needs would be catered to, and they would feel valued; they would certainly be more satisfied with the process and thus more willing and able to accept an outcome which may not be in their favour. Procedural justice can therefore improve the 'plight' of the participant in the criminal justice system, which could result in healing and the ability to move forward – the focus and spirit of therapeutic jurisprudence.

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Therapeutic Jurisprudence and Restorative Justice

Restorative justice is a movement in the criminal justice realm which has been growing since the 1980's. The root of this movement may be traced to Canada in 1974, when a probation officer and prison worker brought two young men who had vandalized property, in contact with the victims of the offence and through victim-offender mediation, arrived at an agreement for restitution to the victims. There was an obvious shift here from the retributive model of justice which prioritized punishment and blame as the way to address crime, to a focus on responsibility and reparation. This 'restorative' course of action paved the way for a restorative justice approach within the criminal law arena, which advanced proportionately to the vision and acceptance of the law as a possible therapeutic/healing agent.

Restorative justice perceives a criminal offence as an attack on the harmony of interpersonal relationships and community wellbeing. It seeks to bring all those harmed by the crime or conflict, those responsible for the harm, and the community affected, into communication with each other, so that everyone impacted by these victim/offender, offender/community relationship breaches, would 'resolve collectively' how to mend the effects of the harm and advance positively into the future. The main participants in this encounter process would be the victims, the offenders and the community.

The victims: Victims of crime had generally remained 'invisible' - uninformed and uninvolved - throughout the criminal justice process, as the state basically assumed the role of the injured party, undertaking the investigation and prosecution of crimes. This, even though victims of crime may experience varying degrees of harm, based on the gravity of the offence, its duration and their own reaction to it. The harm suffered by victims could involve property damage, financial loss, physical injury, emotional pain and suffering, ongoing treatment, anger, fear, diminished self-esteem or reduced quality of life. Furthermore, a victim's experience of insensitivity by the justice system to their subjective harm, could result in secondary victimization.

Increased awareness of this marginalization of the victims - that they deserve more than what the criminal justice system has traditionally offered - led to reforms in criminal justice systems around the world from the 1980's, which included the creation of victim support services and the use of victim impact statements. This focus on victim restoration in the criminal law arena, which involves attending to victims' needs, is now seen as an important process that includes "reassurance and support, reparation, vindication, meaning, safety and empowerment": Howard Zehr, ***Changing Lenses: A New Focus for Crime and Justice***, (3rd ed, Herald Press 2005). Their voice needs to be included not only for the process of justice, but for their recovery and survival, and for the possibility of future victimization to be erased.

It is important to note that therapeutic jurisprudence is advocating the increased use of restorative justice with child victims in particular, to facilitate as much healing as possible before a trial, as the courtroom experience would involve trauma for the child in addition to the pain of the crime itself. The victims of domestic violence would also benefit

from a restorative justice process, where the prosecution can interact with them pretrial to emotionally and psychologically empower them, can limit negative victim character evidence, can introduce evidence of the offender's prior abuse, and can allow the victims to contextualize the violence in their testimony.

The offenders: Offender restoration requires that it be made clear to the offenders what their actual degree of responsibility is for the criminal event which occurred, in order to avoid complications which may arise from their misconceptions about their culpability. Offenders may also need "social support, assistance to deal with guilt, education and training, interpersonal skills, emotion management skills and a positive self-image": ***Changing Lenses*** at pg 200. This could lead to an enhanced capacity on their part to face the victim, accept the consequences of their action on the life of the victim and be accountable and empathetic. The ultimate effect of such restorative justice would be the opportunity for the offender to heal and re-enter society as a trusted member.

The community: A community where crime has occurred is also a victim in a broad sense and it needs to be restored to a place of stability, where the breaches of relationships are healed, and citizens feel safe and can live without fear. Processes which "denounce offending behaviour, hold offenders accountable for their actions and promote the healing of victims and offenders can help address the community's need for restoration" to a place where there is peace and quality of life: Michael S King, ***Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*** (2008) 32(3) Melbourne University Law Review 1096 at pg 1103. The community is best positioned to address the causes of crime, as these are often rooted in its social or economic framework.

Aim of Restorative Justice

The aim of a restorative justice program is to:

a. resolve conflict

b. facilitate healing for victims – give them a voice

c. facilitate rehabilitation for offenders – let them accept responsibility for wrongdoing; apologize to victims

d. strengthen communities – restore trust between parties by putting right the harm caused; reparation/restitution e.g. financial or other compensations

e. prevent future damage – no recidivism, through remediation of offenders

Restorative justice seeks to enable a shift from the adversarial model of litigation, where the focus is on legal rights, entitlements, blame and punishment, to a justice system which balances the victims' needs for healing and rights for protection; the need for offender responsibility, rehabilitation and remediation, and the duty to protect the public/community.

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Process of Restorative Justice

A restorative justice process should promote active participation and discussion, where each party may voice their subjective feelings and exchange information on the impact of the offence, in a supportive and collaborative environment. The offender can explain why the offence occurred, take responsibility, express remorse and convey an apology; and the victim can share the effects of the offence on them and express their hurt feelings. Such an environment would also be conducive to a decision-making process, where the parties can offer suggestions and agree on how the situation may be addressed and resolved, in order to bring about healing, restitution and no future reoffending, which would also be beneficial to the wider community. The overall positive outcomes of this process can include shame management for both the victim and the offender; victim satisfaction, through the removal of negative mental images associated with the offence, as well as empowerment in choosing whether to forgive; and for the offenders, a sense of closure for the offence committed.

One specific restorative justice process is the victim – offender mediation (VOM), where the victim and the offender interact with the aid of a neutral mediator. The meetings can be face to face, through recordings or letters, or with the mediator acting as a go-between. The offender's progress is monitored by support groups, community committees, probation officers and by the court. Conferencing is another practice and is widely and most influentially used in Australia. It includes family group conferencing, police-mediated conferencing, community group conferencing and circle methods.

Research conducted by the Correctional Services of Canada in 1998 indicates that the system of restorative justice reduces recidivism and increases the probability that the offenders will accept responsibility and make restitution. It also shows that participating victims and offenders prefer and are more satisfied with the restorative justice approaches, than the traditional criminal justice system; that restorative justice reduces posttraumatic stress and has a positive effect on their health, physically and psychologically.

The focus of the restorative justice process aligns with the insight of therapeutic jurisprudence, that legal processes impact the psychological well-being of participants and need to be reviewed to minimize anti-therapeutic consequences and maximize healing. Therapeutic jurisprudence advocates that victims should not be revictimized through their encounters with the criminal justice system; rather, legal procedures should be reshaped so that the victim can re-establish equilibrium and gain control over their life. In order to achieve this, all participants within the criminal justice system process should be highly trained in restorative justice in order to be sensitive to what a victim needs at every stage of healing.

This would include training for participants such as judges, lawyers, police officers and court personnel in social and psychological services, so they can attain increased sensitivity to each victim's subjective needs. In addition, court proceedings should support victim empowerment and discourage their sense of loss of control and feelings of responsibility for what happened. One route is to encourage the victims to write or speak about their

feelings in relation to the crime, as this validation would help in healing post-traumatic stress disorder, which is crucial to the victim's restoration.

Restorative justice involves the victim, the offender and the community with the aim of 'restoring' circumstances to their status prior to the offence. Its processes of reparation, reconciliation and remediation can lead to holistic healing, which is the hallmark of therapeutic jurisprudence. It should be noted that restorative justice processes have been added to the criminal justice system as an enhancement and not as a substitute; constitutional rights and procedural due processes are preserved. The therapeutic, restorative approach to criminal justice, however, is resulting in doors being opened through which both the victim and offender can pursue and experience healing, and the wider community can be satisfied and move forward, restored.

Therapeutic Jurisprudence and Problem-Solving Courts Approach

Lawyers and judges in their roles as upholders of the law, interacting with legal rules and legal procedures, create social forces which may produce therapeutic or anti-therapeutic results. A significant question which naturally arises, is what approach taken by a judge in the courtroom, promotes the potential therapeutic effects of the law, without compromising due process and procedure?

Therapeutic jurisprudence reaches into the criminal courts through lenses which view the offender's behaviour as capable of rehabilitation, and the ultimate justice process outcome as possibly transformative – they will never again appear in court as an offender. This therapeutic jurisprudence perspective lends the court a solution focused or problem-solving characteristic, and the criminal judge will obviously play an important role in motivating and helping the offender to be rehabilitated. This revolutionary change in the way courts function can be seen as therapeutic jurisprudence at the judicial level.

It is important to note that this approach cannot be adopted in every court, as there are often instances where the judge has to perform the traditional adjudicatory role of neutrally deciding historically disputed issues. There are cases, however, where the court can provide help to prevent a reoccurrence of the problems before it, such as substance abuse, juvenile delinquency, domestic violence, child abuse and neglect, and untreated mental illness. In these types of matters, courts can function as psycho-social channels and judges as social workers.

Judges' Problem-Solving Skills

In Canada, the National Judicial Institute published, in 2011, ***Problem-Solving In Canada's Courtrooms:A Guide To Therapeutic Justice*** (first published in 2005 **as Judging for the 21st Century: A Problem-solving Approach**) which specifically outlines problem-solving skills for judges. These include communicating effectively; clarity in the courtroom; and adopting a team approach. These are explored further, below, and salient areas of the Guide highlighted.

Chapter 27 – Therapeutic Jurisprudence

1. Communicating Effectively

It is advocated that problem-solving judging requires "[d]irect interaction between a judge and court participants" – direct speaking and listening. The Guide notes at pg 29 that through this process, judges would, "inspire trust, motivate change, give participants a sense of voice and dignity, enhance progress and healing, and make court procedures more relevant to participants' lives". Such effective communication incorporates:

a. **Empathy** – the ability to understand and relate to another's feelings and views. To establish empathy, judges can:

   i. show an interest in the court participant's perspective. For example, Justice Stanley Sherr of the North Toronto Family Court has stated that a father may be afraid of not having a relationship with his child, so he makes a custody claim, when all he wants is to develop access. If you say to the father, "It looks to me what you really want is a relationship with the child. You're not trying to take the child away from the mother," and the father says "No, I'm not," this addresses the fear of both father and mother in a meaningful way, which allows all parties to work things through together.

   ii. relate events to court participants' lives. In a domestic violence context, a judge can ask an offender if they have children and tell them that their children will model their behaviour, which they would not want to see happen.

   iii. acknowledge not only the facts of the case, but people's emotional responses to the case or court events. For example, a judge can say, "I can see that this situation upsets you/makes you angry/is frustrating".

   iv. convey a sense of caring, compassion and respect for all court participants. According to Justice Sherr, this starts with being kind. At pg 32, Justice Sherr notes, "You want to project that you're fair and that you care about people and that you want to make sure that everybody is heard …Validation is extremely important."

   v. act in a trustworthy, credible manner. Treat all court participants fairly and consistently, respect due process, be prepared.

   vi. be aware of their own biases and predetermined ideas. This may be most clearly illustrated through youth offenders, who can appear in court in what they believe is their most special outfit, but which clothes would 'drive their parents insane'. Judges would have to realize that young people have a different outlook from what might be expected of adults (Judge Janice leMaistre, Provincial Court of Manitoba).

b. **Respect** – A judge must respect the dignity of all people in the courtroom. A judge's respect for an offender can result in the offender respecting the judge and the courtroom, and this mutual respect can have a positive effect on the progressive and ultimate outcome for the offender. There are various techniques which a judge can use to promote mutual respect in their courtroom:

- Speak slowly, clearly and loud enough to be heard by everyone.
- Ask the offender their name and/or how they would like to be addressed.
- Pronounce names correctly and ask for guidance when in doubt.
- Use words and tones which convey concern, not pity or condescension.
- Refrain from sarcasm, or from rushing/interrupting court participants.
- Encourage dialogue, rather than making speeches.
- Treat all participants equally.
- Make and maintain eye contact with participants, especially the offenders, as they speak and while speaking to them, rather than looking down at papers or only at lawyers. Be aware of the cultural practice of refraining from making eye contact as a sign of respect.

c. **Active Listening** – Therapeutic judging requires judges to give court participants a voice and a chance to tell their stories. This active listening provides opportunities for judges to listen for what's not said, to inquire about gaps and inconsistencies and to ask questions. This would convey to the participants that they are being heard and would promote the court's credibility. It is now accepted that process counts more than results and a judge's active listening would satisfy the participants that a fair procedure is involved, which would lead to respect for the court's decisions and orders. Active listening requires that judges:

i. give participants the opportunity to speak, listen attentively, do not rush speakers and seldom interrupt them.

ii. ask questions and make comments which illustrate that they want to know about and understand a person's position.

iii. refer to that position in their judgment.

iv. invite the victim to speak and acknowledge and validate the victim's experience when referring to it in court.

v. read verbal and non-verbal cues which could reflect a participant's discomfort, confusion or emotional state.

vi. ask court participants if they have any questions.

vii. maintain active and attentive body language, such as upright posture, eye contact and focusing on the speaker.

d. **Positive Focus** – A judge can create opportunities for therapeutic outcomes when interacting with offenders, by:

i. refraining from condemnation of the offender and directing disapproval at the anti-social and criminal behaviour.

ii. highlighting the offender's good qualities and contrasting them with the specific criminal acts.

iii. expressing hope and faith in the person's ability to become a law-abiding citizen.

iv. focusing on the offender's future and the possibilities for pro-social, law-abiding, healthy behaviour.

e. **Non-coercion** – Participants in the court process tend to be more satisfied, if they feel that their responses to choices open to them are not forced. Judges can reduce feelings of perceived coercion, by:

i. using positive pressures such as persuasion and inducement, rather than negative pressures such as threats and force.

ii. seeking input from offenders on such issues as parole, sentences, treatment and risk management plans, and other terms and obligations imposed by the court. This can lend to feelings of autonomy and responsibility on the part of the offenders.

iii. emphasizing discrepancies between the offender's current behaviour and their expressed long-term goals.

iv. avoiding arguments and confrontation, which can result in defensiveness; rather allow the offender to create solutions to their problems and remain in control.

f. **Non-paternalism** – A paternalistic attitude of telling the offender what the problem is and how to fix it, "can be offensive, reinforce denial, foster resentment, and cause a judge's efforts to backfire": at pg 41 of the Guide. In contrast, problem-solving judges recognize that therapeutic justice requires offenders to acknowledge their problems and take responsibility for solving them. These judges can, with

the support of treatment staff, help offenders to identify their beneficial qualities which they can use constructively in the joint effort to solve the problem.

2. Clarity in the Courtroom

The majority of persons who appear before judges in the criminal courts, may not be able to properly understand the legal documents and language involved in the management of their case. This may be due to limited literacy skills, as well as the highly specialized legal language used and the particular way of formulating legal documents. The result is that people are intimidated by the legal system and do not see it as a place where they can defend their rights.

If, however, judges facilitate greater understanding in their courtroom, the offenders would more clearly appreciate such matters as the reasons for and the terms of their sentences, restraining orders and why they have to report back to the court on a certain date, and they would more likely comply as required. Techniques which the judge can use to achieve this clarity are:

a. Look for signs of limited literacy, e.g., participants saying they forgot to bring glasses, hesitating when asked to read a document or reading at a very slow speed, mood change when faced with a document – upset, quiet, uncommunicative, forms which are incomplete or incorrectly completed or grammatically incorrect, their coping with the fear and embarrassment of inability by being flippant, dishonest, defensive, frustrated, angry.

b. Be proactive by breaking silence and directly asking if the participant has difficulties reading or writing.

c. Speak slowly and clearly, using short sentences and repeating important information.

d. Read documents aloud in the courtroom.

e. Use plain language instead of "legalese", and translate specific legal terms when they arise.

f. Use the active voice (we understand) rather than the passive voice (it is understood).

g. Use the first and second person (I/You) rather than the third person (One).

h. Ask the court participant if they understand and ask them to repeat in their own words what was just said.

i. Ask often if the court participants have any questions, waiting a sufficient amount of time for a reply and using body language such as eye contact, leaning forward, a nonthreatening vocal tone and open hands to show willingness to receive.

j. Watch the listeners' body language to determine if they have questions but are hesitant to ask.

k. Answer reasonably expected questions, even if not asked ("A question people often have is …").

3. Team Approach

Judges vested in a problem-solving approach can achieve great progress, through the cooperation and input of an experienced team which includes lawyers for all parties, police officers, social workers, mental health professionals, mediation professionals, victims' services professionals, addiction treatment centres and community outreach representatives. The court staff can also be included, guided by the judge to create a therapeutic courtroom tone and environment, by treating offenders with respect and facilitating court participants' understanding of the process. Finally, the offenders themselves and other court participants can be included to provide input from their respective perspectives. This muti-disciplinary, team-based approach can only enhance the potential for problem-solving.

Judges who succeed in honing the courtroom problem-solving skills of communicating effectively, clarity and a team approach, would clearly aid in the realization of procedural fairness, and facilitate the aims and process of restorative justice. The ultimate result would be doors opening for the psychological and emotional healing of court participants and consequently, the positive experience of therapeutic justice in the management of their matters before the courts.

As explored in **Problem-Solving In Canada's Courtrooms**, an international group of approximately 50 judges who took a problem-solving approach to judging were asked to complete the statement: "One way that I practise therapeutic jurisprudence in my courtroom is …". The following statements summarize their responses.

a. Speaking directly to the defendant in language and a tone of voice I think he or she will understand.

b. Finding something positive to say about the defendant; praising positive steps toward recovery; identifying and building on any indications or demonstrations of willingness to try to effect positive change.

c. Learning as much as I can about each defendant; trying to understand where a defendant is coming from – educationally, socially, psychologically – so they feel that I know and care about them.

d. Taking into account the impact of police and court processes to date.

e. Viewing the case as a primarily emotional, not legal, event.

f. Not allowing therapeutic/anti-therapeutic considerations to trump legal considerations.

g. Communicating to the parties that I understand their plight and the emotions involved.

h. Considering any cultural/linguistic factors that have an effect on a defendant's understanding of communication in the courtroom.

i. Using research-based decision making.

j. Working in a collaborative fashion with lawyers, health care professionals, and community organizations to provide a comprehensive treatment plan

k. Looking at each defendant's support system and utilizing that system in the treatment plan.

l. Listening carefully to each person who comes before me.

m. Being mindful of the impact of my words and actions on all participants.

n. Explaining my decisions to all parties.

o. Trying to schedule all of my contested cases for a case management conference so everyone appears informally and expresses their position. By doing so, often the problem can be resolved.

p. Using any influence I might have to encourage the client to get services they need to be well.

q. Always asking an offender, when they say that they will not offend again, what they are going to do to ensure that they do not offend and what supports they have in place.

r. Getting a defendant to explain what they have agreed to do and to explain how they are going to do it.

s. Asking defendants to explain why they think they offended: "What made you do it?"

t. Insisting on participation by all family members who are present at the disposition stage for an offender.

u. Being absolutely open about discussing underlying problems.

v. Constructively incorporating psychological or psychiatric assessments with the parties and their lawyers as a step toward problem-solving.

w. Treating clients/defendants with respect.

x. Letting clients ask questions and report positive progress.

y. Requiring treatment and medication compliance as conditions of release.

z. Setting status hearings to monitor court orders.

aa. Using incentives (e.g., applause, positive affirmations/reinforcement, encouragement) to reward compliance, and sanctions (e.g., increasing release restrictions) for non-compliance.

ab. Educating myself and parties about mental-health and substance-abuse disorders, treatment, and available community resources.

ac. Believing that people can change.

ad. Recognizing that you can't punish people to make them get better.

ae. Viewing the person as a whole instead of seeing only the parts of them that committed a crime.

a. Determining what would be in the best interest of the community

Specialized Problem-Solving Approaches

In the criminal law context, therapeutic jurisprudence was initially applied in specialized problem-solving courts, as these courts were "therapeutic jurisprudence friendly" designed. They facilitated the judges not only being able to resolve the case, but also the underlying issue or issues which gave rise to the matter. These solution-focused or problem-solving courtrooms are where therapeutic jurisprudence flourished. Their embrace of therapeutic jurisprudence included a focus on procedural fairness, as well as their use of the principles of restorative justice.

In Canada, specialized problem-solving courts can be found in almost every province and territory. They started in 1998, when a drug treatment court and a mental health court were initiated in Toronto, Ontario. Today, specialized problem-solving courts have expanded to include domestic violence courts, community courts, aboriginal courts and youth courts.

In the United States, problem-solving courts were formalized in 2000, by the adoption of a joint resolution of the Conferences of Chief Justices and Chief Court Administrators which explicitly supported the development of problem-solving courts. These include drug

treatment courts, mental health courts, domestic violence courts and other specialized courts.

The relational, interdisciplinary and healing focuses of these courts, facilitate the aim to identify and resolve the psychological issues underlying the legal problems, rather than on administering punishment or assigning blame.

For instance, in drug treatment courts, awareness of the fact that repeat offending occurs due to addiction, leads to a team approach being used to focus on mandatory programs for addiction, judicial supervision and life-skills training, over incarceration. In mental health courts, there is sensitivity to the fact that crimes by the mentally ill are health issues rather than criminal law matters, as well as awareness of the impact of the court process on them. A non-adversarial, relaxed atmosphere, as well as expedited assessments of mental illness and where appropriate, treatment of mental health conditions, are opted for over punishment. In domestic violence courts, there is recognition of the unique and complex characteristics of violence between family members and the approach adopted includes early and effective intervention and processing of these cases to increase victim safety; a team approach with social services to support the victims throughout the matter; and requiring the offenders to take responsibility for their actions not only through legal sanctions, but also through monitoring their compliance with court orders for treatment and for terms of contact with the survivors.

In Australia, a problem-solving courtroom approach has actually led to research being conducted into the benefits of legal representation in the courtroom, for the victims of serious sexual violence. It was examined and found that such representation would significantly support victims during the criminal justice process, especially during aggressive cross-examination; it would reduce secondary victimization and trauma; secure and maintain the victim's confidence in their own testimony, which would lead to the probity and efficacy of the evidence that goes before the jury; ensure the veracity of the criminal proceedings themselves; and may improve low conviction rates. If such representation is granted, the therapeutic jurisprudence outcomes can only be enhanced. However, fairness to the defendant remains vital and the defendant's rights to ask questions and test the prosecution's case cannot be compromised. Victim legal representation may therefore have to be limited to the specific role of protecting the victim's confidence and their capacity to testify with integrity.

Specialised Courts in the region where Therapeutic Jurisprudence may be facilitated:

a. **Bermuda**: Drug Treatment Court, DUI Treatment Court, Mental Health Treatment Court, Juvenile Court; (In progress: establishment of a Family Treatment Court - parents with drug, alcohol, and mental health issues - and a Domestic Violence Court).

b. **Cayman Islands**: Drug Treatment Court; (Informal Domestic Violence and Mental Health Treatment Courts).

c. **Guyana**: Juvenile Court, Adult Drug Treatment Court, Juvenile Drug Treatment Court, Sexual Offences Court.

d. **Saint Lucia**: Juvenile Court.

Mainstreaming Therapeutic Jurisprudence and The Problem-Solving Courtroom Approach

An issue which has arisen, is whether therapeutic jurisprudence problem-solving techniques should be limited to the specialized problem-solving courts. The underlying principles of therapeutic jurisprudence however, combined with the significant roles judges often play in the resolution of wide-ranging disputes, has led to the phenomenon of mainstreaming.

Mainstreaming is the process of applying the principles and practices of therapeutic jurisprudence to any and all aspects of the legal system where a therapeutic jurisprudence focus may make a difference (see Elizabeth Richardson, Pauline Spencer, and David B Wexler, ***The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Well-Being*** (2016) 25 JJA 148). That is, therefore, employing therapeutic jurisprudence in regular criminal courts and other general courts, beyond the specialised, problem-solving ones. The rationale for this expansion is that the law would be able to broadly impact the social wellbeing of society.

David B Wexler and Michael Jones in ***Employing the "Last Best Offer" Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation*** (2013) 6 Phoenix L Rev 843 (citing David B Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices'(2014) 7 Arizona Summit LR 463) illustrate this development, through the analogy of the landscape of legal rules and procedures as "bottles" and the therapeutic jurisprudence practices of legal actors like judges, as "liquid". To achieve mainstreaming, certain legal landscapes (rules and provisions) or "bottles" must be explored, to determine the extent to which the various practices and techniques of therapeutic jurisprudence, the "liquid", can be poured into them.

Judges in the States of New York and California in the United States, who had sat in both dedicated problem-solving courtrooms and courts of general jurisdiction, in conjunction with the New York-based Center for Court Innovation, actually conducted such an exploration, and identified some no or low-cost therapeutic jurisprudence approaches which judges can transfer from problem-solving to regular courtrooms; that is, therapeutic jurisprudence approaches which they can mainstream. These are outlined below.

a. **A proactive, problem-solving orientation of the judge**: This orientation leads judges to seek creative solutions to problems and to treat court participants as individuals worthy of respect and attention.

b. **Direct engagement with participants**: Courts can engage in clear communication with litigants, enhancing their understanding and confidence in court proceedings. For example, judges and other court staff can ask litigants whether they have questions. They can make direct eye contact, address litigants directly, and speak courteously. Direct engagement is a prerequisite for effective behaviour modification and enables judges to motivate and influence defendants to make progress in treatment, while identifying parties' crucial needs and laying the groundwork for positive solutions. Courts can also solicit litigant feedback (in comment boxes or via a website).

c. **Individualized screening and problem assessment**: The court screens or assesses potential litigants for key circumstances, including drug and alcohol use, mental illness, literacy and language difficulties, and prior or concurrent court involvement (e.g., criminal court and Family Court).

d. **Sentencing therapeutically**: Judges can involve offenders in crafting sentences to include risk- management strategies, relapse-prevention plans, and goals, and that incorporate specific rewards and sanctions for compliance and meeting those goals. Combined with ongoing judicial supervision (see point below), problem-solving sentencing can dramatically increase compliance and the likelihood of addressing or ameliorating some of the underlying causes of criminal activity.

e. **Ongoing judicial supervision**: Ongoing supervision – such as having defendants report back to court for treatment updates and judicial interaction – keeps judges informed and offenders accountable and allows judges to tailor sentencing provisions according to an offender's progress or relapse. Such reviews demonstrate to defendants and litigants that the court watches and cares about their behaviour, while providing ongoing opportunities for the court to communicate with litigants and defendants, and respond to their concerns and circumstances.

f. **Establishing links and partnerships with social services agencies, and integrating social services into sentencing and courtroom procedures**: By establishing direct links and relationships with such agencies, judges and counsel can more effectively and efficiently refer offenders to appropriate and available services, increasing the likelihood of compliance. Such partnerships and referrals are especially useful when dealing with defendants having addiction, mental illness, or vocational/educational needs.

g. **Tracking service mandate compliance**: Courts can track the number of litigants assigned or recommended to social services – including drug treatment, mental health treatment, domestic violence programs, education initiatives, parenting classes, etc. – each year and monitor the compliance rate.

h. **Prompt information sharing**: Courts can provide up-to-date information, forms, and instructions to litigants and family members in order to ensure that they understand the process and to help them prepare and file necessary paperwork. Courts can routinely collect and update relevant case information.

i. **A team-based, non-adversarial approach** with lawyers, social service agencies, and other court actors.

j. **Courthouse training and education**: Courts can educate staff about the context of offending, problem-solving strategies, and socioeconomic contexts that can underlie criminal behaviour and conflict through informal and formal trainings. Such training sessions can take the form of brown-bag talks, lectures from outside experts, or participation in out-of-court judicial education programs.

k. **Community outreach**: A court's presence in the community can be bolstered by hosting site visits from community groups, expanding court information available online and in libraries, schools and other public centres, and encouraging transparency in how courts operate.

See generally, Rachel Porter, Michael Rempel and Adam Mansky, ***What Makes a Court Problem-Solving: Universal Performance Indicators for Problem-Solving Justice*** (Center For Court Innovation 2010).

The following table shows a comparison of traditional and transformed court process, adapted from Roger Warren, ***Reengineering the Court Process*** (Great Lakes Court Summit, Madison, September 1998).

Traditional Court Process	Transformed Court Process
• Dispute resolution	• Problem-solving dispute avoidance
• Legal outcome	• Therapeutic outcomes
• Adversarial process	• Collaborative process
• Claim or case oriented	• People-oriented
• Rights-based	• Interest- or needs-based
• Emphasis placed on adjudication	• Emphasis placed on post adjudication and alternative dispute resolution
• Interpretation and application of law	• Interpretation and application of social science
• Judge as arbiter	• Judge as coach
• Backward looking	• Forward looking
• Precedent-based	• Planning-based

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Traditional Court Process	Transformed Court Process
• Few participants and stakeholders	• Wide range of participants and stakeholders
• Individualistic	• Interdependent
• Legalistic	• Common-sensical
• Formal	• Informal
• Efficient	• Effective

One positive feature of mainstreaming is the involvement of legal personnel other than judges; this includes professional and administrative staff involved with the court who also contribute to the participant's experience of the justice system.

The advancement of mainstreaming was endorsed by the Canadian Council of Chief Judges in 2011, when it released a Therapeutic Justice Resolution which expressly stated, inter alia, that judges are not only expected to deal with "disputed issues of facts and law but are also… asked to resolve a variety of human and social problems that contribute to offending behaviour"; and that it is "desirable that judges apply the principles of Therapeutic [Jurisprudence]", not only within the context of problem-solving courts, but "whenever it is appropriate to do so". It was moved by the Resolution, inter alia, that the "Canadian Council of Chief Judges endorses the principles and purposes" of therapeutic jurisprudence and "encourages their application in the courts whenever it is appropriate and feasible"; and it "supports the development of evidence-based best practices" in therapeutic jurisprudence and "the dissemination of that information to all judges". The Resolution is set out in Appendix A of ***The International Framework for Court Excellence and Therapeutic Jurisprudence*** at pg 162.

Evidence regarding the development and practice of therapeutic jurisprudence within the Caribbean jurisdiction of Trinidad and Tobago, was acquired through a two-year research project on procedural fairness conducted by the Judicial Education Institute of Trinidad and Tobago. According to Kerrigan, consultant to the research project, the data reveals a therapeutic jurisprudence "culture of progressive members of the judiciary in T&T, which is promising and working for liberation and the building of new communities and humane ways for dealing with disputes": Dylan Kerrigan, 'Therapeutic Jurisprudence in Trinidad and Tobago: Legitimacy, Inclusion, and the Neo-Colonialism of Procedural Justice' in Daniel Nehring, Ole Jacob Madsen, Edgar Cabanas, China Mills and Dylan Kerrigan and (eds) ***The Routledge International Handbook of Global Therapeutic Cultures*** (1st edn, Routledge 2022) at pg 449. That the mainstreaming of therapeutic jurisprudence has also been accepted as essential, emanates from the work done by several judges of the Trinidad and Tobago judiciary, including Justices Kokaram and Jamadar, who "actively through training seminars, workshop papers, judgments and changes in their processes helped to push the idea of therapeutic jurisprudence beyond a niche concern": at pg 452.

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The difficulties which may be encountered with mainstreaming therapeutic jurisprudence, include a regular court calendar which cannot effectively accommodate a therapeutic jurisprudence approach to everyday judging; traditionalist judges who resist change; as well as attorneys who view a "team approach" as an infringement of their traditional role as pure advocate, or a waste of time. It is proposed, however, that if therapeutic jurisprudence practices are extended into the "ordinary" system, a more humanistic approach to law would evolve and expand into everyday life, which would maximize the therapeutic potential of the law on those it affects. The benefits of mainstreaming therapeutic jurisprudence outweigh its challenges.

Helpful Text Resources

a. Australian Human Rights Commission (AHRC), ***Equal Before the Law: Towards Disability Justice Strategies*** (2014)

b. Bruce J Winick, ***Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*** (2009) 33(3) Nova Law Review 536

c. Carolyn Copps Hartley, ***A Therapeutic Approach to the Trial Process in Domestic Violence Felony Trials*** (2003) 9(4) Violence Against Women 410

d. David B Wexler, ***Therapeutic Jurisprudence in a Comparative Law Context*** (1997) 15(3) Behavioral Sciences & the Law 233

e. Douglas B Johnson, ***Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioural Contracting, Prevention Planning, & Reinforcing Law-Abiding Behaviour*** (2016) 1(1) Int'l J Ther Juris 313

f. Elizabeth Gresson, ***Restorative Justice in Criminal Offending: Models, Approaches and Evaluation*** (2018) 3 Special Edition Int'l J Ther Juris 1

g. Lori Carroll, ***Restoring the Weak and Victimized*** (2016) 1(1) Special Edition Int'l J Ther Juris 119

h. Michael L Perlin, ***"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*** (2017) 27 NZULR 1135

i. Natasha Bakht and Paul Bentley, ***Problem Solving Courts as Agents of Change*** (2004) 16(3) Commonwealth Judicial Journal 7

j. Tyrone Kirchengast, ***Victim legal representation and the adversarial criminal trial: A critical analysis of proposals for third-party counsel for complainants of serious sexual violence*** (2021) 25(1) International Journal of Evidence and Proof 53

Chapter 28 – Human Trafficking, Forced Labour, and Modern Slavery

In this Chapter: **Introduction | Human Trafficking in The Caribbean | Defining Modern-Day Slavery | Treaties and Legislative Frameworks | The Role of Judicial Officers | Constitutional Lenses | Practical Implications | Three Key Legal Principles | The Special Case of Child Victims | Practical Considerations | Special Indicators | Judicial Attitudes for Increasing Awareness - Ascertaining Red Flags**

Introduction

The islands of the Caribbean and its mainland jurisdictions arc from the northern coast of Venezuela, sweeping north first, curving eastwards and then veering westwards to the southern tip of the United States of America. Comprising in total some 700 islands, islets, reefs, and cays, not all of which are inhabited by humans, these island arcs delineate the eastern and northern boundaries of the Caribbean Sea and simultaneously, the western boundaries of the Atlantic Ocean. To their west across the Caribbean Sea are the countries of Central America. Like stepping-stones across a great expanse of water, the Caribbean islands are a natural pontoon-like bridge between South America and North America, and a seafaring link between North, South, and Central America. Humans from the earliest times have traversed these islands, moving between continents over and across these island-chains. The peoples, cultures, flora, and fauna in the Caribbean bear testament to these historical movements. Today these movements continue and include nefarious activities, from drug and arms smuggling to human trafficking and modern slavery: Jason Haynes, ***Caribbean Anti-Trafficking Law and Practice*** (Hart Publishing 2019) at pg 5.

In Caribbean spaces, historical practices of slavery, overt 'chattel' slavery, Indian indentureship, human trafficking and forced labour, are woven into the fabric, cultures, and psyches of regional peoples. The trauma, injustice, and inhumanity of these experiences – and their consequences – persist. Forced sexual exploitation, commercial sexual exploitation of children, and the exploitation of migrant and undocumented workers, remain major concerns in the American region, including Commonwealth countries. The Caribbean, with open unsecured borders and economies heavily reliant on tourism, provides opportunities for undocumented migrants seeking employment, as well as a destination for sex tourism, including the commercial sexual exploitation of children. Indeed, child sex tourism in the Caribbean results in the exploitation of numerous children each year: Commonwealth Human Rights Initiative (CHRI) and Walk Free, ***Eradicating Modern Slavery: An assessment of Commonwealth governments' progress on achieving SDG Target 8.7*** (2020); Peter Jamadar and Laurissa Peña, ***Human Trafficking, Forced Labour, and Modern Forms of Slavery: Commonwealth Caribbean Perspectives*** (March 2022).

In fact, these practices are globally rampant, and increasingly so. As of 2020, 1 in 150 persons in the Commonwealth is living in contemporary forms of slavery, such as forced

labour, trafficking, or other exploitative conditions; an estimated 40% of the 40.3 million people living in modern slavery reside in Commonwealth countries. This represents about 15.7 million men, women, and children in forced labour, forced marriage, and human trafficking; and 1 in every 130 women and girls globally is currently trapped in modern slavery. An estimated 29 million women and girls are victims of modern slavery: ***Eradicating Modern Slavery***.

This evidence describes a global phenomenon of enormity, tragedy, and criminality. It is unavoidably an issue for judicial systems, and all who are interested in human rights and justice. The exposure and eradication of human exploitation and cruelty, that is manifesting in our times as modern-day slavery, must be made a high priority – it is both urgent and imperative.

Statistics show that women and girls are the most vulnerable. According to the United Nations Office on Drugs and Crime's 2020 ***Global Report on Trafficking in Persons*** at pgs 4 and 9:

> Migrants account for a significant share of the detected victims in most regions. Traffickers prey upon the marginalized and impoverished. Cases examined by UNODC found that at least half involved victims who were targeted because of economic need.
>
> Children living in extremely poor households are especially vulnerable and countries in West Africa, South Asia and Central America and the Caribbean report much higher shares of detected child victims. Globally, one in every three victims detected is a child, but in low income countries, children account for half of the victims detected, most of them trafficked for forced labour.
>
> ….
>
> …In 2018 for every 10 victims detected globally, about five were adult women and two were girls. About one third of the overall detected victims were children, both girls (19 per cent) and boys (15 per cent), while 20 per cent were adult men.
>
> Traffickers target victims who are marginalized or in difficult circumstances. Undocumented migrants and people who are in desperate need of employment are also vulnerable, particularly to trafficking for forced labour.

Finally, considering the percentages of detected trafficking victims, classified according to the categories of exploitation, "[w]hat is striking is that 50% of victims are trafficked for the purpose of sexual exploitation, and 38% are trafficked for the purpose of forced labour. The research data also shows that where forced labour revolves around domestic servitude, women and girls predominate": '**Human Trafficking, Forced Labour, and**

Modern Forms of Slavery' at pg 21. See also ***Global Report on Trafficking in Persons 2020*** at pgs 10-12.

The trends canvassed in the 2020 Report have generally remained. However, there is new data which is cause for increasing concern not least of which being that victims detected globally in 2022 surpassed 2019 pre-pandemic levels by some 25%: United Nations Office on Drugs and Crime, ***Global Report on Trafficking in Persons 2024*** (United Nations 2024) at pg 3. The Preface to the ***Global Report on Trafficking in Persons 2024*** at pg 3 summarises the data in the following terms:

> As climate disasters, conflicts, and displacement converge and their consequences cascade, vulnerabilities are growing. Some of the people at the heart of those crises are pushed directly into trafficking and exploitation, others are left without homes and prospects and at huge risk of trafficking, while others still are exposed due to structural risks created by low incomes and insecurity.
>
> Human trafficking continues to target the vulnerable, and we see this in persistent as well as emerging trends. Women and girls remain the biggest share of detected victims worldwide, accounting for 61% of the total in 2022, and most of them continue to be trafficked for sexual exploitation, a pattern that has carried on for many years now. In parallel, the number of children among detected victims is growing rapidly and alarmingly, increasing by a third over the space of three years. In particular, the number of girls detected has surged, increasing by 38%. In several regions, children now account for the majority of trafficking victims detected.
>
> The dynamics of trafficking in persons are also changing. It is becoming an increasingly global and transnational phenomenon, with more nationalities and more countries of destination detected than before. A third of all cross-border human trafficking flows involve citizens of Africa, where the impact of crises has been particularly stark, and where there are more people at risk than anywhere else.
>
> …
>
> Another important development is the fact that victims trafficked for forced labour now account for the biggest share of all victims around the world, overtaking those who are trafficked for sexual exploitation, yet criminal convictions remain primarily focused on the latter. We are also seeing a rise in trafficking for forced criminality, as organized crime models evolve and use trafficking victims to conduct online scams and other crimes in a spiral of victimization. It is critical to highlight the role of organized crime in human trafficking more broadly, and to dispel any misconception that trafficking is largely an isolated or disorganized form of crime. Our findings suggest that

most traffickers operate as structured groups or loose networks, and that these organized traffickers exploit more victims.

Despite global detection rates trending upwards by 25% in 2022 compared to 2019 continuing into 2023, countries in the Caribbean were among those that recorded a decrease in the detection of victims when compared to 2020 figures: ***Global Report on Trafficking in Persons 2024*** at pg 10. For the majority of detected girl victims (60 percent), sexual exploitation continues to be the purpose for which they are trafficked. For 21% of detected girl victims, they are trafficked for forced labour with 19% being trafficked for other purposes. Forced labour and other purposes such as forced criminality and forced begging featured in 45% and 47%, respectively, of cases involving boys while 8% of boys were trafficked for the purpose of sexual exploitation. See ***Global Report on Trafficking in Persons 2024*** at pg 12.

One of the points of special interest highlighted in the 2024 Report is that while there has been a significant increase in detection of victims identified in forced labour, worldwide, convictions relate mostly to sexual exploitation. As well, due to the complexity of forced labour cases, it takes on average 1 year more to secure convictions in those trafficking cases compared to cases where trafficking takes place for the purpose of sexual exploitation. The 2023 data confirms this trend as ongoing which leads to the suggestion that, "the criminal justice response to cases of forced labour is still less effective than for cases of sexual exploitation": ***Global Report on Trafficking in Persons 2024*** at pg 14.

See, generally:

a. United Nations Office on Drugs and Crime, ***Global Report on Trafficking in Persons 2020*** (United Nations 2021)

b. United Nations Office on Drugs and Crime, ***Global Report on Trafficking in Persons 2024*** (United Nations 2024)

Human Trafficking in The Caribbean

The **Global Report on Human Trafficking in Persons 2020** highlights (at pgs 155 – 156) the key features of human trafficking in the Caribbean and the Americas, as follows:

a. In the Caribbean, most of the detected victims in 2018 are girls and women, equalling 79 per cent of the total detected trafficking victims in this region. The percentage of girls as a proportion of the total detected victims, was 40 per cent in 2018, and is among the largest percentage of girl victims of trafficking recorded worldwide.

b. In North America, Central America and the Caribbean, sexual exploitation is the most commonly detected form of trafficking (over 70 per cent), which is among the highest recorded globally. As far as victims of trafficking for sexual exploitation

are concerned, most victims in North America are adult women, while a higher share of girls is reported in Central America and the Caribbean.

c. The share of detected victims trafficked for forced labour ranges between 13 and 22 per cent in the two subregions. In North America, detected victims who are trafficked for forced labour are mainly adults, with men and women detected in similar shares. The victims detected in Central America and the Caribbean who are exploited in forced labour are girls and boys.

d. In Central America and the Caribbean, children are also trafficked for the purpose of exploitative begging, for forced criminal activity and for some forms of illegal adoption.

In terms of trafficking flows, the Report research data shows that victims detected in Central America and the Caribbean are primarily citizens of the country of detection. The other significant flows are from South America and other countries in the subregion. These flows mainly move from south to north, from relatively poorer countries towards relatively richer countries across borders. Overall, the trafficking flows affecting Central America and the Caribbean continue to be confined to the Americas, both in terms of their origin and destination.

The 2024 Report echoes the findings of the 2020 Report. Data showed that:

a. Over 80 per cent of all detected victims within Central America and the Caribbean in 2022 were female; women comprised 30 per cent of the total and girls accounted for 52 per cent (see pg 128).

b. Noting the drop in the detection rate recorded in 2022 and the further decrease of victims detected between 2021 and 2022, the 2024 Report explains that sexual exploitation remains the most detected form of trafficking in the region even though it only accounted for 62 per cent of cases. The Report goes on to state that sexual exploitation "almost exclusively involves female victims – slightly more girls (56 per cent) than women (41 per cent)" (see pg 128). Boys accounted for the remaining 3% of victims detected in sexual exploitation-based trafficking cases.

c. In 2022, across Central America and the Caribbean, 69 per cent of victims trafficked for forced labour were female with women victims comprising 37 per cent and girls comprising 32 per cent of those victims. Men and boys accounted for 16 per cent and 15 per cent, respectively (see pg 129).

d. In 2022, 80 per cent of victims detected in Central America and the Caribbean were from these states although a significant number of victims (20 per cent) are trafficked from South America. North America, South America and Central and South-Eastern Europe were found to be destinations for victims trafficked form the region (see pg 129).

Jamadar and Peña in describing the data from the 2020 report (which is equally apposite to the 2024 Report's findings) comment that:

> From this research data, the picture that emerges is of hemispheric trafficking, generally flowing from south to north but with significant internal local trafficking, and all influenced by both wealth differentials and economic factors. In the Caribbean subregion, poverty is a significant factor, and women and girls are the most highly trafficked victims, with sexual exploitation, forced labour and domestic servitude being the most prevalent drivers: ***Human Trafficking, Forced Labour, and Modern Forms of Slavery*** at pg 28 (citations omitted).

Defining Modern-Day Slavery

Slavery is defined in contemporary terms as, "the status or condition of a person over whom any or all the powers attaching to the right of ownership or control are exercised": **Slavery Convention** (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, art 1. "Modern day slavery therefore encapsulates human trafficking, forced labour, debt bondage, descent-based slavery, slavery of children, forced marriage and child marriage": ***Human Trafficking, Forced Labour, and Modern Forms of Slavery*** at pg 34.

The International Criminal Tribunal for former Yugoslavia Appeals Chamber, in the case of ***Prosecutor v Kunarac*** **(Judgment) ICTY-96-23 and ICTY-96-23/1 (ICTY Appeals Chamber, IT-96-23 & IT-96-23/1-A, 12 June 2002)**, shed further light on modern slavery. The "traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery'", the Court notes at para 117, "has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership."

The Court made it clear that slavery is not limited to the "right of ownership over a person", as with chattel slavery, but extends to where the "powers attaching" to such a right are exercised. The court, quoting the judgment of the Trial Chamber, also identified, at para 119, a non-exhaustive list of factors which may be indicators of enslavement:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.

The Appeals Chamber further explained: (i) lack of consent of a victim, (ii) duration of enslavement, and (iii) the nature of the relationship between the defendant and the victim, are relevant considerations. These are not necessary elements, though they may be evidential considerations: see paras 120 and 121.

The intention required is simply "an intentional exercise of power attaching to the right of ownership": see para 122.

A good working definition that encapsulates the essence of modern-day slavery is **forced or involuntary servitude** (see ***Prosecutor v Kunarac*** at para 123, citing with approval ***United States v Pohl*** **(United States Military Tribunal Nuremberg, Case No 4, 3 November 1947) reprinted in** ***Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council No 10*****, vol 5, (US Government Printing Office 1950**) 958 at pg 970.

A cohesive expression of what "modern slavery" encapsulates is provided in International Labour Organization, Walk Free Foundation and ***Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*** (International Labour Office 2017) at pg 16 where the Report's context is set out. What is stated there is helpful. The term "modern slavery":

> …covers a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking. Although modern slavery is not defined in law, it is used as an umbrella term that focuses attention on commonalities across these legal concepts. Essentially, it refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power.

Treaties and Legislative Frameworks

The majority of the Commonwealth Caribbean are signatories to the ***Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*** (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol), which at the time of writing has been ratified or acceded to. The Bahamas is among the ratifying states, having signed the instrument on 9 April 2001 and ratifying it on 26 September 2008.

The Palermo Protocol is the most significant international instrument to combat and prevent human trafficking. Notably, it creates the internationally accepted definition of human trafficking. Human Trafficking is defined, at Article 3(a), which states:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs….

It bears emphasising that treaties are becoming more important, as Caribbean courts, when interpreting and applying the law, strive as far as is reasonable to ensure that their approaches are aligned with States' international treaty obligations. A hallmark decision

that demostrates this, is the decision of the CCJ in ***Attorney General v Joseph*** **[2006] CCJ 3 (AJ), (2006) 69 WIR 104**.

Many Caribbean territories have either amended/ modified their existing laws, or enacted new laws, to address the issue of human trafficking. In The Bahamas, the legislation in this area is covered under the **Trafficking in Persons (Prevention and Suppression) Act, Chapter 106**.

The Role of Judicial Officers

Judicial officers have pivotal roles to play in the mitigation, amelioration, and eradication of these modern forms of slavery, forced labour, and human trafficking. They are, after all, amongst the primary powers when it comes to trial procedures, determinations of guilt, and sentencing, all of which are deeply intertwined in good practices for protecting victims of contemporary forms of slavery.

The terms of Article 1 of the **Slavery Convention,** which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised", were shaped by context, and thus by prevailing historical circumstances. The language is contractual – "right of ownership" – informed by the dominant form of chattel slavery, and shaped by existing ideologies.

Constitutional Lenses

Viewed through modern constitutional lenses and in post-colonial contexts, a critical interrogation of this almost 100-year-old colonial era treaty, may reveal the true potential of the roles and capacities of judicial officers in relation to contemporary forms of slavery; a potential un-shackled by both history and "tabulated legalisms": ***Marin v R*** **[2021] CCJ 6 (AJ) BZ** at paras 31 – 33; ***McEwan v AG of Guyana*** **[2018] CCJ 30 (AJ), (2019) 94 WIR 332**.

The jurisprudential implications for contemporary forms of slavery should be self-evident; the inherent dignity and worth, the freedom, and the unequivocal equality of all persons, are constitutionally presumed inviolable (subject of course to lawful exceptions). Courts and judicial officers are obliged to orient themselves around these values – both procedurally and substantively. This is what a rights-centric, rule of law approach to judicial work requires. In the context of this issue, it is an approach where the primary focus is on the rights and interests of victims/survivors. Judicial officers are the guardians of constitutional values. In the context of contemporary forms of slavery, when viewed through the principles of constitutional supremacy and human rights paramountcy, judicial officers are under a constitutional imperative to act to protect victims/survivors.

The Constitution of the Commonwealth of The Bahamas contains several provisions that facilitate a rights-centric and rule of law approach to the issues of human trafficking, forced labour, and modern forms of slavery in The Bahamas.

Chapter 28 – Human Trafficking, Forced Labour, and Modern Slavery

The Preamble acknowledges that the Commonwealth of The Bahamas is a "Free and Democratic Sovereign Nation" that subscribes to the "Fundamental Rights and Freedoms of the Individual", thereby importing the notions of the inherent dignity and worth of all persons implicit in the principles of freedom and democracy (**Universal Declaration of Human Rights** (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1). And it goes further. It specifically states in relation to this sovereign democratic territory, "and in which no Man, Woman or Child *shall ever be Slave or Bondsman to anyone or their Labour exploited* or their Lives frustrated by deprivation" (emphasis added). Moreover, ss 17 and 18 of Chapter III, which deals with the protection of fundamental rights, specifically prohibit torture, inhuman and degrading treatment (s 17), and slavery, servitude, and forced labour (s 18).

Given that the Constitution is supreme (s 2) and all persons are entitled to the protection of the law (s 15), there are ample and explicit constitutional bases to robustly address matters of human trafficking, forced labour, and modern forms of slavery in The Bahamas.

Practical Implications

In a very practical sense, the following are some general approaches that should be embraced by all court systems and judicial officers. In this context, it is worth remembering that human trafficking, forced labour, and all modern forms of slavery, are events of violence perpetrated against unwilling and most often vulnerable victims.

Some important matters that courts and judicial officers should therefore always be concerned about and address from the earliest opportunities, are:

a. the safety and security of victims/survivors

b. the physical, mental, emotional, and psychological wellbeing of victims/survivors, including access to services that can aid recovery and healing

c. the active and meaningful participation of victims/survivors throughout court proceedings, ensuring convenient access to necessary information, amenities, and legal and other social services

d. considerations (where appropriate) of regularization of immigration status, safe repatriation, and community and filial reintegration

e. the avoidance of revictimization

f. the provision of relevant compensation tailored to the circumstances of each case.

Care, however, needs to be taken to avoid adverse effects on victims' rights, including rights to privacy, freedom of movement, and choices about the exercise and enjoyment of freedom (agency).

Dr Haynes itemizes some general human rights obligations at pg 106 of ***Caribbean Anti-Trafficking Law and Practice***. These are as follows:

a. Give primacy to the rights of victims/survivors

b. Provide basic supplies to victims/survivors

c. Provide medical and psychological assistance to victims/survivors

d. Afford children specialized care and treatment

e. Provide safe and secure accommodation

f. Protect privacy of victims and ensure confidentiality

g. Provide information, documentation, and interpretation/translation

h. Regularize victims' immigration status

i. Ensure the safe repatriation of victims/survivors

j. Assist in the reintegration of victims

Three Key Legal Principles

One of the major pillars of international anti-trafficking law, is the protection of victim's rights. The Commonwealth Constitutions, like international law, have adopted a rights centric approach, focusing on the rights of the victim and putting safeguards in place to prevent revictimization of the person. To some extent, these principles have been incorporated into the domestic law through the enactment of Trafficking in Persons legislation.

1. Non-punishment Principle

The principle is best explained in the case of ***R v L*** **[2013] EWCA Crim 991, [2014] 1 All ER 113**. This case consolidated several separate appeals, as the appellants were all victims of human trafficking. The appellants were all Vietnamese nationals who had been brought to the United Kingdom as children and forced to cultivate cannabis plants. The appellants were charged and convicted of cultivating cannabis and being in possession of fake passports.

At para 13, the Court held:

> What, however, is clearly established, and numerous different papers, reports and decided cases have demonstrated, is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation, and

> the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now. **The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals** (emphasis added).

At para 16, the Court further stated:

> …[T]he court reviews the decision to prosecute through the exercise of the jurisdiction to stay. **The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution which fails to acknowledge and address the victim's subservient situation, and the international obligations** to which the United Kingdom is a party. The role of the court replicates its role in relation to agents provocateurs. It stands between the prosecution and the victim of trafficking where the crimes are committed as an aspect of the victim's exploitation (emphasis added) (references omitted).

The legal principle in operation is that where the crime committed (the offence) has a *sufficient nexus* to the fact that the person was trafficked and there was evidence of *compulsion* (to commit the offence), to a degree that the victims' culpability can be considered to be effectively extinguished, then a judicial officer should exercise their discretion to grant a stay of the proceedings. The jurisprudential basis for the stay is that the proceedings or their continuation amounts to an abuse of process.

The case of ***R v Joseph*** **[2017] EWCA Crim 36, [2017] 1 WLR 3153**, is one involving a Saint Lucian national who was a victim of human trafficking in the UK and had smuggled cocaine into the UK. The court affirmed the sufficient nexus and compulsion test but noted that the seriousness of the offence must also be considered when determining whether a stay was appropriate in the instance. In the case of a child, however, it was determined that it is not necessary to consider the element of compulsion in deciding whether to stay a matter.

2. Duress

In the Commonwealth Caribbean, the defence of duress is a recognized defence, and it has applicability in the area of human trafficking and victim/survivor criminality. However, this will usually mean that the victim/survivor must go through a full trial to prove duress, as opposed to a court ordering a stay of the prosecution.

According to the Jamaican case of ***Reid v R*** **[2013] JMCA Crim 41 (Jamaica CA, 27 September 2013)**, a defence of duress will be successful where:

a. the victim was forced against their will to act as they did by threats which they genuinely believed would cause serious harm to them or their family.

b. a reasonable person of the victim's age and circumstance would have been forced or compelled to act as they did in the commission of the offence.

c. the victim could not reasonably have avoided acting as they did without either being harmed or having their family harmed as a result.

3. Avoidance of Revictimization

Building upon the above, particularly on procedural fairness requirements that include understanding, respectful treatment, availability of amenities, and access to information, ***Proceeding Fairly*** notes that judicial officers must be careful to avoid secondary victimization caused by court proceedings, in relation to victims/survivors of modern-day slavery.

According to the International Centre for Migration Policy Development's ***Anti-Trafficking Training Material for Judges and Prosecutors Handbook*** (ICMPD 2006), judges should put all measures in place to eliminate security risks to the victim and manage the victim's psychological trauma and stress (pg 60). Judges should treat the victim with compassion, fairness, respect, and dignity, and encourage and arrange special support for the victim. These measures, according to the Handbook and ***Caribbean Anti-Trafficking Law and Practice***, include:

a. Explaining the nature of the proceedings to victims in understandable terms.

b. Arranging for victims to be under the care of an established NGO.

c. Allowing victims to be accompanied to Court by a person they trust.

d. Ensuring access to translation services.

e. Monitoring the types of questions put to the victim.

f. Providing Witness Protection.

g. Ensuring the basic needs of Trafficked Victims are met.

h. Providing medical and psychological assistance.

i. Providing accommodation.

Dr Haynes explains in ***Caribbean Anti-Trafficking Law and Practice***, at pg 31:

> The importance of protection … lies in the fact that trafficked victims are, by virtue of the exploitation which they have had to endure, vulnerable individuals whose mental and physical wellbeing could easily be compromised by the recalcitrant practices of traffickers and their associates who wish to regain their "property" or dissuade victims from cooperating with prosecuting authorities in the institution of criminal proceedings.

The safety of these persons can easily be compromised by their vulnerable positions.

Many Commonwealth Caribbean countries now have legislation to ensure that the victims/survivors are safe from threats and intimidation from their traffickers.

The Special Case of Child Victims

Children have always been recognized by the law as being especially vulnerable. Article 3 (1) of the **Convention on the Rights of the Child** (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Many Commonwealth Caribbean countries have enacted legislation that recognises this vulnerability and the best interests of the child.

The respective Acts also require housing care and support, and that the victims are reunited with their families as soon as practicable. In some instances, there is a requirement that criminal proceedings involving child victims be held in camera, to prevent secondary victimization.

Some of these countries provide that child victims are not to be housed in prison or other detention facilities.

Some of these jurisdictions also provide that child victims are to be assigned trained social or case management workers to support them in court proceedings.

In The Bahamas, the Child Protection Act, Chapter 132 is the primary piece of legislation, among a suite of statutes dealing with children, that governs the protection of children's rights. A number of its provisions address the Convention on the Rights of the Child. Pursuant to section 4(c) of the Act, a child shall have the right to:

> …exercise, in addition to all the rights stated in this Act, all the rights set out in the United Nations Convention on the Rights of the Child (the Convention) subject to any reservations that apply to The Bahamas and with appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws.

As it relates to trafficking in children, Article 35 of the Convention mandates States to, "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form". The Bahamas' Trafficking in Persons Act includes provisions that specifically address trafficking involving children relating to the protection and support of child victims as well as dependent children of victims of trafficking.

Practical Considerations

The considerations offered in this section are reflected in the following resources:

a. ***Identifying Victims of Human Trafficking: Fact Sheet*** published by the United States Department of Health and Human Services' Office on Trafficking in Persons (OTIP)

b. ***Anti-Trafficking Training Material for Judges and Prosecutors Handbook*** developed in 2006 by the International Centre for Migration Policy Development (ICMPD)

c. ***Information Sheet: Red Flags – Indicators of Human Trafficking*** from the Office to Combat Trafficking in Persons in the British Columbia Ministry of Justice

The United Nations Office on Drugs and Crime has also developed a fact sheet that lists human trafficking indicators. The fact sheet lists general indicators as well as some specific to children and various forms of exploitation such as domestic servitude, sexual exploitation, labour exploitation, and begging and petty crime.

Red Flags and Indicators that a Person may be a Victim of Human Trafficking

In order to afford the victim/survivors their rights and prevent secondary victimization and revictimization in society, it is crucial that the victim is identified. Sometimes victims themselves are unaware of their possible victim status; lived experiences of mistreatment and abuse are "common" to some migrants. Victims may have a negative perception of authority and may be afraid of being deported (see ***Identifying Victims of Human Trafficking: Fact Sheet***).

Human Trafficking Can Occur in the Following Situations

a. Prostitution and escort services

b. Pornography, stripping, or exotic dancing

c. Massage parlours

d. Sexual services publicized on the Internet or in newspapers

e. Agricultural or ranch work

f. Factory work or sweatshops

g. Businesses like hotels, nail salons, or home-cleaning services

h. Domestic labour (cleaning, childcare, eldercare, etc. within a home)

i. Restaurants, bars, or cantinas

j. Begging, street peddling, or door-to-door sales

General Physical Indicators of Human Trafficking

a. Bruises, broken bones, burns, and scarring

b. Chronic back, visual, or hearing problems

c. Skin or respiratory problems

d. Infectious diseases, such as tuberculosis and hepatitis, which are spread in overcrowded, unsanitary environments with limited ventilation

e. Untreated chronic illnesses, such as diabetes or cardiovascular disease

f. Reproductive health problems, including sexually transmitted diseases, urinary tract infections, pelvic pain and injuries associated with sexual assault, or forced abortions.

Special Indicators

The considerations offered in this section are reflected in the US OTIP's ***Identifying Victims of Human Trafficking: Fact Sheet***, the ICMPD's ***Anti-Trafficking Training Material for Judges and Prosecutors Handbook***, and the British Columbia Ministry of Justice's ***Information Sheet: Red Flags – Indicators of Human Trafficking***.

Forced Labour

a. Evidence of a failure to pay a worker the minimum wage

b. Work is extracted from workers by physical or sexual violence

c. Confinement to the workplace

d. Retention of identification documents

e. Threats of deportation or harm to family

f. The person feels linked to the employer by debt bondage

g. Working hours are disproportionate

Domestic Servitude

a. Cohabitation

b. Disproportionate working hours and lack of time off

c. Perpetration of offensive acts or manifestation of racist attitudes against the domestic worker

d. Exposure to physical or sexual abuse/violence

e. They are prevented from leaving the place of residence/work freely

f. No negotiation of work conditions is allowed

g. Inadequate remuneration such as to maintain dependent relationships

h. The person feels linked to the employer by debt bondage - for instance to pay back travel expenses often for an undefined amount

Sexual Exploitation

a. Women without passports or identification documents or visas and whose personal data cannot be verified

b. Women speak only their native language

c. Women seem to be very anxious or in a helpless situation

d. Women are not able to explain how they entered the country

e. Women do not have their earnings at their free disposal

f. The price of sexual services is considerably lower than market prices

g. Women have to earn a minimum amount of money per day

h. Women are limited in their freedom of movement

i. Women have a relatively high debt

Chapter 28 – Human Trafficking, Forced Labour, and Modern Slavery

Judicial Attitudes for Increasing Awareness - Ascertaining Red Flags

Situational Awareness and Intersectionality

This speaks to the recognition, understanding, and awareness that a matter may present itself as a straightforward case, when in reality it involves intersecting and other influencing considerations. The nature of human trafficking, how and why humans are trafficked and who is trafficked (currently there is an overwhelming and disproportionate number of women and children), is constantly changing; contemporary forms of slavery are shifting, changing forms, yet fundamentally the same. Judicial officers who operate in a closed-minded way, within the "four-corners" of a case, can miss the existence and impact of contemporary forms of slavery in those cases.

Judges therefore have a responsibility to be highly attentive. They must be acutely aware of any of the red flags or subtle indicators that an individual may be a victim of trafficking. Often these signs are not readily apparent and at times it may fall on the Judge to "sniff out" whether such circumstances exist. Victims of trafficking have faced significant trauma and are marred with fear. Judges must take a deeper look at the people who appear in their courtrooms. By practicing situational awareness, judges can effectively prevent some of the victims of tracking from "slipping through the cracks" of the justice system.

Mindful Judging

Mindful judging requires judicial officers to adopt a 360-degree internal and external view of court proceedings and court relationships. This approach places an enhanced and specific focus on not only the substance of a case, but also on behaviours, the environment, and communications in the court room (and courthouse). Mindful judging offers judicial officers an opportunity to understand how victims/survivors may be impacted by judicial proceedings.

In Caribbean spaces, for example, judicial officers are required to become aware of whether there are factors which may influence "rites of domination" and more generally, whether there are incidences of power and control and of manipulation at play, that operate to intimidate, silence, and re-victimise (see Mindie Lazarus-Black, ***The Rites of Domination: Practice, Process, and Structure in Lower Courts*** (1997) 24(3) American Ethnologist 628).

For victims/survivors who have notably endured trauma (which can be both immediate and long-term), the judicial environment can reinforce unequal power relations that negatively impact on the victim/survivor's safety and comfort, impact their levels of trust, and their capacity to meaningfully participate in proceedings. Mindful judging thus gives rise to enhanced degrees of courtroom consciousness, that may otherwise be overlooked on account of familiarity.

Chapter 28 – Human Trafficking, Forced Labour, and Modern Slavery

Judicial Humility, Compassion, and Concern

Victims/survivors of human trafficking have already suffered trauma, exploitation, dehumanization. They enter court systems disadvantaged. Their core human rights to dignity, respect, and equality have already been compromised. Achieving substantive equality for them may necessitate appropriate differential treatment.

Judicial humility begins when judicial officers give up their need to be right, be in control and have power over, and their predisposition to be pre-judgmental. Judicial humility leads to genuine attitudes of openness and receptivity and consequently, to judicial compassion and concern. Indeed, these three judicial attitudes may be exactly what victims/survivors of contemporary forms of slavery are both entitled to and need.

Chapter 29 – Self-Represented Litigants

In this Chapter: **General Scope | Judicial Responsibilities and Considerations | Best Practices for Judges in Addressing the Needs of Self-Represented Litigants: A Procedural Fairness Approach | General Case Management Guidelines | Specific Guidelines | Sample Checklist for Cases Involving Self-Represented Litigants**

> Providing access to justice for [self-represented litigants] within the constraints of a system that has been developed on the basis that most litigants will be legally represented poses considerable and unique challenges for the judiciary.... However, [self-represented litigants] are not in themselves "a problem"; the problem lies with a system which has not developed with a focus on unrepresented litigants. [It is] vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of [self-represented litigants], rather than vice versa.
>
> (Judiciary of England and Wales, The ***Judicial Working Group on Litigants in Person: Report*** (2013), at para 2.5 cited in Judicial College, ***Equal Treatment Bench Book*** (2024) at pg 10)

Throughout this chapter, the term "self-represented litigants" or "SRLs" is used to describe persons who appear before the court in criminal proceedings without legal representation, having waived their right to an attorney-at-law and choosing to represent themselves without the assistance of legal counsel. The use of this term is not meant to suggest any inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals may prefer to represent themselves.

Judges, court staff and other participants in the judicial process have a shared responsibility to ensure the proper administration of justice and to promote a fair and just process including for defendants, particularly those who choose to represent themselves. The safeguarding of fundamental rights, clear and transparent procedural guidance, proactive and respectful communication, ethical conduct, accountability and judicial impartiality are pivotal to these objectives. It is imperative that every effort is made to ensure that self-represented litigants are not disadvantaged because they are conducting proceedings on their own behalf, while preserving justice, as well as the integrity, efficiency and impartiality of the criminal justice system.

General Scope

This chapter addresses critical issues pertaining to SRLs in criminal proceedings in The Bahamas. It also provides practical tools and approaches that judges can use in cases involving accused SRLs.

Chapter 29 – Self-Represented Litigants

SRLs often face unique challenges in navigating court procedures, as they are likely to have a limited or no knowledge of the law and legal processes (see Darwin Fitzgerald Rice, ***What are the Barriers Experienced by Self-Represented Litigants in Civil Court?*** (DPhil thesis, Walden University 2022) at pg 69). Potential pitfalls can include misunderstandings about and failure to follow procedure, delays, ethical dilemmas, failure to follow court directions/orders, incorrect or improper filings, inappropriate conduct and inappropriate or unsound submissions. These pitfalls arise, as highlighted in Judicial College, ***Equal Treatment Bench Book*** (2024) at pg 10, mainly because SRLs may:

a. be unfamiliar with the language and technical vocabulary that feature in legal proceedings.

b. have little or no knowledge of the legal and court procedures involved.

c. find it difficult to understand and apply the law and rules to their case (even where they do research).

d. be ill-informed about the procedures for presenting evidence.

e. be unskilled in advocacy and so unable to make proper arguments, undertake proper cross-examination or test evidence presented.

f. not know how to challenge a decision that they believe is wrong.

g. lack objectivity and emotional distance from their case.

These challenges significantly limit SRLs' ability to effectively conduct criminal proceedings on their own, putting them generally at a disadvantage both in preparing and presenting their case. Accordingly, the proper treatment of cases in which SRLs are involved necessitates careful attention and management by court officers and judges throughout the entirety of the proceedings. As well, there will be additional considerations for SRLs or witnesses who are persons with disabilities. These nuanced and court-user focused approaches are critical to upholding the integrity, fairness and efficiency of the judicial process while safeguarding SRLs' rights. It is therefore essential that the judicial system is equipped with the ability to properly anticipate, identify and address SRLs' needs in conducting criminal proceedings. One major aspect of this is ensuring that judges have access to the tools needed to manage cases involving SRLs effectively.

Cases in which SRLs are involved will likely require court staff and judges to provide more information and assistance to SRLs than would generally be required in proceedings where all parties are represented by counsel. Thus, for example, judges may need to intervene more frequently during hearings and the trial to ensure that an SRL is not unfairly disadvantaged and understands and can fully participate in the proceedings. A careful balance must, however, be struck between assisting SRLs and maintaining judicial impartiality and independence, avoiding the perception of bias, and ensuring that all parties receive a fair trial all while ensuring the efficiency and integrity of the proceedings. To achieve this,

judges must adopt best practices in courtroom management, procedural guidance, and clear communication.

Judicial Responsibilities and Considerations

There are four imperatives, spanning both individual and institutional remits of the judiciary, that must consistently guide the implementation of nuanced and court user-focused approaches to address the needs of SRLs. These are ensuring a fair trial, maintaining impartiality, addressing the SRL's specific needs, and judicial accountability. Some of the key responsibilities and considerations involved are outlined below and are informed by the following:

a. Canadian Judicial Council, ***Statement of Principles on Self-represented Litigants and Accused Persons*** (2006)

b. Canadian Judicial Council, ***Criminal Law Handbook: For Self-Represented Accused*** (Canadian Judicial Council 2021)

Ensuring a Fair Trial

The right to a fair trial is a fundamental constitutional right of all defendants. Naturally, when it comes to SRLs, it is paramount that great care is taken to ensure that this right is protected. It is the judge's responsibility to do whatever is possible to ensure that SRLs are given a fair hearing and that impartiality is observed throughout the process.

SRLs are typically not well informed about the full extent of their rights or of standard court procedures, legal terms, and legal concepts. This at times may be as simple as their constitutional right to a fair trial or may be more nuanced depending on the circumstances. Similarly, legal terms can be challenging to understand and coherently follow. It is therefore the duty of the judge to ensure that an SRL is fully informed of their rights. Care must also be taken when using complex terminology to explain them clearly and, as best as possible, ensure their understanding. The judge plays an active role in this process which extends beyond merely explaining rights, rules and procedures.

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To help ensure that accused SRLs have a fair trial, judges should	
Explain Rights, Court Procedures and Legal Concepts using *Plain* and *Clear* Language	• Explain courtroom procedures ***simply*** and ***clearly***. **Note:** Where complex legal terminology must be used, carefully explain them and ensure that an SRL understands what is being conveyed. Simple and clear language explaining fundamental technical concepts, for example the burden of proof, can make a difference in safeguarding the right to a fair trial.
Assist with Procedural Matters	• Guide an SRL, using simple language, on how to properly undertake processes such as presenting their evidence, questioning witnesses, and present their legal submissions. **Note:** Having clarified what court procedures generally entail, there is a further step which must be taken. An SRL, now informed on procedure may invariably require guidance on how to properly engage with the Court. It is important that judges do not take specialized knowledge for granted. Judges must be willing to guide an SRL on simple procedures while maintaining impartiality.
Carefully Manage Courtroom Proceedings	• Remain patient and understanding. • Gently (but firmly, if required) ensure that legal proceedings remain orderly and SRLs adhere to courtroom protocols. This may involve intermittent intervention, when necessary. **Note:** SRLs who are unfamiliar with courtroom etiquette may breach protocol. However, with careful, proper management and instruction, judges can effectively prevent detrimental irregularities and unnecessary delays and maintain the dignity of the proceedings.

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Maintaining Judicial Impartiality

Judicial impartiality is a paramount foundation of the legal process. While providing assistance to SRLs, a judge must be careful to avoid actions that may be perceived as bias. This, coupled with considerations such as fairness, respect, integrity, judicial independence, etc. are central to upholding the integrity of judicial process and the rule of law. Judges must find a balance between the duty to ensure fairness and the obligation to remain impartial.

To help demonstrate and maintain impartiality, judges should	
Avoid Giving Legal Advice	• Restrict any interventions made to assist an SRL to guidance. • Refrain from commentary which expands into the substantive aspects of an SRL's case. • Where necessary, direct SRLs to available resources and, if appropriate, suggest SRLs obtain legal representation. **Note:** There is a fine line between guiding an SRL and providing legal advice. . Excessive assistance can be flagged as legal advice and perceived as bias. At times, striking the appropriate balance, may be difficult due to the nature of the circumstances. In those instances, judges can direct SRLs to available resources or even suggest that they seek independent legal representation. Access can be facilitated if deemed necessary. For example, by recommending relevant legal aid authorities and drawing the attention of the SRL to any viable alternatives.

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To help demonstrate and maintain impartiality, judges should	
Treat Parties/Participants Equally	• Demonstrate the same level of respect and consideration to an SRL as is given to the Prosecution, or that would be given to a defendant who has legal representation. • Make specific interventions, as may be required, to ensure that SRLs also treat witnesses, the Prosecution and other parties, as the case may be, fairly and with respect. This will help to ensure impartiality. **Note:** Judges must be acutely aware of the treatment of SRLs. By feeling respected and by receiving due consideration, an SRL is more likely to listen to the overall guidance provided and adhere to courtroom procedures. This inevitably will aid in guaranteeing a fair judicial process.

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To help demonstrate and maintain impartiality, judges should	
Communicate Transparently	• Ensure open communication in all interactions with an SRL. • Observe strict record-keeping and documentation practices. Records should be kept of, for example, any procedural explanations, clarifications of rights and waivers, interventions, and any accommodations or adjustments made in the proceedings. **Note:** Transparent communication, with appropriate record-keeping, is particularly important when it comes to cases involving SRLs. Judges should ensure that any significant interaction with SRLs is properly recorded and documented. Additionally, all explanations or clarifications should be given openly in the courtroom and reflected in the transcript. The transcript should also reflect the SRL's response to any such explanations or clarifications. By speaking and guiding the SRL openly in the courtroom, judges also ensure that all parties are aware of what information is shared. This not only protects the fairness and integrity of the proceedings but also the parties as well as the judge. Further, if it comes to it, an appellate court, can understand what guidance was provided and objectively assess whether a judge's impartiality and the fairness of proceedings were maintained.

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Addressing Specific Needs of Self-Represented Litigants

When conducting proceedings involving SRLs, judges must maintain an awareness of any needs that may arise whether by virtue of the defendant not being represented by an attorney, or by virtue of any specific characteristic of the SRL.

To that an SRL's specific needs are addressed, judges should:	
Manage Expectations	• Explain the purpose of a particular hearing, court event, or procedure. • Set clear expectations. This may entail explaining the limitations of what can be done as well as the various possibilities that exist within the legal framework. **Note:** SRLs may have unrealistic expectations on the legal process and outcomes. By managing these expectations, judges assist SRLs in understanding how to go about conducting their defence in an effective manner. Doing so will help to ensure that the proceedings progress more smoothly.

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To that an SRL's specific needs are addressed, judges should:	
Appropriately Manage (Overly) Emotional Conduct and Outbursts	• Manage any outburst of emotions and inappropriate conduct arising from the SRL being overwhelmed by emotion with patience and firmness. • Acknowledge the SRL's perspective. • Exercise active listening and provide meaningful feedback. • Explain the need for and maintain in a calm, collected manner, proper courtroom decorum. **Note:** Unfamiliarity with the courtroom setting and court procedures as well as being the subject of criminal proceedings may be overwhelming and cause stress to SRLs. When faced with highly stressful situations such as these, SRLs may become overly emotional and unable to manage those emotions well. Heightened feelings of fear, uncertainty, desperation or frustration can negatively impact SRLs' ability to maintain their composure or properly conduct their case. This can have implications on the overall fairness and efficiency of criminal trials and can negatively impact other participants in the proceedings. By properly managing any emotional outbursts or inappropriate conduct, judges can ensure that the SRL regains their composure, continues to display proper decorum, and also ensure that the integrity and efficiency of the trial are safeguarded.

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To that an SRL's specific needs are addressed, judges should:	
Appropriately Manage Procedural Non-compliance	• Avoid being overly punitive where non-compliance is unintentional. **Note:** Judges must ensure that SRLs comply with procedural rules without being overly punitive for any unintentional non-compliance. SRLs must not be denied relief on the basis of minor or easily rectifiable deficiencies in their case.
Refer SRLs to Relevant Resources	• Direct SRLs to any available Legal Aid assistance schemes, whether Government-funded Clinics or no/low-cost NGO-provided services. Provide information about any applicable eligibility criteria, the overall process and required documentation. • Direct SRLs to available resources and, where appropriate, caution them to trust and use materials only from reputable sources. Refer them to reputable court websites and any online legal databases that offer ***relevant*** educational materials and resources on criminal proceedings.

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To that an SRL's specific needs are addressed, judges should:	
Refer SRLs to Relevant Resources	**Note:** Ensuring that SRLs have access to relevant resources is essential for promoting fairness and efficiency in criminal proceedings. Judgess should take proactive steps to direct SRLs to available legal, informational and support services that can assist them in navigating the legal system. As well, in today's technological context where there is ready access to internet resources including social media and generative artificial intelligence tools, SRLs should be cautioned about the pitfalls of relying on sources of legal information that may not be reputable. Courts should consider developing and maintaining up-to-date resources to assist and facilitate the needs of SRLs. These may be in both print and electronic formats, with consideration for accessibility features to ensure access for persons living with disabilities. Resources can include process diagrams, legal glossaries, FAQs, handbooks, leaflets, booklets, video tutorials and any other material that may be useful in providing information that can help SRLs in navigating court procedures and the preparation and presentation of their case. For example, information may be provided about options for securing legal representation; their rights and responsibilities as SRLs; court procedures; how cases progress through the system, what happens at each stage, and what is required of them at each stage.

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Judicial Accountability

Judicial accountability, at both the individual level and the institutional level, is crucial for maintaining public confidence in the due administration of justice and upholding the rule of law with fairness and integrity. It ensures that judges act competently, ethically, impartially and respect the rights of parties, thereby reinforcing the fairness and trust in the judicial process. Ensuring that judges and court staff are equipped to and in fact do treat accused SRLs fairly and with respect, is imperative if the judiciary is to comply with its constitutionally mandated functions.

Judicial Accountability and the fair and respectful treatment of SRLs can be ensured where judges	
Stay Abreast of Developments and Best Practices in Dealing with Cases Involving SRLs	• Actively pursue ongoing judicial education concerning the best practices in handling cases, particularly those involving SRLs. • Keep abreast of judicial and legal resources that provide guidance on managing cases in which SRLs are involved. • Keep abreast of available materials and resources that may be useful for SRLs. • Keep abreast with technological developments. **Note:** As the legal landscape is constantly changing and with the advent of new technologies such as artificial intelligence (AI), the number of SRLs has the potential to significantly increase. It is therefore critical that judges regularly review emerging standards and best practices. Judges may consider staying updated with regional and international developments, participate in targeted training, and even developing personal reflective practices. This will better equip judges to handle unique challenges that may arise thereby improving the fairness and efficiency of cases.

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Judicial Accountability and the fair and respectful treatment of SRLs can be ensured where judges	
Have Access to Institutional Support and Guidance	• Seek guidance and support where a complex ethical dilemma arises in a case where an SRL is involved. **Note:** At times, judges may encounter situations where they are unsure about how to proceed. This may involve some complex ethical dilemma in which their experience may not be able to properly guide them or where they believe guidance would be useful. In such scenarios it is wise to seek the counsel of peers. This can apply especially where the line between neutral assistance and legal advice has the potential to become blurred. Where there is uncertainty as to whether a contemplated action crosses this threshold, consulting a trusted colleague may help neutralize doubts and assist the judicial officer in coming to an informed decision. By seeking guidance before action, judges protect themselves and promote ethical consistency, transparency and confidence in judicial decision-making. This reinforces accountability and the collective learning of fellow judicial officers. Such actions can be especially important in contexts where the demand of impartiality intersects with the right to access to justice, equal treatment and the right to a fair trial of potentially vulnerable parties such as SRLs.

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Judicial Accountability and the fair and respectful treatment of SRLs can be ensured where judges	
Provide Guidance and Oversight to Court Staff to Ensure SRLs are Treated Fairly and with Respect	• Provide guidance to and set clear expectations with staff on how to treat and interact with SRLs. • Monitor the conduct of court staff and promptly address any complaints or conduct that falls below the expected standard. **Note:** A judge's role encompasses more than just the managing and deciding of cases as they exercise a supervisory role over court staff. The conduct of court staff is a reflection on the judge and the judiciary. It is therefore imperative that court staff operate in a manner which is consistently fair, impartial and respectful to SRLs. Ensuring respectful, impartial, and supportive conduct by court staff reinforces public trust, fairness and the integrity of the court.

Best Practices for Judges in Addressing the Needs of Self-Represented Litigants: A Procedural Fairness Approach

Effectively managing cases involving SRLs requires judges to adopt specific best practices that ensure both procedural fairness and the efficient administration of justice. According to the Judicial Education Institute of Trinidad and Tobago, ***Procedural Fairness: A Manual - A Guide to the Implementation of Procedural Fairness in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago*** (2017) at pg 8:

> Procedural Fairness describes the kinds of behaviours and systems that inspire trust in, confer legitimacy on, and bestow authority upon court systems, and internal actors within these systems. It prescribes core, non-negotiable values and standards that are necessary for the legitimate and trustworthy exercise of legal authority within a community and society.

There are nine core elements of procedural fairness that constitute court users' experiences and perceptions of fairness. These are discussed in depth in Chapter 26 of this Bench Book.

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General Procedural Fairness Guidelines

Drawing upon the nine core elements of procedural fairness, the following guidelines are recommended in cases involving SRLs:

Element	Guidelines
VOICE: Ensuring Meaningful Participation	Create an environment where SRLs can actively participate in their proceedings. This can be done through: ***Encouraging Expression*:** • Allow SRLs to present their concerns, opinions, and questions throughout the process. • Actively encourage inquiries. • Explain what information is needed and why. ***Active Listening:*** • Demonstrate to SRLs that their submissions are understood before decisions are made. • Paraphrase and seek confirmation on what the SRL is trying to communicate. This approach ensures that SRLs feel "heard" in their cases.
UNDERSTANDING: Clear Communication	To promote comprehension, judges should: ***Simplify Language:*** Use plain language to explain court protocols, procedures, and decisions. ***Confirm Comprehension:*** Regularly check that SRLs understand the information provided. ***Where appropriate direct Prosecutors to do the same.*** Clear communication helps SRLs navigate the legal process more effectively.

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Element	Guidelines
RESPECTFUL TREATMENT: Upholding Dignity	Treating SRLs with dignity involves: ***Demonstrating Respect*:** • Acknowledge SRLs' rights and ensure their concerns are taken seriously. • Interact with SRLs in a dignified and respectful manner. • Clearly delineate the expectations of behaviour and procedure to be followed by SRLs and ensure understanding. • Maintain a calm disposition especially where you are required to be assertive or decisive. • Judiciary personnel in the courtroom (and generally) must also maintain the equivalent high standard of respect. The Prosecution is also expected to treat SRLs with respect in accordance with their professional ethical obligations. (see also Canadian Judicial Council, Statement of Principles on Self-represented Litigants and Accused Persons (2006) at pg 9) ***Value time:*** • Be mindful of SRLs' time and commitments. • As a general rule, follow scheduled times. • Where there are delays or postponements, notice should be given promptly. Respectful treatment fosters trust and cooperation as individuals believe that their concerns and problems are given due weight.

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Element	Guidelines
NEUTRALITY: Ensuring Impartiality	Judges must maintain impartiality by: ***Applying Laws Consistently*:** • Ensure legal principles are applied fairly without discrimination. • Come to decisions only upon consideration of the relevant and admissible facts. • Make decisions based on law without regard to personal feelings or extraneous factors. ***Avoiding Bias:*** Be aware of and mitigate any potential biases, including unconscious biases. Neutrality reinforces the legitimacy of judicial proceedings. It ensures that SRLs experience fairness and consistent treatment throughout court proceedings thereby supporting trust in outcomes.
TRUSTWORTHY AUTHORITIES: Building Legitimacy	To establish trust, judges should: ***Demonstrate Competence*:** Fulfil duties efficiently, fairly, and transparently. ***Show Compassion:*** Attend sincerely to the needs of SRLs. Trustworthy conduct enhances the credibility of the judiciary.
ACCOUNTABILITY: Justifying Actions	Judges are accountable for their actions by: ***Providing Explanations:*** Clearly justify decisions and explain all actions taken. ***Accepting Responsibility:*** Being open to scrutiny and responsible for outcomes. Accountability ensures transparency and fairness.

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Element	Guidelines
AVAILABILITY OF AMENITIES: Facilitating Access	Courts should be equipped to support SRLs by: ***Ensuring Accessibility:*** Providing necessary infrastructure and information resources and systems. ***Offering Amenities*:** Ensuring facilities and information meet the functional and cultural needs of court users, including SRLs. Proper amenities enable SRLs to engage fully in the legal process.
ACCESS TO INFORMATION: Providing Relevant Details	Ensure SRLs have access to: ***Timely Information*:** Provide accurate and timely information at each stage of proceedings. ***Clear Communication*:** Use clear and coherent language and be receptive to questions. Access to information empowers SRLs to make informed decisions.
INCLUSIVITY: Promoting Engagement	To foster inclusivity: ***Welcome Participation*:** Make SRLs feel included in court proceedings. ***Encourage Active Involvement*:** Facilitate SRLs' effective participation throughout the process. Inclusivity ensures SRLs do not feel alienated from the justice system.

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General Case Management Guidelines

The General Procedural Fairness Guidelines set out above form the basis of the methodology by which judges must facilitate and navigate proceedings involving SRLs. The following expands on some of these strategies, applying them to practical aspects of proceedings.

Case Management Strategies for SRLs

a. Identify SRLs at the earliest stage of proceedings to anticipate potential needs and any special measures required. Court staff can assist in this regard.

b. Courts may implement screening procedures to determine whether SRLs require additional assistance. This includes where the SRL may require specific support on account of, for example, disabilities, trauma or language.

c. Make any necessary adjustments from the inception. For example, accommodate any disabilities.

d. Inform the SRL of their right to an attorney, the potential consequences of proceeding without representation, and subject to the exercise of judicial discretion, their ability to seek legal representation at different stages during the proceedings.

e. Holding pre-trial conferences in cases involving SRLs can help clarify legal issues, procedural requirements, and trial expectations. This can include explanations on the specific requirements of Witness Statements, the course of proceedings, etc.

f. Ensure that SRLs understand key deadlines and consequences for non-compliance, evidence submission rules, and their rights and responsibilities.

g. Explain the scope and limits of self-representation, including the potential disadvantages.

h. SRLs should be made aware that the judge cannot act as their lawyer or provide legal advice. SRLs should be informed of any options available to them to secure legal representation if they wish to do so, as well as general information that may help them understand court procedures and how they may approach representing themselves.

Treatment of Vulnerable Groups

a. Judges must try to identify potential vulnerabilities of SRLs at an early stage (see Judicial College, ***Equal Treatment Bench Book*** (2024) at pg 31.

b. Judges must be mindful of how various social factors such as gender, age, language, disability, economic status and cultural impact may intersect and impact SRLs.

Such factors can affect potentially vulnerable SRLs' ability to understand and fully participate in criminal proceedings.

c. In cases where specific vulnerabilities are identified, judges and the court staff must endeavour to provide any necessary assistance. For example, if it is identified that an SRL is suffering from trauma, the judge may accommodate a trauma-informed approach.

Note: Resources such as the England and Wales Judicial College, ***Equal Treatment Bench Book*** (2024) and the Caribbean Association of Judicial Officers, ***Disability and Inclusion Awareness Guidelines for Judiciaries and Judicial Officers*** (2023) can be particularly useful in this regard.

d. Judges must be vigilant in cases involving gender-based violence, sexual offences or domestic violence.

e. Judges ought to consider implementing protective measures such as the use of screens or video links to safeguard vulnerable parties, for example, during cross-examination by the accused SRL in sexual offences cases. (See **Evidence Act, Chapter 65** ss 78B and 78D on evidence by live television link and video recording of testimony of child witness.)

f. Judges must ensure that SRLs understand the language in which proceedings are being conducted.

g. Judges can consider appointing certified interpreters where deemed necessary. This may be particularly appropriate in cases involving illegal migrants or asylum seekers.

Assistance Without Compromising Impartiality

a. Provide step-by-step explanations of courtroom proceedings in a neutral manner.

b. Introduce those present and explain the role of each party i.e. the judge, the prosecution, court staff and the jury (if any).

c. Key aspects to clarify can include the order of evidence presentation, cross-examination, and the role of the prosecution and defence.

d. Explain every direction or court order clearly while anticipating potential misunderstandings and avoid complex legal jargon.

e. Provide neutral guidance on procedural requirements, such as how to introduce exhibits or question witnesses.

f. Ensure that the SRL understands by asking them to give feedback on what they must do.

g. A balance must be maintained between ensuring fairness and avoiding undue judicial intervention.

h. Direct SRLs to available court resources such as SRL handbooks and legal aid services.

i. Courts may consider and are encouraged to allocate resources to developing written materials or videos explaining common legal processes.

Managing Trial Proceedings Involving SRLs

a. Judges must ensure that SRLs adhere to proper courtroom decorum and do not disrupt proceedings.

b. Firm but respectful interventions may be necessary if an SRL exhibits inappropriate behaviour, such as excessive interruptions or aggressive or impermissible questioning of witnesses.

c. Judges may need to explain evidentiary rules in simple terms, particularly regarding hearsay, relevance, and admissibility.

d. Where an SRL struggles to properly frame a question or introduce evidence, the judge can provide neutral clarification to ensure procedural compliance.

e. If an SRL is cross-examining a vulnerable witness (e.g., a child or victim of sexual assault), the judge may consider appointing an intermediary or imposing protective measures (see **Evidence Act, Chapter 65** ss 78B and 78D on evidence by live television link and video recording of testimony of child witness as well as s 78F which reiterates the judge's discretion to exclude otherwise admissible evidence where it would operate unfairly against the defendant).

f. Judges should monitor for power imbalances, for example, where an SRL faces an experienced Prosecutor. If there are significant power imbalances that can reasonably undermine a fair hearing, relevant accommodations and or interventions may be considered.

g. Should SRLs be desirous of obtaining legal representation, judges in their discretion may consider granting an adjournment and facilitating this request. In circumstances where the SRL has opted to retain legal representation, necessary accommodations ought to be made such as the making of adjournments or reconsidering timelines in order to ensure the SRL's right to a fair trial.

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Decision-Making and Judgment Delivery

a. All decisions, orders and outcomes should be plainly stated in simple language. Judges may consider seeking feedback for understanding.

b. Judges should provide well-structured oral and written rulings that are easy to follow.

c. If a SRL is convicted, the sentencing process should be clearly explained, including available options and mitigating factors. Judges should avoid making formulaic statements and ensure that the SRL understands the process.

d. Where feasible, a brief written summary of key judicial decisions and sentencing explanations may assist SRLs in understanding the outcome of their case.

Post-Trial Support and Follow-Up

a. If convicted, the SRL must be made aware that sentencing is a separate phase of the criminal process. Judges should clearly explain the purpose of the sentencing exercise and the SRL's right to make submissions, present mitigating circumstances or any other appropriate measure. Once the sentence has been pronounced and explained, SRLs must be informed of the implications. These include any applicable parole eligibility, probation conditions, or other post-sentencing obligations.

b. If acquitted, the process for clearing their record and returning property (if applicable) should be explained.

c. Right to Appeal: Judges should inform SRLs of their right to appeal their conviction or sentence. This includes providing guidance on how to initiate an appeal and the deadlines for doing so. Reference may be made to available resources.

d. Judges should ensure SRLs are aware of appeal deadlines, consequences for not meeting those deadlines, and where to seek assistance in filing an appeal.

e. Appeal Process Overview: The judge should provide a basic overview of the appeal process, including the general grounds on which an appeal can be made.

f. Courts should consider implementing feedback mechanisms where SRLs can express concerns about and explain their experience. This can help to inform and improve judicial and court policies, protocols, and practices over time.

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Responsibilities of the Prosecution and Court Staff

a. Prosecutors may consider conducting the trial in a manner that is not intimidating and exploitative of the vulnerabilities of SRLs. This includes avoiding the usage of complex legal jargon etc.

b. Prosecutors have an ethical and constitutional obligation to ensure fairness and justice throughout the entire process of criminal proceedings.

c. Court staff must be trained to effectively address potential needs of SRLs.

Specific Guidelines

The following guidelines address key aspects of the criminal trial process, including guilty pleas, cross-examination, evidence, opening and closing statements, bail, and other procedural matters.

Bail Considerations

a. Clarifying Bail Hearing Process**:** Judges should explain the bail process to the SRL. In particular, judges should explain the criteria used to decide whether bail will be granted, as well as factors that the court takes into consideration such as the risk of flight, the likelihood of reoffending, and the seriousness of the charges.

b. Right to Make Bail Applications**:** SRLs must be informed of their right to apply for bail and the relevant legal principles governing the decision.

c. Conditions of Bail: If bail is granted, judges should clearly outline any conditions attached such as reporting to the police, surrendering passports, or staying within a specified geographic area. It is imperative that SRLs understand their obligations under the bail conditions.

d. Non-Compliance: Judges should explain the consequences of violating bail conditions, including the potential revocation of bail and subsequent detention.

Guilty Pleas

a. Explaining the Consequences: Judges must ensure that the SRL fully understands the consequences of pleading guilty. This includes but is not limited to the potential sentence and the implications of waiving the right to a trial. This can also involve explaining the elements of the offence with which the SRL has been charged (see Judicial College, ***Equal Treatment Bench Book*** (2024) at pg 21).

b. Voluntary Plea: Judges should ask questions to ascertain whether the plea is voluntary. The SRL must not feel coerced or under duress when entering the plea.

c. Clarifying Rights: Judges should remind the SRL of their rights, including the right to a fair trial, their right to an attorney, and the general principle that they are presumed innocent until proven guilty.

d. Record of Understanding**:** The judge should make a record that the SRL understands the charge, the legal implications of pleading guilty, and the potential consequences of their plea. It would be useful to also record an SRL's indication of having understood the potential consequences, they still wish to proceed unrepresented.

Assessing Mental Capacity

Mental State Evaluation**:** If there are concerns about the SRL's mental capacity or understanding, the judge should consider referring the individual for a mental health or psychological evaluation before proceeding with the plea.

Cross-Examination

a. Clarifying Process: Judges should explain to the SRL the purpose of cross-examination and how to conduct it. For example, the SRL should be reminded that cross-examination is used to challenge the credibility of witnesses, and where appropriate guided on how to put relevant parts of a defendant's case to them.

b. Protecting Witnesses: Judges should intervene to prevent SRLs from asking impermissible, inappropriate or hostile questions, particularly if they could intimidate or harm vulnerable witnesses. If necessary, the judge should protect witnesses by limiting certain questions, or by taking other appropriate protective measures (see above).

c. Assistance with Questioning: If the SRL struggles with formulating questions, the judge may guide them but must be careful in ensuring that they do not overstep into providing legal advice or making interventions in such a way that they may be perceived as biased.

d. Use of Intermediaries or Support Personnel: In cases involving vulnerable witnesses (e.g., minors or victims of sexual assault), the judge may consider appointing intermediaries or allowing for protective measures (such as video links or screens) to facilitate the process (See above). An intermediary can be a neutral communication specialist who assists SRLs, particularly those who may have communication difficulties, vulnerabilities, or cognitive impairments—by supporting their ability to understand questions, express themselves, and follow courtroom procedures

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Evidence

a. Clarity of Rules**:** Judges must explain basic rules of evidence to the SRL in simple terms. This includes the difference between admissible and inadmissible evidence, the requirements for presenting documents, and the standards for witness testimony.

b. Assistance with Evidence Submission**:** If the SRL is unsure how to introduce evidence, the judge should provide neutral guidance. For instance, if the SRL has physical evidence, the judge should explain how to offer it as an exhibit and when to introduce it.

c. Avoiding Irrelevant or Prejudicial Evidence**:** Judges should advise against, explain about, and prevent SRLs from presenting evidence that is irrelevant, prejudicial, or inadmissible under the law.

d. Objectivity in Assessing Evidence: The jury or judge, as the case may be, must evaluate the evidence based on the facts and the law, without bias towards the SRL or the Prosecution. SRLs should be reminded that the jury's/judge's role is to assess the evidence presented fairly and impartially. Where there is a jury, the respective roles of the judge and jury should be carefully explained, and checks made for understanding (See above).

Opening and Closing Statements

a. Assisting SRLs with Structure: Judges should explain the purpose of the opening statement and may remind SRLs that the opening statement should not include arguments or conclusions but should merely set the framework for the trial.

b. Explaining the Role of Closing Arguments**:** Judges should clarify that closing arguments provide an opportunity to summarize the evidence and argue how it supports the SRL's case. The SRL should be reminded that they can draw inferences from the evidence presented but should avoid introducing new evidence at this stage.

Chapter 29 – Self-Represented Litigants

Sample Judicial Officer Self-Represented Litigants Checklist

In managing cases in which SRLs are involved, checklists are useful tools that can provide an accessible and straightforward way for judicial officers to record and track key interactions, events, and developments. This sample Checklist is provided only as an example of what can be created as an aid to the effective and fair treatment of SRLs. Each judicial officer is encouraged to develop checklists to suit the law and practice in their specific jurisdiction and to meet their needs. This Checklist does not supplant the Case Management Checklist set out in Chapter 25.

[Court Details]
Sample Checklist for Cases involving Self-Represented Litigants

1. Case Details

Case / File Number(s): _____
Case Name: _____
_____
Offence/Charge: _____
_____
Assigned Judicial Officer: _____
_____
Other important case details/notes: _____
_____
_____
_____
_____
_____

2. Preliminary Considerations

Consideration / Requirement	Details	Notes
☐ Special Circumstances of the Defendant		[Address any special circumstances Examples: Disabilities, vulnerabilities, age, language barriers, etc. Considerations of whether the SRL may be a victim-survivor of sexual exploitation, forced labour, domestic servitude, human trafficking, other forms of modern slavery]

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2. Preliminary Considerations (cont'd)		
Consideration / Requirement	**Details**	**Notes**
☐ Special Trial Needs		[Examples: Open court, in-camera, screens, victim support]
☐ Confirm the defendant has chosen to represent themselves. Prior to the defendant's confirmation I have: ☐ Informed the defendant of their right to legal representation and legal aid ☐ Informed the defendant of the potential consequences and responsibilities of proceeding without legal representation ☐ Ensured the defendant understands the charges and possible penalties		
☐ Explain court procedures in simple terms		
☐ Ensure the defendant understands the presumption of innocence and the potential consequences of pleading guilty		
☐ Provide information on disclosure and access to Prosecution evidence		

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3. Case Management & Pre-Trial Preparation		
Consideration / Requirement	**Details**	**Notes**
☐ Outline the trial process, including examination and cross-examination of witnesses and evidentiary rules		
☐ Provide any available court resources or guides for self-represented litigant		
☐ Allow reasonable time for the defendant to prepare their case		
☐ Confirm the defendant understands the procedure for calling and questioning witnesses		
☐ Confirm the defendant understands the procedure for marking and tendering items of evidence, if applicable		
☐ Confirm the defendant understands the importance of legal arguments and objections		

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4. Trial Procedures		
Consideration / Requirement	**Details**	**Notes**
☐ Clearly explain the trial sequence (opening statements, evidence, closing submissions)		
☐ Ensure fairness by preventing intimidation or undue pressure from the Prosecution		
☐ Guide the defendant on proper questioning of witnesses without leading or improper questioning and the procedure for tendering evidence (if applicable)		
☐ Assist in framing legally permissible objections		
☐ Explain the relevance and admissibility of evidence		
☐ Allow breaks if needed for preparation or clarification		

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5. Conduct During Trial		
Consideration / Requirement	**Details**	**Notes**
☐ Maintain patience and neutrality		
☐ Ensure the defendant has an opportunity to be heard		
☐ Prevent procedural disadvantages due to lack of legal knowledge while maintaining judicial impartiality		
☐ Allow informal guidance while maintaining judicial impartiality		
☐ Control inappropriate questioning or behaviour		
6. Decision-Making & Sentencing		
Consideration / Requirement	**Details**	**Notes**
☐ Clearly explain the decision and reasons for the verdict and other decisions or interlocutory orders where appropriate (Judge alone trials)		
☐ If guilty, outline sentencing principles and possible outcomes		

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6. Decision-Making & Sentencing (cont'd)		
Consideration / Requirement	**Details**	**Notes**
☐ Explain the right to appeal and procedures for filing an appeal		
☐ Ensure the defendant understands the consequences of any sentence imposed		
7. Post-Trial Considerations		
Consideration / Requirement	**Details**	**Notes**
☐ Provide written copies of the judgment and sentencing order		
☐ Inform the defendant of available post-conviction remedies		
☐ Confirm the defendant understands their obligations post-trial (fines, probation, etc.)		

Other notes: _____

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ISBN 978-976-97661-0-5