BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 13 of 2016

BETWEEN:

EDWARD BAILEY **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C. D. Gibson, K.A, Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)

2017: June 7, October 25

2018: March 22, September 24

2019: January 22, March 13, April 23

December 17

The Appellant in person

Mr. Alliston Seale for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 9 April 2013, the appellant was arraigned on a charge of murdering Ricardo Small (the deceased) on 15 January 2009. He entered a plea of not guilty to that charge. At the trial, the appellant represented himself and

Mr. Arthur Holder, attorney-at-law, appeared as *amicus curiae*. On 24 May 2013, the jury found the appellant not guilty of murder, guilty of manslaughter by a unanimous verdict.

[2] On 13 December 2013, the appellant was ordered to serve 15 years 67 days in prison. He has now appealed against his conviction and sentence.

THE PROSECUTION CASE

[3] The prosecution adduced evidence in the form of photographs, the bullet extracted from the body of the deceased, the oral and written statements of the appellant and eyewitness accounts of the incident.

[4] According to the prosecution's case, in the written statement attributed to the appellant, on 15 January 2009, the deceased had pulled a gun on him and had threatened to shoot him before the day was over. The appellant retrieved a firearm which he had hidden in a stash at Vauxhall and returned to the Blue Bar Block with it. The statement continued that the deceased had threatened the appellant a second time while in a minivan by pointing his finger at him and saying "Just now".

[5] Later that evening, the deceased was a passenger in the Route Taxi ZR-244 which was being driven by a Dayne Harewood. The deceased was seated in the front seat closest to the left side passenger door and a female passenger, Ms. Trisha Thomas sat between him and the driver.

[6] As the vehicle made a stop in Gall Hill, Christ Church, the appellant approached the vehicle. The eyewitnesses, Mr. Harewood and Ms.

Thomas testified that after a brief exchange of words between the appellant and the deceased, the appellant drew a firearm and shot the deceased, who was unarmed. The occupants of the vehicle, including the driver, exited the ZR van through the windows and door, while the deceased got into the driver's seat and attempted to move the vehicle. He failed in this attempt. The deceased then exited the vehicle and ran off with the appellant in pursuit. The appellant was still armed. The deceased ran into a building which housed a business known as Johnno's Pizza where he fell to the ground. The appellant remained on the outside of the building for some time before he left.

[7] The deceased was transported to the Queen Elizabeth Hospital by ambulance where he was pronounced dead on arrival.

[8] A post mortem conducted by Dr. Stephen Jones, Consultant Pathologist, on 16 January 2009, revealed that the deceased sustained 2 gunshot injuries. Dr. Jones' opinion was that death was as a result of gunshot injury to the abdomen with haemorrhage and shock.

[9] The witness, Jamal Layne, testified that earlier that morning some men had come onto the block asking after the appellant in a hostile manner and that the deceased had been one of those men. Another witness, Shawn Yarde, testified that there was an ongoing feud between two groups of men and that the appellant had made threats within earshot of the deceased.

THE DEFENCE CASE

[10] The appellant gave an unsworn statement and called 6 witnesses in his defence. He did not deny shooting the deceased but maintained that the shooting was done in self-defence.

[11] According to the appellant's unsworn statement, on the day in question, he was on the Falcon Crest block when he was approached by the deceased and another man. The appellant and this man quarrelled and the appellant then left on a bicycle.

[12] That afternoon, while the deceased was in a public service vehicle, he pointed his finger at the appellant and stated that before the day was over he was going to "gun" him down. Later, the deceased came up in another van, and pointed his hand through the window stating "Just now".

[13] Sometime in the evening, the appellant was sitting under a dunks tree when Route Taxi ZR-244 came up and stopped. The appellant took up a firearm which had been placed in the bush next to him and went across the road. The deceased who was in the vehicle leant to his right side and pulled out something with his left hand. The appellant on seeing the handle of a firearm got annoyed, pulled the gun out of his pocket and stated "Wuh happen you coming round me all the time so, boy? I ain't do you nothing or nothing so. Wuh happen you coming 'round me all the time so".

[14] The appellant continued that he put the firearm at his side. He heard an explosion. The appellant spun around and saw the deceased raising a

firearm towards him. He and the deceased shot at each other. The deceased ran down the road with the appellant behind him but he had no intention of doing anything to the deceased. After the deceased ran into Johnno's Pizza, the appellant left the area and went home.

[15] The appellant's witnesses, Viril Harewood and Douglas Aurelien, testified that they saw the deceased with a firearm at the time the incident occurred.

THE APPEAL

Procedural History

[16] By notice of appeal filed on 10 July 2013, the appellant appealed against his conviction. Subsequently, on 19 December 2016, a notice of appeal against his conviction and sentence was filed.

[17] Case management orders were made in respect of this appeal on 7 June 2017 and 25 October 2017 respectively. Those orders were not complied with.

[18] On 22 March 2018, Ms. Safiya Moore, who was then counsel for the appellant, sought an extension of time for the filing of grounds of appeal and written submissions. That extension was granted.

[19] On 24 September 2018, Ms. Moore made an application to withdraw as counsel in the matter. She indicated that the appellant wished to deal with the appeal on his own and that there was no need for a reassignment of counsel by the Community Legal Services Commission. This was confirmed by the appellant who informed the Court that he was going to

argue the appeal himself and requested an adjournment to prepare his submissions. The matter was adjourned to 21 November 2018.

THE GROUNDS OF APPEAL

[20] The appellant argued 21 grounds in relation to his conviction and 2 grounds on sentence. We shall set out these grounds and discuss them below.

The Appeal Against Conviction

Grounds 1 to 6

[21] It is convenient to deal with these grounds together. The appellant has alleged that the judge erred in law by entering the arena and obstructing and deflecting his questioning of Mr. Dayne Harewood, Sgt Allen Bailey and Ms. Trisha Thomas and in so doing, assisted the Crown. In support of this submission, the appellant relied on **Matthews & Matthews (1984) 78 Cr. App. R. 23**.

[22] The relevant legal principles which are applied by this Court when dealing with a complaint of improper interventions by a trial judge were set out at **paras [11]** and **[13]** of **Colin Wooding v R, Criminal Appeal No. 2 of 2002** where **Sir David Simmons CJ** stated:

> "[11] The question in any case where it is alleged that a trial judge improperly intervened in the trial must be answered both from the standpoint of the defendant (subjectively) and from the standpoint of a reasonable person who might have observed the trial (objectively). Thus, the trial must have been fair in the eyes of the bystander. Convictions will be quashed where judicial interventions have made it impossible for defence counsel properly to present the defence or have deflected counsel during

> cross-examination from his strategy and considered line of questioning.
>
> [13] In determining whether judicial interventions may amount to material irregularities adversely affecting the fairness of a trial, it is important to analyse not only the quantity of interventions but the quality of those interventions. A large number of interruptions may, at first, put the court on notice that there may be a denial of justice, but the large number is not, per se, decisive- see Purchas LJ in Matthews & Matthews (supra) at p.32, "The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judge… Essentially the investigation is whether it might reasonably appear that the appellant did not have a fair trial and, in particular, whether excessive judicial intervention may have created a real danger that the trial was unfair. The number of interruptions or questions are, by themselves, insufficient to give rise to unfairness. It is the quality of interruptions that counts."

[23] We have examined the interventions which are the subject of complaint against the background of the above principles. In our opinion, those interventions do not amount to obstruction of the appellant's cross-examination of the witnesses. Rather, they can be characterised as the judge managing the proceedings, preventing repetitive questioning and ensuring that the rules of evidence were not breached. They do not amount to interventions adversely affecting the fairness of the appellant's trial. There is therefore no substance to these grounds.

Ground 7

[24] The complaint on this ground is that the judge erred when she failed to withdraw the case from the jury after they had heard evidence which prejudiced the appellant.

[25] The two instances identified by the appellant arose during his cross-examination of PC Griffith. The first occurred when the officer was asked by the appellant if he recalled what he had done in relation to him on 17 February 2009 at 2035 hrs. PC Griffith replied that as the night detective at the time he enquired from the appellant his name, address, age, what he was at the station for and what he was previously charged for. Nothing further was said by the officer and at this point there was nothing to suggest that the appellant had been previously charged with any offence.

[26] The second instance was when the judge read certain entries from the officer's notebook. The appellant then requested that the notebook be placed on the projector, at which point it was disclosed that the appellant had been previously charged. No information was given as to the nature of the charge. The judge immediately cautioned the jury to disregard any information that they might have seen on the screen.

[27] We consider that any prejudice which might have occurred to the appellant was cured by the warning given by the judge and there was therefore no need for the judge to withdraw the case from the jury. This ground is without merit.

Ground 8

[28] The appellant contended that the judge failed to adequately direct the jury in relation to the evidence of Mr. Dayne Harewood. He argued that since this witness used to visit the deceased's family and had worked with the

deceased, the judge should have warned the jury that his evidence could be tainted and given them a warning in accordance with **section 137(1)** of the **Evidence Act, Cap. 121 (Cap. 121)**.

[29] **Section 137(2)** of **Cap. 121** requires a trial judge to give a warning to the jury as to the likely unreliability of evidence given by a witness called by the prosecution "who might reasonably be supposed to have been concerned in the events giving rise to the proceeding".

[30] There is nothing in the record which discloses that the witness Mr. Harewood and the appellant were involved in any dispute or feud. Nor is there anything which suggests that the witness was involved in the commission of the offence. In these circumstances, we do not agree that any such warning was required in relation to this witness.

[31] There is no substance to this ground.

Ground 9

[32] On ground 9, the appellant argued that the trial judge fell into error when she failed to adequately put the defence evidence in relation to self-defence to the jury for their consideration.

[33] According to the appellant, the judge informed the jury that self-defence was raised in his unsworn statement. However, she did not remind the jury that the written statement also made reference to self-defence. He relied on **Hooper v R, Criminal Appeal No. 18 of 2008** to support his argument.

[34] In summarising the evidence for the prosecution, the judge reminded the jury of the contents of the written statement. However, the judge did not deal with the written statement in any detail when she was analysing the defence evidence. We note that this statement mirrored to a considerable extent the unsworn statement given by the appellant.

[35] The record reveals that in her summation, the judge informed the jury that the appellant's case was that he shot the deceased in self-defence. She gave the direction on self-defence, and referred to this issue at **p 1463 lines 5** to **9**; **p1480 line 5** to **p1483 line 6**; **p1587 line 20** to **1588 line 10**; **p1608 line 23** to **p1609 line 24** and **p1610 line 22** to **p1612 line 16**.

[36] Further, at **p1487 line 4** to **p1489 line 1**, **p1587 line 15** to **p1588 line 10 p1602 line 14** to **p1603 line 4**, the judge marshalled the facts in relation to the issues raised and also reminded the jury of the appellant's unsworn statement by reading it in its entirety.

[37] We are of the opinion that the judge adequately identified the issues and analysed the evidence supporting the appellant's defence of self-defence in her summation. We therefore conclude that this ground is without merit.

Ground 10

[38] Here the appellant's contention is that the judge failed and/or omitted to adequately direct the jury in relation to the written statement.

[39] The appellant submitted that, while the certificate at the bottom of the written statement indicated that it had been read back to him and he had

made no corrections, alterations or additions thereto, there was a correction in the body of the statement. According to the record, the evidence of the officer was that a mistake was made in the statement and the appellant was asked to initial it, which he did.

[40] In our view, this was a matter for the jury to resolve in carrying out their function as judges of the facts, as to whether the officer was being truthful, whether there was an inconsistency or whether the officer had lied. The jury had been given the appropriate directions on how to deal with discrepancies and inconsistencies at **p1457 line 14** to **p1460 line 12** and **p1464 line 13** to **p1466 line 9**.

[41] This ground cannot be sustained.

Ground 11

[42] On this ground, it is alleged that the judge failed to adequately analyse the evidence of Sgt Bailey, PC Griffith and Mr. Harewood for the consideration of the jury.

[43] The appellant argued that the trial judge did not identify certain discrepancies between the evidence of the police officers and inconsistencies which arose in Mr. Harewood's evidence.

[44] We do not agree. Having given the appropriate directions on discrepancies and inconsistencies to the jury, the judge focused their attention on the majority of the differences which arose in relation to the evidence of these witnesses. We are of the opinion that the judge's treatment of these issues

was more than adequate and the criticisms made in this regard are unfounded.

Ground 12

[45] The appellant submitted that the judge erred when she directed the jury to find certain facts at **p1478 line 22** to **p1479 line 6** in the following terms:

> " Madam Foreman and members of the jury, based on what the accused man told you in his unsworn statement and again in his closing address on Tuesday, the defence is not denying that he deliberately let go a shot at Ricardo Small inside ZR-244 on January 15, 2009. It is therefore my opinion, Madam Foreman and members of the jury, that you may have little difficulty in finding that this particular ingredient of the offence has been established and that Ricardo Small died as a result of a deliberate act of the accused man Edward Bailey, which was not an accident."

[46] According to the appellant, the use of the word deliberate by the judge amounted to stating that his actions were premeditated.

[47] We see nothing wrong with this direction. The judge was in the process of explaining the ingredients of the offence of murder to the jury, particularly the fifth element/ingredient of that offence. Prior to stating the above, the judge had informed the jury that the prosecution had to satisfy them that the shooting was a deliberate, conscious act of the appellant and that it was no accident. The appellant's case was that he shot the deceased but that he acted in self-defence because he saw the deceased raising a firearm towards him. In any event, the trial judge directed the jury at

p1438 of the record that they were not bound by her opinion on any facts. The finding of facts was purely a matter for them.

[48] This ground therefore fails.

Ground 13

[49] The contention on this ground is that the judge erred in law when she failed to adequately direct the jury in relation to oral statements as required by **section 137(2)** of **Cap. 121**.

[50] The appellant's argument is that, having regard to the **CCJ**'s decision in **Edwards and Haynes v The Queen [2017] CCJ10 (AJ) (Edwards and Haynes)** the judge was obligated to give the specific direction.

[51] The relevant part of **section 137** provides:

> "137. (1) This section applies in relation to the following kinds of evidence:
>
> (d) in criminal proceedings,
>
> (ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;
>
> (2) Where there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so,
>
> (a) warn the jury that the evidence may be unreliable;
>
> (b) inform the jury of matters that may cause it to be unreliable;
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

[52] In **Edwards and Haynes**, the issue for the **CCJ**'s determination was:

> "given the provisions of the Evidence Act of Barbados, may a person charged with an offence be properly convicted in circumstances where the only evidence against him is an unacknowledged, uncorroborated, oral confession allegedly made to investigating officers whilst in police custody but which he denies making?"

[53] The **CCJ** determined that issue in the following way:

> " [30] In the present case, there were no eyewitnesses, no fingerprints, no DNA evidence, no other forensic evidence. The only evidence linking the appellants to the murder were the unacknowledged and disputed oral admissions allegedly made to the police whilst in police custody. There was no electronic or video recording of the giving of the verbals. There was no independent corroboration of guilt…
>
> [34] In the present case, because there was no electronic verification of the alleged confessions by the accused and there was no independent corroborating evidence of their guilt, we have concluded, with some reluctance, that the convictions of the appellants cannot stand; that on its entirety, the evidence was such that the case ought not to have gone to the jury."

[54] In a separate concurring judgment, **Saunders J CCJ** as he then was stated at **paras [49]** and **[50]**:

> "[49] This does not at all suggest that evidence of an un-acknowledged oral confession can never be placed before a jury. Section 137 of The Evidence Act assumes that there will be circumstances when this will be the case. When such a confession is properly left with the jury, the Act obliges the judge, when summing up, scrupulously to comply with certain requirements if so requested by the Defence. We dealt with this matter in *Sealy* and all that was said there fully applies to this case.
>
> [50] Section 137 states that the judge, in his summation, has to do three things. Firstly, the judge must warn the jury that such evidence may be unreliable. Secondly, the judge is obliged to inform the jury of matters that may cause the evidence to be unreliable. Thirdly, the judge must warn the jury of the need for caution in determining whether to accept the evidence and the

> weight to be given to it. Trial judges usually comply with the first and third requirements. But some tend to fall short in relation to the second, perhaps because the full breadth of its scope is misunderstood. Interestingly, while all three requirements are important, the second is probably the most critical. Why? Because it obliges the judge to provide the jury with the essential rationale for the first and the third."

[55] The record reveals that the judge reminded the jury that Sgt Bailey testified that he had invited the appellant to initial his police notebook in which he had recorded (i) each of the oral statements made by the appellant and (ii) the questions asked and answers given during the investigations and that the appellant had refused to do so. She further stated that the appellant had objected to those oral statements on the ground that he never made them.

[56] The judge then proceeded to read **section 137(1) (d) (ii)** and gave the jury the following direction:

> "And so, Madam Foreman and members of the jury I am required by section 137 of the Evidence Act to warn you and I hereby warn you, that the oral statements attributed to the accused man by the police witnesses may be unreliable; those statements have not been signed by the accused or acknowledged in writing by him. And so, you must exercise caution when determining whether to accept those statements and when determining the weight that you will attach to them."

[57] As can be seen from the above, the judge complied with the first and third requirements of the section but not the second. She did not specify those matters which may cause the evidence to be unreliable. However, we are of the opinion that such an omission was not fatal in the context of this case. Apart from the oral statements which were disputed by the appellant, there was sufficient evidence including the written statement

and the evidence of the various eyewitnesses on which the jury could convict him. Once the jury accepted that evidence, it meant that they had rejected the defence put forward by the appellant.

[58] This ground therefore fails.

Ground 14

[59] This ground alleged that the summation was unbalanced in that the judge summed up more on provocation than self-defence, and in so doing deprived the appellant of a more favourable verdict.

[60] An examination of the record shows that the trial judge was careful to identify the issues raised. First, she dealt with the issue of self-defence in detail at **p1463 lines 5** to **9**, **p1480 line 5** to **p1483 line 6**, **p1587 line 20** to **p1588 line10**, **p1608 line 23** to **p1609 line 24**, **p1611 line 22** to **p1612 line 16**.

[61] Second, the judge dealt with the issue of provocation at **p1484 line 12** to **p1486 line 14**, **p1488 line 22** to **p1489 line 20** and **p1609 line 12** to **p1610 line 11**.

[62] We have examined the summation in its entirety. In our opinion, the judge presented a balanced summation for the consideration of the jury. She dealt with the appellant's case fairly, identifying the issues of self-defence and provocation and directed their attention to the relevant evidence. The judge instructed the jury throughout her summation that the burden

remained on the prosecution to prove its case against the appellant. We do not see what more she could have done.

[63] There is no merit in this ground of appeal.

Ground 15

[64] The contention on this ground is that the judge erred when she failed to adequately put the salient features of the evidence to the jury for their determination.

[65] Similarly, the criticism is without merit. A careful reading of the summation reveals that the judge identified the salient features of the evidence for the jury. In so doing, she focussed their attention on the issues which they needed to resolve and marshalled the evidence accordingly. The judge reminded the jury that if she omitted to mention something which they considered important, they must still consider it and give it such weight that as they thought fit.

[66] All in all, the trial judge did what was expected of her. She could do no more.

Ground 16

[67] The complaint on this ground is that the judge's comments to the jury in relation to the evidence of the defence were prejudicial to the appellant.

[68] In this regard, the appellant took objection to the judge's directions to the jury at **p1441** and **p1464** of the record which were concerned with the burden of proof and discrepancies respectively. In the first instance, the

appellant took issue with the sentence "If as has happened in this case, the accused person offers you an explanation, gives evidence which you do not accept or believe, this does not mean that he is guilty as charged." However, this sentence must be examined within the context in which it was made. The judge continued immediately thereafter:

> "The burden of proof is always on the prosecution to prove his guilt. So even if you do not accept what the accused has told you in his unsworn evidence before the court, you do not accept what any of his witnesses have told you in the defence case, before you can find the accused man guilty of this charge, you still have to go back and examine the prosecution case and the evidence which the Crown has adduced in order to see that the prosecution has satisfied you on each and every ingredient of the offence of murder with which the accused man stands charged."

[69] In our opinion, the construction placed by the appellant on the extract is misconceived.

[70] Similarly, we can see no basis for complaint with regard to the second instance. Here the judge informed the jury that all of the evidence adduced at the trial could not be true and that it was for them as judges of the facts to weigh the evidence of the various witnesses, including the evidence of the appellant and determine where the truth lies.

[71] The complaint on this ground is without substance.

Ground 17

[72] On this ground, the appellant contended that the judge's comments in the presence of the jury in relation to the evidence of Sgt Bailey were prejudicial.

[73] The appellant argued that Sgt. Bailey had given an incorrect date in his evidence and that the judge erred when she attempted to clarify this bit of evidence.

[74] According to the record, Sgt. Bailey had testified that he had arrested the appellant on 17 January 2009. Later in his evidence he stated that on the following day, 18 February 2009, he had spoken with the appellant while at the Oistins Police station.

[75] During the summation and while reviewing the evidence of Sgt. Bailey, the judge recognised that there was something wrong with the dates. In her attempt to correct this, the judge herself mistakenly stated the dates.

[76] Nonetheless, we are of the opinion that no prejudice was caused to the appellant by the judge's action. Clearly, the issue of the dates was an inconsistency in the witness's evidence and it was a matter for the jury, having been directed on inconsistencies and discrepancies, to determine whether the witness was a truthful witness.

[77] This ground accordingly fails.

Ground 18

[78] The complaint here is that the judge's directions to the jury in relation to the evidence of the witnesses "though the summation contained correct statements of law in some parts, when viewed as a whole, were unhelpful and in some parts confusing in others". In this regard, the appellant referred to **p1439 line 21** to **p1440 line 25** of the record.

[79] We have examined the extract identified by the appellant and have found that it is part of the general direction which the judge gave on the demeanour of witnesses. We do not agree with the appellant's assessment that this caused the summation to be unhelpful and confusing in parts.

[80] There is therefore no basis for complaint.

Ground 19

[81] It is the argument of the appellant on this ground that the judge erred when she failed to adequately direct the jury in relation to the evidence of Ms. Thomas and Mr. Harewood as required by **section 137** of **Cap. 121**.

[82] This point was raised by the appellant in ground 8 in relation to Mr. Harewood. Our discussion of that ground and our conclusion there apply with equal force to the appellant's argument in relation to Ms. Thomas.

Ground 20

[83] The appellant's contention here is that the judge misdirected the jury and herself in relation to the defence evidence when she told the jury that there was discontent between two groups of men at **p1587**.

[84] The direction by the judge was not a mischaracterisation of the state of affairs between the two groups of men. The evidence disclosed that there was tension, not only between the appellant and the deceased, but also between the persons who were supporting them. In our view, the judge

was setting the context in which the incident occurred and the backdrop to the appellant's defence of self-defence.

[85] This ground cannot be sustained.

Ground 21

[86] This ground alleged that the judge erred when she failed to uphold the no case submission and allowed the case to be tried by the jury.

[87] The appellant contended that the inconsistencies in the evidence made the case weak and that the evidence of Ms. Thomas and Mr. Harewood was unreliable. On an application of the test in **R v Galbraith 73 Cr. App. R 124, CA**, (**Galbraith**) he argued that his no case submission should have been upheld.

[88] We take a different view. According to the second limb of **Galbraith**, "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' 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."

[89] In this case, the prosecution had adduced more than sufficient evidence which would have necessitated that the appellant be called upon to answer the charge of murder.

[90] This ground is without merit.

Conclusion on Conviction

[91] Having regard to all we have said in relation to the above grounds, we have concluded that the verdict is safe and satisfactory and that the appeal against conviction should be dismissed.

The Appeal Against Sentence

Grounds 22 and **23**

[92] These grounds are concerned with the sentence which was imposed on the appellant. We therefore consider it convenient to deal with them together.

[93] On ground 22, the appellant's contention is that the judge failed to adequately take into consideration all the mitigating factors relating to the offender and the offence as required by **section 37(3)** of the **Penal System Reform Act**, **Cap. 139 (Cap. 139)**. On ground 23, the argument is that the sentence is excessive.

[94] The appellant submitted that the judge did not take into account the following mitigating factors: (i) self-defence which she was required to do according to **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)**, even if it was rejected by the jury; (ii) the deceased's propensity for violence and (iii) the deceased's conduct which caused him to genuinely believe that he should act in self-defence. He also argued that the judge did not consider his pre-sentence report which he characterised as excellent.

[95] As to the length of the sentence, the appellant submitted that since his defence was self-defence, the judge should have selected a starting point of 10 years.

[96] We have reviewed the judge's sentencing remarks. In our opinion, the judge properly applied the provisions of **Cap. 139**. First, she took into account the circumstances and was of the opinion that the offence was so serious that only a custodial sentence could be justified. Second, she determined that a starting point of 23 years was appropriate after examining the aggravating and mitigating factors relating to the offence and the guidelines set out in **Pierre Lorde**. Third, the judge took into account the mitigating factors relating to the appellant including the appellant's remorse and arrived at a notional sentence of 20 years. Finally, the judge deducted the time spent on remand and sentenced him to serve 15 years and 67 days in prison.

Conclusion on Sentence

[97] Having regard to the above, we are of the opinion that the sentence imposed by the judge was not excessive.

[98] This was a contested trial. The appellant was charged with murder. The jury found him guilty of manslaughter by unanimous verdict. This offence was committed by the appellant discharging a firearm into a public service vehicle which contained passengers who would no doubt have been terrified during this incident.

[99] There is one final point. In recent times, there has been an increase in the use of illegal firearms in Barbados. In many cases, loss of life has been a result of this unlawful behaviour. This trend has dismayed and outraged all right thinking persons in this society and every effort must be made by all concerned to stamp out this form of illegal actitvity. We therefore consider it necessary to reiterate this Court's observations in **Ryan Harewood v R, Criminal Appeal No. 18 of 2007,** where **Williams JA** stated:

> " [21] The Courts are conscious of the need to protect the public from serious harm from the offender in compliance with the Penal System Reform Act, Cap. 139. A paramount consideration of sentencing in cases involving the use of firearms or offensive weapons resulting in death should therefore be the protection of the public. High levels of crime that cause death are inimical to an orderly society and are to be discouraged. It follows that persons who unlawfully carry firearms or weapons that cause death are a danger to society and must inevitably expect long custodial sentences."

DISPOSAL

[101] The appeal against conviction and sentence is dismissed. The conviction and sentence are affirmed.

Chief Justice

Justice of Appeal Justice of Appeal (Acting)