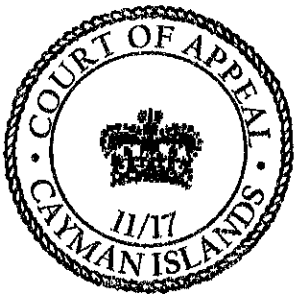
IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal 27 of 2017
IND 0053/2016
SC302469/2016

BETWEEN



MICHAEL FERNANDO JEFFERSON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

BEFORE: **The Rt. Hon Sir John Goldring President**
The Hon Sir Richard Field, JA
The Hon Dennis Morrison, JA

Date of Hearing: **29 August 2018**

Appearances: **Mr. Philip Rule of Samson Law Associates for the Appellant**
Mrs. Nicole Petit for the Crown

JUDGMENT

Approved and Released 14 September 2018

MORRISON JA:

Introduction

1. On 12 July 2017, after a trial before Quin J (the judge) and a jury in the Grand Court, the appellant was convicted of the offences of possession of an unlicensed firearm (count 1) and possession of an unlicensed firearm (ammunition) (count 2), both contrary to section 15(1) of ***the Firearms Law (2008 Revision)*** (***the Act***).

2. On 18 September 2017, the judge imposed concurrent sentences of 10 years' imprisonment on count 1 and two years' imprisonment on count 2 respectively. As regards count 1, section 39(2)(b) of ***the Act*** prescribes a minimum sentence of 10 years' imprisonment in certain circumstances, save where the sentencing court takes the view that there are exceptional circumstances justifying a lesser sentence.

3. The appellant appealed against the convictions and the sentences. In relation to the convictions, the grounds of appeal were that (1) on the evidence, the weapon allegedly seized by the police officers from his residence was not a firearm within the meaning of the Act (the firearm issue); (2) the judge wrongfully admitted a confession allegedly made by him to one of the police officers on the scene (the alleged confession issue); (3) the judge's summing-up lacked impartiality and unfairly undermined the defence and/or bolstered the prosecution (the unfair summing-up issue); and (4) the judge failed to give him the benefit of a positive good character direction as regards his propensity to commit the offences for which he was charged (the good character direction issue).

4. As regards sentence, the appellant's complaint was that, in imposing the minimum sentence provided for in the section 39(2)(b) of ***the Act***, the judge failed to give effect to the exceptional circumstances justifying a lesser sentence in his case. In the result, the appellant contended, the sentence of 10 years' imprisonment on count 1 was manifestly excessive in all the circumstances.

5. The appeal was heard on 29 August 2018. After considering the submissions of Mr Rule for the appellant and Mrs. Petit for the Crown, the court announced that, for reasons to be given in due course, the appeal against conviction would be allowed. The convictions on both counts were accordingly quashed. However, the court ordered that, in the interests of justice, there should be a new trial at the earliest convenient date.

6. These are the promised reasons for this decision. As will be seen, the appeal succeeded on grounds 2 and 4, but not on grounds 1 and 3.

The factual background

7. In the light of the fact that the appellant is to stand trial again, we will state the factual background in outline only. On 11 June 2015, acting on the strength of a search warrant obtained for the purpose, officers of the Royal Cayman Islands Police Force (RCIPF) carried out a search of the house at which the appellant lived. The appellant's girlfriend, her pre-teenage daughter and her adult brother (a person with special needs) also lived at the premises.

8. Members of the police party included Detective Constable Gareth Daley (DC Daley) and Detective Constable Gordon (the logger). The case for the prosecution was that, when the bedroom identified by appellant as his was searched by the police officers, a Bryco .38 semi-automatic pistol (the pistol) and two rounds of .380 ammunition were found. The police officers testified that, when shown the pistol, the appellant made no comment. The appellant was then arrested and cautioned. His girlfriend was also arrested, whereupon the appellant said, "*this doesn't have anything to do with her*". Search of another bedroom in the house uncovered a quantity of ganja, which the appellant acknowledged to be his.

9. The appellant was then taken outside the house, while further searches were carried out on the inside. DC Daley was sent to relieve the officer who was guarding the appellant. DC Daley testified that, at about 6:30 pm, while still under caution, the appellant made an inculpatory statement (the alleged confession) to him. DC Daley made no note of the alleged confession (because, he would later say, he had left his note-book in the police vehicle). Nor did he report it to the logger or to any of the other officers on the scene.

10. Some 15 minutes later, DC Daley and two other officers escorted the appellant to the Georgetown Police Station, where he was handed over at the custody suite. While at the police station, DC Daley took the opportunity to update his note-book by reference to the logger's detailed record of what had transpired in the course of the search at the appellant's residence. However, he did not record the alleged confession. His evidence was that he forgot about it. He concluded his duties for the day at about 11:00 pm and left the station.

11. However, later that night ("*in the middle of the night*") DC Daley recalled the alleged confession. He accordingly told two of the officers who had taken part in the search of the appellant's house about it the following morning, so that they could put it to the appellant when he was being interviewed. And, in his witness statement prepared that same day, DC Daley also referred to the alleged confession. When the appellant was interviewed later that day, he made no comment when he was asked to explain what he meant by the statement he allegedly made to DC Daley.

12. At trial, the appellant strongly denied any knowledge of the pistol found at his home. He also denied making the alleged confession to DC Daley.

The firearm issue

13. Arising out of the search of his home on 11 June 2015, the appellant was charged with the following offences allegedly committed contrary to section 15(1) of ***the Act***:
    (i) possession of an unlicenced firearm, namely a .380 auto calibre Bryco pistol, otherwise than in accordance with the terms of a Firearms Users (Restricted) Licence (count 1);
    (ii) possession of an unlicenced firearm (ammunition), namely two rounds of .380 auto caliber live cartridges, otherwise than in accordance with the terms of a Firearms Users (Restricted) Licence (count 2); and
    (iii) in the alternative to count 1, possession of the component parts of a .380 auto calibre Bryco pistol, otherwise than in accordance with the terms of a Firearms Users (Restricted) Licence (count 3).

14. The prosecution's primary case against the appellant was that he was in unlawful possession of the pistol (count 1) and two rounds of ammunition (count 2). For this purpose, it was therefore necessary to prove that the pistol was a firearm within the meaning of section 2(1) of ***the Act***. Count 3 would only arise as an alternative if count 1 was not proved.

15. Section 2(1) defines 'firearm' as follows:

> "*'firearm' means artillery, machine gun, sub-machine gun, rifle, shot gun, pistol, air gun, air pistol or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged or noxious fumes can be emitted except any air rifle, air gun or air pistol of a type prescribed by the Governor and of a calibre so prescribed, and includes any component part of any such weapon and such accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, and includes any ammunition capable of being used in any firearm in any reloader which is capable of or designed for the reloading of shotgun cartridges or any other type of ammunition.*"

16. In order to prove that the pistol was a firearm within this definition, the prosecution relied on the evidence of Mr Anthony Stuart, a member of the RCIPF with over 20 years' experience working with firearms; and Ms. Erica Lawton, a firearms and tool mark expert employed by the Alabama Department of Forensic Science.

17. Mr Stuart's job was to test the pistol, by checking it and carrying out a "*test shoot*" of it. But when he attempted to do this, the pistol would not fire. He then realised that it was defective, in that "*a bit of the firing pin had been sawn off, so the weapon did not discharge*". The pistol was, he testified, in "*a depreciated state*", and "*unkempt*". However, its working parts all appeared to be in order and, apart from the missing bit of the firing pin, everything else about it appeared to be normal. He said that, if the firing pin were intact, the pistol would operate normally and on this basis he concluded that it was in fact a firearm. In so far as replacement of the firing pin was concerned, Mr Stuart said that it was a simple weapon and it would be quite easy to have the firing pin replaced. In fact, he told the court, the firearm company provides a video and it is also on YouTube, "*so a lay person could replace the firing pin*".

18. Under cross-examination, Mr Stuart amplified his evidence on this point. This is the judge's summary of what he said:

> *"He said you can get a new firing pin or with some welding you can extend the firing pin. He said you would have to disassemble the firearm. He said it would only take a small flat head or a Philips screw driver. He said if you have a new firing pin nothing else is needed ... He said in its current state it wouldn't discharge anything or harm anybody by discharging any projectile. He said in its present state it is not a lethally [sic] barrelled weapon from which any shot, bullet or other missile can be discharged ... He said you can get the firing pin quite easily. There are dealers who make parts for weapons. He said there was no problem to source the firing pin or to repair it with a little welding. He said he could repair it without too much trouble."*

19. Ms. Lawton's evidence was to generally similar effect. She confirmed that, as a result of the broken firing pin, the pistol was inoperable. But it was, in her view, a firearm and it was lethal barrelled. She said that it was very easy to repair the firing pin: all that was needed was a screw driver and, armed with that, it would take less than five minutes to change that part of the pistol and make it work properly. She said that the cost of the part was $17 and it could be ordered online and sent by post to any address in the United States. She also said that, with very basic knowledge, one could get it on YouTube or the Internet.

20. The judge's directions to the jury on how to approach this evidence were in three parts. First, early on in the summing-up, the judge went through the charges in the indictment with the jury, read to them the statutory definition of a firearm and added the following[1]:

> *"So, members of the jury, just to break it down, a firearm can mean any pistol, or any lethal barrelled weapon from which any shot,*

[1] At pages 8-9 of the transcript

bullet or other missile can be discharged. A firearm includes any component part of any such weapon, and the firearm includes any ammunition capable of being used in any firearm.

Now, there is no statutory definition of a lethal barrelled weapon but the definition that has been accepted by the courts is this, and I would invite you to ask yourselves whether the Bryco .38 was a weapon or was one which any shot, bullet or other missile can be discharged, or whether it could be so easily adapted so as to be capable of discharging such a shot, bullet or any other missile. So that's the definition of a lethal barrelled weapon. You ask yourself whether the Bryco was one which [sic] any shot bullet, or any other missile can be discharged, or alternatively, whether it could be so easily adapted so as to be capable of discharging such a shot, bullet or other missile.

Now, I will be reviewing the evidence of PC Anthony Stuart who has got over 25 years of firearm experience and is a firearms instructor, and also Erica Lawton, who is a Tool Mark and firearms expert. Now, whether count one is made out as regards a firearm is a matter for you after you consider all the evidence. If you find it is not a firearm, you would then go on to consider count three. If you conclude that the Bryco is a firearm, there would be no need to consider count three. So that's the firearm."

21. Next, after reminding the jury in detail of the evidence given by Mr Stuart and Ms. Lawton, the judge went on to explain the function of expert evidence and the way in which to approach it[2]:

[2] Transcript, pages 37-38

"Now, members of the jury, these are both experts ... Now, I just tell you this: expert evidence is permitted in a criminal trial to provide you with scientific information and opinion which is within an expert's expertise, but is likely to be outside of your experience, or my experience, or most people's experience and knowledge. So it is by no means unusual for evidence of this nature to be called and it is important that you see it in its proper perspective which is before you as part of the evidence as a whole with regard to one particular aspect, namely, whether the Bryco is a firearm ...

... you are entitled to come to a conclusion based on the whole of the evidence which you've heard, and that of course includes the expert evidence. The two expert witnesses have been called to express an opinion in respect of their findings and the matters which were put to them and you are entitled and indeed, I think you would no doubt wish to have regard to the evidence and to their opinions when coming to your own conclusions about this aspect of the case, but you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of experts, you do not have to act upon it and you should remember that this evidence relates to only part of the case and whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence."

22. And lastly, after the conclusion of the summing-up, the judge responded to an enquiry from the foreman of the jury by revisiting the definition of a firearm in this way:[3]

"What the Firearms Law doesn't contain is a definition of the lethal barrelled weapon but a definition has been accepted by the courts so I just repeat it for you to ask yourselves, is whether the Bryco .38

[3] Transcript, page 60

was one which any shot, bullet or other missile can be discharged, or whether they could be easily adapted so as to be capable of discharging such a shot, bullet or other missile. That is a definition that has been accepted by the courts but it is a matter for you as to whether you consider it to be a firearm, having heard all the evidence and obviously the evidence of Officer Stuart and Ms. Lawton."

23. Mr Rule submitted that there was no evidence from which the jury could have found that the pistol was a firearm within the meaning of the statutory definition. In this regard, he pointed, firstly, to what he described as a disagreement between the experts, given Mr Stuart's evidence that, in the condition in which it was when he examined it, the pistol was not a "*lethal barrelled weapon*", while Ms Lawton considered that it was lethal barrelled and was firearm. Secondly, and this was perhaps the real nub of Mr Rule's submissions, he contended that the fact that, in order for the pistol to be rendered operable, it required a component, that is, a firing pin, that was not in the appellant's possession or control, but needed to be sourced and acquired from elsewhere, meant that it could not be considered capable of discharging any shot, bullet or other missile. In the light of this gap in the evidence, Mr Rule concluded that the appellant could not to have been convicted on count 1: the prosecution's best case in these circumstances, assuming that the other elements of the charge were proved, was a conviction on the alternative count 3.

24. In her printed skeleton arguments, Mrs. Petit submitted that the question whether the pistol was a firearm within the statutory definition was clearly one for the jury to decide[4]; that the evidence of Mr Stuart and Ms. Lawton provided an ample basis for them to come to the conclusion which they did; and that the jury's finding of guilt on count 1 could therefore not be successfully impugned.

[4] Citing, among other things, Blackstone's Criminal Practice 2018, paragraph B12.16

25. Mr Rule referred us to several English and Caymanian cases in which the question of whether or not a particular weapon was a firearm within the meaning of the applicable definition arose. We will mention a few of them.

26. In ***Grace v Director of Public Prosecutions***[5], the issue was whether the air rifle which was found in the appellant's possession was a firearm within the meaning of section 57(1) of ***the Firearms Act*** 1968 (***'the 1968 Act'***), which provided that "... the expression '*firearm*' means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged".

27. There was no evidence before the justices as to whether the rifle worked, or was capable of being made to work, or as to its capacity. The appellant was nevertheless convicted on the basis that, if misused, the weapon which was produced to and examined by the court, "*was capable of causing more than trifling and trivial injury and, that if discharged at a particularly vulnerable part of the body, it was a possibility that death could result*". The justices were therefore satisfied that the weapon fell within the definition contained in section 57(1).

28. On appeal, the appellant's conviction was set aside on the ground that there was no evidence upon which the justices could have found that the air rifle was a firearm within the meaning of section 57(1). After a review of some of the older authorities, the court concluded that although the test applied by the justices as to what constituted a firearm was correct in so far as it went, their error lay in their approach to determining whether, on the evidence before them, the prosecution had proved that the weapon in question satisfied that definition. In a judgment with which Mann LJ agreed, Auld J explained that the justices' inquiry should have involved the following two issues[6]:

> "*... first whether the weapon, in the words of s.57(1) of the Act, was 'one from which any shot, bullet or other missile could be*

[5] (1988) 153 JP 491
[6] At page 497

discharged' or whether it could be adapted so as to be made capable of discharging such a missile; secondly, if they were so satisfied, whether it was, in the words of the subsection, 'a lethal barrelled weapon'."

29. Mr Rule placed particular reliance on ***R v Bewley***[7], which was concerned with whether a starting pistol found in the accused's possession fell within the definition of a firearm in section 57(1) of ***the 1968 Act***. The evidence was that the starting pistol, which was originally designed to fire blank cartridges, was constructed with a solidly blocked dummy barrel. However, part of the barrel had been removed by drilling, leaving a small section of the original blockage, through which ran an off-centre hole with a diameter of approximately 2mm. The top part of the hammer was also broken off. But a senior forensic scientist at the Metropolitan Police Service Forensic Firearms Unit was able to fire the starting pistol by mounting it in a vice or clamp, loading it with a specially selected lead pellet and using a mallet and punch to strike the firing pin. On this evidence, the trial judge ruled that the starting pistol was a lethal-barrelled weapon within the meaning of section 57(1).

30. On appeal, delivering the judgment of the Court of Appeal (Criminal Division), Moses LJ acknowledged at the outset[8] the existing principle that a weapon may fall within the statutory definition of a firearm, notwithstanding some temporary fault at the time it is found in the possession of the accused:

"The very notion of the capacity of a weapon must refer not only to its condition at the time of possession but to its construction and its potential as a means of discharging a missile."

31. But, Moses LJ continued -

[7] [2012] 2 Cr. App. R. 27
[8] At para 16

> *" ... once it is recognised that a gun may fall within the definition of firearm, even if its condition at the time renders it incapable of firing, the question arises as to the extent to which it is permissible to look to possible alterations to the gun from the condition in which it is found in the possession of the accused. If a minor repair is all that is needed, the gun is a firearm. But what if it needs a major conversion, adaptation or repair before it can discharge a missile?"*

32. It was therefore necessary for the court to consider whether the fact that the starting pistol could only be discharged by the "*elaborate technique*" (as Moses LJ described it[9]) deployed by the forensic scientist took the case outside of the category of "*a minor repair*". It is in that context that the question then arose whether and, of if so, to what extent, the application of section 57(1) was affected by the provisions of the ***Firearms Act 1982*** (***'the 1982 Act'***) relating to imitation firearms. As in section 2(1) of ***the Act***, section 57(4) of ***the 1968 Act*** defines an imitation firearm as "*anything which has the appearance of being a firearm ... whether or not it is capable of discharging any shot, bullet or other missile*".

33. Moses LJ pointed out[10] that ***the 1982 Act*** had widened the scope of ***the 1968 Act***, to embrace imitation firearms readily convertible into firearms to which section 1 of that Act (imposing the requirement of a firearms certificate) applied. Under ***the 1982 Act***, in order to ascertain whether an imitation firearm was readily convertible into a firearm to which ***the 1968 Act*** applied, it was necessary to look to section 1(6) of ***the 1982 Act***. According to that section –

> *"... an imitation firearm shall be regarded as readily convertible into a firearm to which section 1 of* ***the 1968 Act*** *applies if –*
>
> *(a) it can be so converted without any special skill on the part of the person converting it in the*

[9] At para 9
[10] At para 23

construction or adaptation of firearms of any description; and

(b) the work involved in converting does not require equipment tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes."

34. Section 1(5) ***the 1982 Act*** also provides "*that it is a defence for an accused to show that he did not know and had no reason to suspect that an imitation forearm could be readily convertible into a firearm to which s. 1 of the 1968 Act applies*".

35. On the basis of the evidence in the case, Moses LJ concluded[11] that the starting pistol was only capable of discharging a missile "*with the aid of other implements external to the weapon itself*". Because it had no capacity to discharge any shot, bullet or missile otherwise than in combination with other pieces of equipment, such as the vice, the clamp and the mallet, the starting pistol was not "*a lethal-barrelled weapon from which any shot, bullet or other missile can be discharged*". It was therefore an imitation firearm, in respect of which it would have been necessary to (a) ascertain whether it fell within the provisions of section 1(1)(b) and (b) of ***the 1982 Act***; and (b) afford the accused an opportunity to put forward the defence under section 1(5) of ***the 1982 Act***.

36. ***Bewley*** therefore recognises a distinction between a weapon which is capable of discharging a missile after a minor repair and one which can only do so after "*a major conversion, adaptation or repair*". In England and Wales, a weapon falling into the former category may, depending on the evidence, be a firearm within section 57(1) of ***the 1968 Act*** without more. However, in respect of one falling into the latter category, it will be necessary to consider whether the requirements of ***the 1982 Act*** relating to imitation firearms have been satisfied.

[11] At paras 31-33

37. ***Bewley*** was distinguished by the Court of Appeal in ***R v Heddell***[12], in which a replica of a WWII German MP40 sub-machine gun was seized from the defendant. It was common ground that the replica had been manufactured as such and was not at that stage a '*real*' firearm. The Crown's case was that the replica had been converted to be capable of firing live ammunition upon the completion of the simple task, achievable in 20-30 seconds, of removing a steel bolt from the front of the chamber. The case for the defence was that the replica was, as seized, incapable of discharging a shot, bullet or other missile and so was not a firearm. It was therefore an imitation firearm falling within ***the 1982 Act***, pursuant to section 1(5) of which the defendant might have a defence by showing that he did not know and had no reason to suspect that it was so constructed or adapted as to be readily convertible to a firearm within the meaning of ***the 1968 Act***. There was a difference of opinion between the experts called by the Crown, with one of them saying that at the time of seizure the replica was capable of discharging live ammunition, and the other maintaining that it was not.

38. The Court of Appeal held that the trial judge was right to have left to the jury the issue of whether, since so little required to be done to enable the replica to fire missiles, they could be sure that it was a firearm within section 57(1) of ***the 1968 Act***. Delivering the judgment of the court, Treacy LJ pointed out that, in ***Bewley***, the starting pistol could only discharge a missile from the barrel in combination with other pieces of equipment and was therefore plainly an imitation firearm within the meaning of section 57(4) of ***the 1968 Act***. In ***Heddell*** on the other hand, there was evidence that the replica already satisfied the definition of a firearm within section 57(1) and could with some minor repair or alteration be discharged. It was therefore a matter properly left to the jury to decide which of the contrasting cases of the prosecution or the defence it accepted.

39. Lastly, we will mention ***R v Manderson***[13], a case tried before Quin J in the Grand Court, in which the defendant was found in possession of a modified flare gun. The modification involved the attachment of a rubber tube, allegedly for the purpose of sufficiently

[12] [2016] EWCA Crim 443
[13] [2013] (1) CILR Note 1]

increasing the force of the hammer to allow it to fire modified .38 ammunition. The firearms expert said that it would not require significant knowledge of firearms to modify the ammunition or the flare gun. Further, that with the modification, the gun, if fired, could cause serious injury or death. At the close of the Crown's case, the defence submitted that, as the flare gun was inoperable as a firearm without undergoing a conversion and was therefore not a lethal-barrelled weapon within the meaning of section 2(1) of ***the Act***, there was no case to answer. Quin J rejected this submission on the basis that the flare gun was capable of being a firearm; it was a question of fact for the jury; and the jury would be entitled to find that the flare gun was a firearm within the statutory definition if, as the judge considered to be the case, it could be adapted to discharge a missile without specialist equipment or skill.

40. By analogy to ***Bewley***, Mr Rule submitted strongly that, given the extent of the conversion or adaptation required to make the pistol operable in the instant case, it could not be considered to be a firearm within the meaning of section 2(1) of ***the Act***. Mrs. Petit disagreed, distinguishing ***Bewley*** and pointing out that, on its facts, ***Manderson*** provided a more appropriate comparison.

41. We agree unhesitatingly with Mrs. Petit. In this regard, we note in passing that the appellant's experienced trial counsel made no submission to the judge at the close of the Crown's case that the evidence proffered by the prosecution at that stage was insufficient to prove that the pistol was a firearm. In our view, he was plainly right to do so. The issue of whether the pistol was a lethal barrelled weapon within the meaning of section 2(1) of ***the Act*** was a question of fact. In such a case, as the learned editors of Blackstone's Criminal Practice indicate[14], "[t]*he correct approach is for a judge to determine whether the device is capable of amounting to a firearm and then to leave to the jury the question of whether it is actually a lethal weapon*".

42. The evidence given by both Mr. Stuart and Ms. Lawton clearly supported the view that the only thing which rendered the pistol inoperable at the time it was found at the appellant's

[14] Blackstone 2018, para B12.16

house was the missing firing pin. Both witnesses testified that this deficiency could be easily cured without the need for any expert or particularly technical intervention. None of the authorities to which we have been referred supports the distinction for which Mr. Rule contended, between a minor repair achievable by the use of some part or implement already in the defendant's possession, and one which needed to be sourced from elsewhere. Although they may each have expressed themselves slightly differently on the point, both experts appeared to agree that, with the insertion of the firing pin, the pistol would be capable of operating as a lethal barrelled weapon.

43. Against this background, it appeared to us that the judge's decision to leave to the jury the question of whether they could be satisfied that the pistol was in fact a firearm could not be faulted. Nor can any complaint be made about judge's directions to the jury, in which he was at pains to tell them that the final decision was theirs, having regard to the all the evidence, including the expert evidence.

44. For these reasons, therefore, ground 1 failed.

The alleged confession issue

45. We have already set out the circumstances out of which this issue arose[15]. At the appellant's trial, objection was taken on his behalf to the admission of the alleged confession in evidence. It was submitted to the judge that the alleged confession was more prejudicial than probative and DC Daley was strongly criticised for his failure to make any note of it in his own notebook, or to tell the logger about it. Reliance was placed on section 40 of the ***Evidence Law (2011 Revision),*** which provides as follows:

> "*40. Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of such court, would, if allowed, operate unfairly against an accused person.*"

[15] See paras 9-12 above

46. In his written ruling on the objection given on 17 July 2017[16], the judge observed that the appellant had been given an opportunity to address the alleged confession during the question-and-answer session held at the police station the following day. The judge then ruled the statement admissible for the following reasons[17]:

> "*8. The issue before me is whether this statement was voluntary or not, or whether it was a breach of the Judges' Rules.*
>
> *9. There is no evidence that there was any force, or coercion, or duress put upon the defendant. There is no evidence of any inducement, or evidence that any steps were taken to somehow get him to say this statement. There is no evidence of any breach of the Judges' Rules.*
>
> *10. Officer Daley has given a perfectly plausible explanation as to why he didn't put it in his notes, and why the logger was not present when the statement was made. Officer Daley's statement that he told police officers about it [the statement] is corroborated by the question-and answer-statement.*
>
> *11. Accordingly, having taking everything into consideration, in my view, there is no proper reason to exclude it. It is ultimately a matter for the jury.*
>
> *12. The Defendant can challenge the officer's evidence. The defendant can give his own evidence and the Defendant can still have a fair trial.*

[16] At para 7
[17] At paras 8-13

13. I am going to exercise my discretion and allow what I find to be a voluntary statement in; a voluntary statement made after caution, outside the house in Savannah."

47. Pointing out that the judge had mistakenly focused solely on the voluntariness of the alleged confession, Mr Rule submitted that there were other good reasons for its exclusion. He contended that breaches of basic standards of fairness established by the Judges' Rules[18] for the protection of accused persons had been committed by DC Daley. Not surprisingly, he was particularly critical of DC Daley's failure to make or cause to be made any contemporaneous record, either in his own notebook or in DC Gordon's notebook, of what the appellant was alleged to have told him. In these circumstances, it was unfair and dangerous for the judge to have admitted the alleged confession. Given its obvious significance to the prosecution's case, the judge's failure to exclude the alleged confession rendered the appellant's conviction unsafe.

48. Mrs. Petit did not dispute either the authority or the applicability of the Judges' Rules. However, she submitted that it was a matter for the judge in the exercise of his discretion to determine whether or not to admit the alleged confession. The power given to the court under section 40 of ***the Evidence Law*** to disallow otherwise admissible evidence on the ground that, if allowed, it would operate unfairly against an accused person was, similarly, a discretionary power. Accordingly, this court ought not to disturb the judge's decision to admit the alleged confession unless it concluded that it was an unreasonable decision in the circumstances of the case; and the appellant had not raised anything to suggest that the judge's exercise of his discretion had been unreasonable.

49. We were referred by Mr Rule to Police Standing Order C3, made pursuant to section 6 of the ***Police Law (2017 Revision)***, which incorporates the Judges' Rules. However, as Mr Rule pointed out, the Judges' Rules also apply in the Cayman Islands by virtue of section 23 of ***the Evidence Law (2011 Revision).*** These rules, as is well known, seek to regulate

[18] **Practice Note (Judges Rules)** [1964] 1 WLR 152

the admissibility in evidence at trial of answers and statements made by accused persons to police officers during the course of investigations.

50. In familiar language, the introduction to the Judges' Rules states[19] that –

> *"... it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."*

51. The Judges' Rules go on to characterise this principle[20] as "*overriding and applicable to all cases*"; and to state that non-conformity with the rules "*may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings*". Mr Rule highlighted Rule II, III(b) and IV(a). Rule II provides that *"[a]s soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or any further questions, relating to that offence*". After setting out the well-known terms of the caution, the rule goes on to require that, *"[w]hen after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present*". Among other things, Rule III(b) requires that where questioning is permitted by the rules (that is, after an appropriate caution), "[*a]ny questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by the person or if he refuses by the interrogating officer*". And rule IV(a) requires that, where a person voluntarily opts to make a statement, "*he shall be told*

[19] At para 1(e)
[20] At para 2

that it is intended to make a written record of what he says [and given the option to write it himself or to have the police officer write it for him]".

52. To demonstrate the impact of these breaches, Mr Rule referred us to, among other authorities, ***Peart v The Queen***[21], a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. As Lord Carswell explained at the outset[22], that was a case concerning "*the status of the Judges' Rules ... and the way in which trial judges may exercise their discretion to admit evidence if there has been a breach of the Rules*".

53. The issue arose in this way. The appellant was arrested and charged with the offence of murder. The following day, while he was detained in custody, he was interviewed by the police and asked a series of questions about the offence for which he was charged. This was in breach of rule III(b) of the Judges' Rules, which provide that *"[i]t is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted*". Nevertheless, the questions and the appellant's answers were admitted in evidence at his trial. On appeal, the Court of Appeal of Jamaica held that, as long as a statement was made voluntarily, the trial judge had a discretion to admit it despite a breach of the Judges' Rules. Further, that in this case there were exceptional circumstances which justified the trial judge's decision to admit the statement and there was no miscarriage of justice arising from what the court described as "*the technical breach*" of the Judges' Rules. The appeal was accordingly dismissed.

54. For reasons to which we will come in a moment, the appellant succeeded at the Privy Council. The decision is particularly notable for Lord Carswell's discussion of the interplay between voluntariness, as a specific criterion, and fairness, as a more general consideration, in the context of the admissibility of a statement obtained in breach of the Judges' Rules. In this regard, Lord Carswell's conclusion[23], after a review of some of the older authorities,

[21] [2006] UKPC 5; [2006] 1 WLR 970
[22] At para 2
[23] At para 23

was that "*the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence*". On this basis, Lord Carswell distilled the following four basic propositions from the authorities:

(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the

Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

55. On the facts of ***Peart***, the Board considered that there were no exceptional circumstances justifying the questioning of the appellant after he had been charged. The Board accepted that the trial judge was entitled to exercise his discretion to admit the evidence consisting of the questions and answers notwithstanding the breach of the Judges' Rules. But, in this case, the Board considered that intervention was warranted by, firstly, the fact that there appeared to be no sufficient justification for the trial judge's finding that the answers given to the questions by the appellant were voluntary, and, secondly, there was no indication "*that the judge took into account any other factors bearing upon the fairness to the appellant of admitting the evidence*". Among the matters referred to by Lord Carswell[24] in the latter regard were the appellant's age at the time of his arrest (he was 18), the fact that he had not had the services of a lawyer before being interviewed by the police, and the fact that he was in custody on a charge of capital murder.

56. Mr Rule also referred us to some of the earlier decisions interpreting the provisions of Code C made under section 66 of the Police and Criminal Evidence Act 1984, which replaced the Judges' Rules in England and Wales. It is, we think, sufficient for present purposes to note that those decisions attribute considerable importance to those provisions of the Code requiring that an accurate record be kept of police interviews of suspected persons.

57. Thus, in ***R v Delaney***[25], for instance, in which, contrary to the provisions of the Code, there had been a failure to record an interview with the suspect until the following day, Lord Lane CJ commented that *"[b]y failing to make a contemporaneous note, or indeed any note, as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what indeed did happen during these interviews ..."*

[24] At para 28
[25] (1989) 88 Cr. App. R. 338, 341-342

58. And, in ***R v Keenan***[26], after reviewing some of the authorities in which breaches of the Code had been considered, Hodgson J concluded as follows:

> "*We think that in cases in which there have been 'significant and substantial' breaches of ... the code, the evidence so obtained will frequently be excluded. We do not think that any injustice will be caused by this. It is clear that not every breach or combination of breaches of the codes will justify the exclusion of interview evidence ... They must be significant and substantial. If this were not the case, the courts would be undertaking a task which is no part of their duty ...*
>
> *But if the breaches are 'significant and substantial', we think it makes good sense to exclude them ... If the rest of the evidence is strong, then it may make no difference to the eventual result if [the judge] excludes the evidence. In cases where the rest of the evidence is weak or non-existent, that is just the situation where the temptation to do what the provisions are aimed to prevent is greatest, and the protection of the rules is most needed.*"

59. It seems to us that, in the instant case, contrary to what the judge concluded, there were significant breaches of both the letter and the spirit of the Judges' Rules as regards the alleged confession. Indeed, Mrs. Petit did not contend otherwise. As Mr. Rule pointed out, DC Daley (i) made no contemporaneous note of the alleged confession at the time or shortly after it was allegedly made; (ii) did not inform the logger of it at any time before he and others escorted the appellant to the police station; (iii) did not record it in his notebook, either immediately upon his return to the station, or later that evening when he sought to update it with the aid of the logger's notebook; and (iv) did not tell any of his colleagues about it until the following morning.

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[26] [1990] 2 QB 54, 69-70

60. Even if it is possible to explain (i) and (ii) on the basis accepted by the judge (that the notebook was in the police car and the logger was otherwise engaged), we have found it well-nigh impossible to explain (iii) and (iv) on the same or indeed any basis. Taken together, these breaches were, in our view, significant and substantial, and were apt to give rise to the very mischief which the rules were designed to avoid.

61. But, as we naturally accept, the question of whether the alleged confession should have been admitted, notwithstanding these breaches, was a matter for the judge in the exercise of his discretion. Accordingly, approaching the matter as the Board did in ***Peart***, we also accept that this court ought not readily to review the judge's exercise of his discretion unless it can be shown that his decision to admit the alleged confession was unreasonable.

62. In this regard, we think it is fair to say that, as Mr. Rule observed, the judge's principal focus was on the issue of the voluntariness of the alleged confession. Indeed, having concluded that it was voluntary, the judge then went on to state categorically[27] that *"[t]here is no evidence of any breach of the Judges' Rules*". So there is no question that the judge did not consider any other factor relevant to the fairness or otherwise of admitting the alleged confession. In our view, our contrary conclusion based on the evidence, that there were in fact significant breaches of the Judges' Rules, therefore provides an ample basis upon which we can review the judge's exercise of his discretion and, if we think fit, exercise our own discretion.

63. On the Crown's case, the alleged confession was a significant item of evidence. Given that the appellant denied making it, the provenance of the alleged confession was a vital issue in the case. On the face of it, DC Daley's evidence of the manner in which he dealt with the alleged confession gave rise to serious questions of plausibility. In our view, one of the objectives of the requirement in the Judges' Rules for early recording of any statement allegedly made by an accused person is to avoid or assist in resolving allegations of

[27] At para 9 of the ruling – see para 46 above

distortion or concoction. And, as Hodgson J observed in ***R v Keenan***[28] of the comparable provision in the Code, "*it provides safeguards against the police inaccurately recording or inventing the words used in questioning a detained person*".

64. These safeguards were wholly bypassed in this case. But the alleged confession's potential for prejudice to the appellant was plainly inestimable. In these circumstances, we considered that Mr Rule had made good his contention that it was unfair to the appellant and dangerous to admit the alleged confession into evidence.

65. On this basis, we therefore concluded that the appellant was entitled to succeed on ground 2.

The unfair summing-up issue

66. Mr. Rule made four complaints under this head. The first related to a comment which the judge made to the jury while summarising the evidence of the witnesses for the prosecution. The immediate context was as follows. As was to be expected, counsel for the appellant cross-examined DC Daley in detail about the circumstances of the alleged confession. The fact that DC Daley neither recorded it at the time nor reported it to any of his colleagues came in for particular attention. It was put to DC Daley that the appellant did not make the alleged confession. When DC Daley insisted that the appellant had in fact done so, it was further put to him that he "*couldn't possibly*" have forgotten to put it in his notes. But DC Daley maintained his position that, while he forgot to record the fact, the appellant did make the alleged confession.

67. The judge then turned to the evidence of the next witness for the prosecution (DC Mitchell). But early in his summary, he paused to interpose a general comment to the jury on how to assess the evidence of witnesses[29]:

[28] At page 63
[29] Transcript, pages 18-19

> *"Now, I want to say something here about witnesses generally, and I think Ms. Petit may have referred to this. If all seven of you, and me, and two counsel go out and we witness a little traffic accident, we come in and write down what we saw and it includes light, distance, time, details like that, it would be quite extraordinary if every account was exactly the same. You would be accused of colluding because it would just be quite unbelievable for everybody to have exactly the same time, the same colour, the same -- So that is something to remember. There are and will always be, as Ms. Petit said, different versions, and it doesn't mean that anybody is telling a lie or anybody is deliberately trying to make something up. Everybody is doing their, you know, best to remember what happened. That is something just bear in mind. Similarly with notes, you know, it's a dynamic situation, everybody is moving around, you don't always have time to make notes as you go along. You've got to task at hand and then you try and do your notes when you get an opportunity, and that's just something to bear in mind."*

68. Mr Rule submitted that this comment, coming as it did shortly after the completion of the judge's summary of DC Daley's evidence, was intended to or had the effect of unfairly bolstering, or seeking to explain away the problems with the prosecution's evidence, DC Daley's in particular, while at the same time undermining the effect of the cross-examination.

69. Mrs. Petit submitted that, when taken in the wider context of the summing-up as a whole, the judge's comment was unexceptionable. The judge approached the analysis of the case for both sides in a pragmatic and balanced way and no objection can be taken to the particular way in which he chose to organise his remarks to the jury.

70. Mrs. Petit very helpfully referred us to the decisions of the English Court of Appeal in ***R v Nelson***[30] and ***R v Richardson***[31]. In the former case it was held that "*judges existed to see that justice is done and justice required that they assist the jury to reach a logical and reasoned conclusion on the evidence*". And in the latter, Lord Taylor CJ said this:

> "*In our judgment, the pattern of the summing-up, in what order and under what headings the evidence is marshalled, are matters wholly within the trial judge's discretion. Providing that he fairly reviews the essential features of the evidence, the structure of his summing-up cannot be impugned simply because the defence would have preferred a different format.*"

71. Taken by themselves, the remarks of which the appellant complains under this head might be considered to be quite innocuous. However, we accept that they might have been better placed, so as avoid any impression that they were a direct response to any perceived damage to DC Daley's credibility. Had they been made as part of the judge's general directions on credibility, for instance, there could hardly have been any complaint about them. But, that having been said, we also accept that the structure of the summing-up was a matter entirely within the judge's discretion and we would accordingly not be inclined to disturb the conviction on this basis alone.

72. Of greater significance, perhaps, was the actual content of the judge's remarks. DC Daley was not a witness like any other witness. He was a police officer to whom the Judges' Rules applied. The implication of the judge's remarks was that, as in the case of any other witness, DC Daley's failure to make a note of the alleged confession was perfectly understandable. It is in this regard that we think, with respect, that the judge's remarks were unfortunate.

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[30] [1997] Crim L.R. 234

[31] (1994) 98 Cr. App. R. 174, 178

73. Mr. Rule's second complaint was that the judge's directions to the jury as to the different roles of counsel for the prosecution and counsel for the defence were unfair. This is what the judge said[32]:

> "*There are well established rules which make it clear that it is not the duty of prosecuting counsel to obtain a conviction at all means at her command. Her role is to present the evidence in a fair and impartial manner, and Ms. Petit has laid before you fairly and impartially all of the facts that comprise the case for the prosecution.*
>
> *Now, Mr Aolfi's role is different, obviously, but he presents the case for the defendant and he is entitled to test the Crown witnesses under cross-examination and argue the case for the defendant and his duty within the limits of practice and propriety is to do the best he can for his client in accordance with his client's instructions. So that's the role of both counsel.*"

74. Mr. Rule submitted that this was a misdirection, in that it had the effect of bolstering the case for the prosecution, while at the same time undermining the independence or the quality of defence counsel in the mind of the jury.

75. Mrs. Petit's response to this submission was to refer us to the well-known older case of ***R v Puddick***[33], in which Crompton J said that "*counsel for the prosecution ... are to regard themselves as ministers of justice and not to struggle for a conviction*"; and to the introductory paragraphs of the Farquharson Report[34], in which the learned author states that "[*t*]*here is no doubt that the obligations of prosecution counsel are different from those*

[32] Transcript, pages 5-6
[33] (1865) 4F & F 497, 499
[34] Report of the Farquharson Committee on the role of prosecuting counsel, quoted in Blackstone's Criminal Practice 2018, para D16.3

of counsel for the defence in a criminal case ... [h]is duties are wider both to the court and to the public at large".

76. On this basis, Mrs. Petit submitted that the judge's observations on the differing roles of prosecution and defence counsel cannot be faulted. We entirely agree and there is, in our view, nothing in Mr. Rule's complaint on this score.

77. Mr Rule's third complaint was that the judge failed to direct the jury that they should assess the witnesses for the defence in accordance with the same fair standards as they applied to the witnesses for the prosecution. In this regard, Mr. Rule referred us to specimen directions to this effect contained in the Crown Court Crown Court Bench Book and Specimen Directions[35] and the Crown Court Compendium[36].

78. Mrs. Petit submitted that this criticism was unfounded, given the judge's directions to the jury on how to approach the credibility of witnesses generally. The directions were as follows[37]:

> "*Credibility is an issue in this case and I hope I will try and help you with some common sense sort of assistance in assessing credibility. So in this case you are going to decide whether some of the witnesses, including the defendant, are telling the truth. You might say how is that done. Here are five considerations that you may wish to bear in mind. One, plausibility. So you ask yourself the question, is the evidence plausible in all of the circumstances. You ask yourself the question, did the witness, I mean any witness, act in the way you would expect him to have acted, given the situation in which the witness found himself or herself. Two, internal consistency. If the witness has told a story on a previous occasion,*

[35] 3rd edn, 2010, para 2.0A
[36] Part 1, chapter 4, page 4-3
[37] Transcript, pages 42-43

is the previous telling of the story consistent with the evidence now given in this court. Small inconsistencies provide no reason for concern as they are to be expected when a witness is telling the truth, referring to the seven of us or all of us going out and witnessing an accident. However, major inconsistencies may indicate that the witness is mistaken or is lying. Thirdly, external consistency. Is the evidence of the witness consistent with the evidence of other witnesses. Again, members of the jury, small inconsistencies provide no reason for concern as they are to be expected. However, major inconsistencies may indicate that a witness is lying or mistaken.

Fourthly, bias. Does the witness have a personal reason to favour one side or the other. That is a bias. If so, the witness may have been tempted to exaggerate or embellish his or her testimony.

And finally, fifthly, demeanour. Is there anything about the way in which the witness presented evidence to you which suggest [sic] the witness is mistaken or not telling the truth."

79. We accept that, in this passage, the judge was referring to witnesses for both the prosecution and the defence. To that extent, therefore, it may be said that the directions were sufficient to alert the jury to the need to approach the evidence of both defence and prosecution witnesses in the same manner. We agree that, certainly in the interests of clarity, the judge might have separated the point which the standard direction seeks to make from his more general directions on inconsistencies, bias, demeanour and the like. But this was a matter for the judge and we are not persuaded that the judge's somewhat unusual approach rendered the summing-up as a whole unfair.

80. Mr Rule's fourth point also relates to the judge's directions which we have set out at paragraph 80 above. During the course of the argument before us, it became clear that the

complaint related to the timing, rather than to the content, of the directions. Indeed, Mr Rule accepted that the directions were "*largely uncontroversial*" and would have been unremarkable if given at some other point in the summing-up. But he submitted that, by opting to give detailed directions on how to approach issues of credibility immediately before his review of the case for the defence, the judge would have given the jury the impression that he favoured the case for the prosecution.

81. Not unexpectedly, Mrs. Petit repeated her earlier submission that the structure of the summing-up was a matter for the judge to determine. And again, we agree. In any event, the judge's directions were in our view sufficiently general to make it clear to the jury that they applied equally to witnesses for the prosecution and the defence.

82. Overall, whether taken individually or cumulatively, as Mr. Rule invited us to do, we do not think that the complaints put forward under this ground of appeal can be said to have either compromised the appellant's right to a fair trial or rendered his conviction unsafe. While, as sometimes happens, some of the judge's choices in organising his summing-up were not ideal, these were essentially matters for him to determine. In the circumstances, no basis for this court's interference with the judge's exercise of his discretion in regard to the matters complained of.

83. Ground 3 failed accordingly.

The good character issue

84. In examination-in-chief, the appellant gave evidence that, save for handling offences for which he received community service orders in 2011, he had no previous convictions. He testified that he had never been involved with firearms or weapons of any kind, nor had he ever been involved with any gang activity. He spoke of having been in consistent employment since leaving school and having a very good work record. However, he admitted to having been involved in minor fist fights.

85. The appellant also called four witnesses who testified to his good character. They all spoke of him in very positive terms, one of them describing him as "*decent, hardworking, honest and trustworthy and a person of good moral character*".

86. In fact, the appellant had four previous convictions for handling stolen goods, two each in 2012 and 2013 respectively. He was sentenced to community service orders for these offences.

87. Mrs. Petit, who also appeared at the appellant's trial, told us that, during the judge's discussions with counsel in the absence of the jury in advance of the summing-up, the appellant's counsel (not Mr Rule) did not raise the question of a good character direction. Nor was any mention made of it when, at the end of the summing-up, both counsel were asked by the judge whether there was anything they wished him to add. In the result, although the judge did refer to the character evidence during the summing-up, no good character direction was given.

88. Mr. Rule submitted that, in the circumstances, the judge ought to have given the appellant the benefit of a full good character direction. On the other hand, Mrs. Petit submitted that, given the appellant's previous convictions, the judge had a discretion whether to give a good character direction and in the circumstances none was required in this case.

89. Both counsel referred us to ***R v Hunter (Nigel)***[38], in which a five judge court of the Court of Appeal of England and Wales undertook a full review and restatement of the law on good character directions. ***Hunter*** confirmed that generally, in relation to a defendant who is of good character, a trial judge should give a direction to the jury as to the relevance of good character to (i) his credibility, where he has testified or made pre-trial statements; and (ii) the likelihood of his having committed the offence charged, whether or not he has testified or given pre-trial answers.

[38] [2015] 1 WLR 5367; [2015] EWCA 631

90. Delivering the judgment of the court, Hallett LJ distinguished between a defendant with "*absolute good character*" and a defendant who falls to be treated as being of "*effective good character*"[39]. We would summarise the impact of the distinction as follows. A defendant with absolute good character is one who has no previous convictions or cautions recorded against him and no other reprehensible conduct alleged, admitted or proven. Such a defendant is entitled to both limbs of the good character direction. Where a defendant has previous convictions or cautions recorded against him which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether to treat him as a person of effective good character. Once the judge decides to treat a defendant as a person of effective good character, the judge must then give both limbs of the good character direction, "*modified as necessary to reflect the other matters and thereby ensure that the jury is not misled*".

91. We would mention two further points which emerge from Hallett LJ's judgment. The first[40] is that "*a defendant with previous convictions or cautions to his name has no entitlement to either limb of the good character direction*". Nevertheless, the judge retains a broad discretion in such a case, "*not narrowly circumscribed*", whether to give a warning, or any part of it, or not, having regard to "*what fairness dictates*".

92. The second is that, as Hallett LJ pointed out[41], "*if defence advocates do not take a point on the character directions at trial and/or they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss*".

93. It is not clear to us whether the judge in fact decided to treat the appellant as a person of effective good character. Mrs. Petit said that he did not. However, as Mr. Rule pointed out, the fact that the judge allowed extensive evidence as to the appellant's good character to be given as part of the case for the defence, and was careful to remind the jury of it in the summing-up, might be taken to suggest otherwise. But in any event, even if he did not treat

[39] Paras 77-80
[40] Para 82
[41] At para 98

the appellant as being of effective good character, it is clear the judge had a discretion whether to give a good character direction, taking into account considerations of fairness to the appellant in all the circumstances.

94. As Mrs. Petit pointed out, the appellant's previous convictions were recorded, in the case of the latter two, a mere two years before the offences for which he was charged in the instant case were committed. But, on the other hand, those convictions related to matters of a completely different kind, both in their nature and seriousness, from the offences of unlawful possession of a firearm and ammunition. The quality of the character evidence given in support of the appellant at trial was also impressive. This evidence strongly suggested that, whatever his antecedents, the appellant, who was still not quite 23 years old at the date when the offences in the instant case were allegedly committed, had resumed the right path in life. In these circumstances, we came to the view that, despite the court's principled reluctance to second guess the exercise of a discretion by a trial judge, this was a case in which it was right to do so.

95. It accordingly seems to us that, the appellant having put his good character in issue by way of the character evidence adduced on his behalf, the judge should have given him the benefit of a good character direction, certainly as regards propensity, modified in whatever way he considered necessary to take into account the appellant's circumstances.

96. For these reasons, we concluded that the appellant was also entitled to succeed on ground 4.

Disposal of the appeal

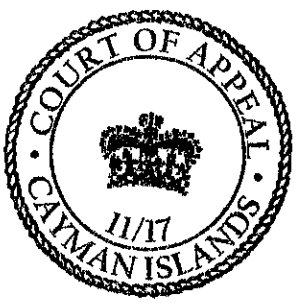
97. Section 9(2) of the ***Court of Appeal Law (2011 Revision),*** provides that where the court allows an appeal against conviction, it may "*quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give*".

98. Having announced that the appeal would be allowed and the conviction quashed, the court invited submissions from counsel on the question of whether a new trial should be ordered.

99. Mrs. Petit submitted that this was a fit case for a new trial. She submitted that there was evidence on which a jury, properly directed, could convict and that, this being a firearm case, it is in the public interest that the appellant should stand trial again. Mr. Rule opposed an order for a new trial, submitting that, once the alleged confession is taken out of the case, there is no other evidence upon which the appellant can be successfully prosecuted.

100. As the well-known decision of the Privy Council in the case of ***Dennis Reid v R***[42] demonstrates, the exercise of the power to order a new trial after a successful appeal involves the balancing of competing considerations. On the one side there is the public interest in ensuring that persons guilty of criminal offences do not go free because of technical errors on the part of judges. While, on the other side, there is the interest of accused persons in not having to go through the ordeal of a trial for a second time based on evidence of uncertain quality. Subject to a myriad of other possible factors (such as the strength of the prosecution case, delay, availability of witnesses and so on), cases of pure '*judge error*' as the reason for allowing an appeal fall more readily on one side, while cases of insufficient evidence clearly fall on the other.

101. Having given careful consideration to the rival submissions in this case, we came to the conclusion that the evidence of the finding of an unlicenced firearm in the home of the appellant, and in the room occupied by him, if believed, and the surrounding circumstances, potentially gave rise to issues which were best ventilated at a new trial. The appeal having been allowed on the basis of errors by the judge, rather than on the ground of a deficiency in the evidence, we accordingly considered that it was in the interests of justice to order a new trial.



[42] [1980] AC 343