**BARBADOS**

**IN THE SUPREME COURT OF BARBADOS**

**COURT OF APPEAL**

**Criminal Appeal No. 14 of 2014**

**BETWEEN**

**DESMOND GARRETT YARD APPELLANT**

**AND**

**THE QUEEN RESPONDENT**

**Before: The Hon. Andrew Burgess, Justice of Appeal, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)**

**2018: 8 February**

**2020: 25 August**

**Mr. Tariq Khan in association with Ms. Alexandria Thomas for the Appellant**

**Mr. Anthony Blackman for the Respondent**

**DECISION**

**REIFER JA (Acting):**

**INTRODUCTION**

[1] In this appeal, the appellant Desmond Garrett Yard was charged with the offence of murder. The Crown indicted him in 2011 for the murder of Martina Gittens on 13 October 2008. He pleaded not guilty.

[2] A jury of his peers convicted him of the offence of manslaughter on 14 August 2014.

[3] On 28 November 2014, the trial judge sentenced him to 25 years in prison.

[4] The appellant has appealed both the conviction and the sentence.

**The Factual Background**

[5] The deceased Martina Gittens (Martina) was a young woman age 22/23, the mother of the appellant's young child, 4-month-old Zaria. She was the mother of two other children when she became involved with the appellant at age 19. The appellant, age 37 was a self-employed painter. At that time, he resided in St. Thomas in a house occupied by his mother and father and three siblings, one of whom was Curtis Prescod. The accused was separated from his wife with whom he had one child. He had had another significant relationship with a woman with whom he had fathered two children. The appellant and Martina had been in a relationship for approximately three years. It had been described as a stormy relationship. The appellant in his 'movement statement' to the police described it as "on and off because we were always arguing about different things." It was not known to be a physically abusive relationship.

[6] The two parties were experiencing relationship problems and had, according to the evidence of the appellant in his movement statement, ended the relationship a few weeks prior to the incident resulting in Martina's death. He

stated in this statement that Martina told him that she was talking to someone else but only as a friend. The appellant had been banned by Martina's mother from coming to her home as a result of an allegation made against him by her young sister, which from the appellant's statement to the police appeared to be the most recent cause of the break up. Nonetheless, the parties remained in close communication. They lived in close proximity to one another in the parish of Saint Thomas. Martina and her baby resided in a three-bedroom house with her mother Deborah Gittens, four siblings and two nephews. Martina and her baby occupied the last bedroom at the back of the house. The appellant Yard lived with his family in a house *'behind'* Martina's mother's home. The evidence suggests that it was not literally behind Martina's home but rather, there were two adjoining districts, Shop Hill and Vaucluse Tenantry.

[7] It is apparent from the facts outlined below that the appellant had some difficulty accepting that the relationship was ended or alternatively, may have been trying to save the relationship. He was, however, displaying signs of jealousy in the face of evidence that Martina may have moved on.

[8] On 9 October 2008, baby Zaria fell ill and Martina asked the appellant to take her and the baby to the clinic. They were accompanied by a friend of the deceased Maria Dixon and her son in a car driven by the appellant's brother

Curtis Prescod. The parties departed the residence sometime after five in the evening. The appellant's movement statement indicates that they did not start this journey on very good terms. On the drive to the clinic an argument broke out between Martina and the appellant over her use of a cell phone about which he had no knowledge, and about who was on the other end of the conversation that she had undertaken when using it. The appellant displayed jealousy by reaching into the back seat to snatch the cell phone from Martina, telling her in the process: "That pussy is still mines."

[9] This was the account of Maria Dixon and Curtis Prescod as to the cause of the argument. The appellant gave a different reason for the argument in his movement statement. He stated that the argument was about Martina insisting that she didn't want to go to the clinic, and his insistence that they should both be there.

[10] The driver of the vehicle intervened and calmed the parties. They appeared to be on good terms for the rest of the journey to the clinic. The appellant even gave Martina his cell phone to listen to music for the rest of the journey.

[11] This argument broke out again sometime later at the clinic when the same cell phone went missing from Martina's handbag after she left it in the seating area prior to taking the baby in to see the doctor. The appellant was seen in the vicinity of the handbag while Martina was with the doctor, shortly after which

he requested the driver's keys on the excuse that he needed to get something from the car.

[12] The parties had a confrontation outside the clinic about the missing cell phone. The virulence of this exchange can be inferred from the two events which occurred thereafter: (i) a security guard attached to the clinic asked them to leave the area and threatened to call the police if they did not; and (ii) the driver of the car, the appellant's brother Curtis, would not allow the appellant to accompany them on the return drive home, but instead gave him a sum of money to enable him to take public transportation.

[13] Driver Curtis Prescod also gave evidence of a threat issued by the appellant to Martina. Martina was threatening to call the police over her missing phone, to which the appellant responded:

"You call the police I will get lock up for you."

Martina was later seen to be using the phone booth next to the clinic.

[14] Witness Maria Dixon's account was different. She gave evidence that the appellant said:

"Go on and call them cause I gine kill you tonight."

[15] The appellant in his 'movement statement 'informed that he threw the cell phone into the wharf on his way home from the clinic later that night.

[16] The evidence shows that Martina returned home from the clinic around 9:00 p.m. and, in the opinion of her family members, went to bed sometime after midnight. In the early hours of the morning, sometime between 1:00 and 2:00 a.m., Martina's mother was awakened by screams. These screams proved to be those of Martina, and her mother observed that the bedroom occupied by her and her baby was on fire. Her sister observed that Martina's back was on fire and that the fire in the bedroom was mainly in the area close to the window. The entire house was evacuated after which it was quickly consumed by the fire. No water could be accessed to put out the fire because the taps were found to be dry by Romario Gittens, Martina's brother who ran to the tap. That was the evidence of his mother Deborah Gittens. The evidence of Natalie Gittens, Martina's sister, was that the water had been 'on' when she went to bed around 1:00 a.m. that morning. She told the court that she was the last person to go to bed. It was later established that the water supply had been deliberately turned off from the meter by person or persons unknown.

[17] Martina and her baby were found to be injured and as a result were transported to the Queen Elizabeth Hospital. Both were detained. Sadly, Martina succumbed to her injuries on 13 October 2008, some 4 days later. Her post-mortem report showed, inter alia, that she suffered partial and full thickness flame burns covering 40% of her total skin surface. The surfaces involved

included the entirety of the back, the back of the head, the upper buttocks on both sides, the front of the chest, both sides of the body lower down in the abdomen, both arms circumferentially, the face (eyelids, cheeks, lips and neck) and the upper surface of the right dorsum. It was the opinion of the pathologist and expert witness, Dr. Stephen Jones, that death was as a result of 40% full and partial thickness flame burns with multiple organ failure. The main surfaces involved were the back, face and chest, essentially the upper body. Evidence of the nature and extent of the burn injuries was also given by Dr. Makeba Brooks, the emergency room doctor.

**Investigations by the Police**

[18] Investigations by the police led them to the appellant who gave them two statements, both of which were admitted by the trial judge. The first was a "movement statement" admitted without objection from the defence, in which the appellant, inter alia, gave an account of his whereabouts between 10:00 p.m. on the 9th and 2:00 a.m. on the 10th October, 2008. In that statement he alleged that on the night of the fire, he went home and went straight to bed and to sleep. He also stated that he became aware of the fire when someone knocked at his door in the early hours of the morning and he observed the fire "on the top of the hill". In this recital, when he got to the scene he was told

that Martina had been taken to the hospital and he woke a friend who then took him there.

[19] The second statement, the admissibility of which was challenged, was a confession statement which in addition to relating the first argument on the way to the clinic and outside the clinic, detailed a second argument taking place later that night in Martina's bedroom after the rest of the family had gone to bed. For obvious reasons, the movement statement conflicts with the confession statement in certain material particulars. According to the confession statement, the appellant had called and apologized for the cell phone incident and offered to pay for its replacement. They made up and Martina invited him to come to her room after the family went to bed. The calm was brief and they argued again. Certain provocative statements were made by Martina to the appellant. He was asked to leave by Martina, he left the premises, returned to his home and his admission of culpability was as follows:

> "I leave and I went home and my head was hot. I take up a pet bottle with gas inside of it and I push piece of rag through the mouth of it. I take up a cigarette lighter from home and I went through the back of my home and I end up by she. I come up through by Ms. Byer and I went over she paling. I light the rag and I pelt the bottle through Martina bedroom window…"

[20] The police evidence, principally of the two investigating officers, Dottin and Gibson, also contained certain oral statements made by the appellant, some of which were incriminating as follows:

> "I done talk with my lawyer I can't get no sleep, this thing haunting me. I do wrong and I ready to tell you what happened. I didn't want to harm my daughter but Martina treat me bad. That is the reason I do that."

And when asked if he wished to give a written statement:

> "For my daughter sake I gine do that."

[21] The Crown's case also relied on what is referred to as the "pointing out exercise" following the appellant's confession statement to the police, in which the appellant made certain oral statements to them corroborative of particulars given in his written statement. For example:

> "I tek my time and went over there."
> "The window was out there."
> "I run through there."
> "I skate down here."

All the oral statements made subsequent to the written statement were challenged on the grounds that they were fabrications.

[22] This was the general factual matrix presented by the Crown at the appellant's murder trial. The appellant's defence was the movement statement taken on 13 October 2008, that is, that he went home from the clinic and went to bed. In other words, an implicit alibi defence: he was elsewhere when the fire

occurred. The admission of the confession statement was challenged on a number of grounds, covering breaches of the appellant's constitutional rights. In short, the defence was that the written statement should be rejected because it was obtained in oppressive conditions, namely that he was tortured, ill-treated, deprived of sleep and forced through physical threats and violence to sign that statement after being tricked into staying at the police station after giving his movement statement. In other words his detention, after giving the movement statement, was unlawful. The defence case was that the confession statement was fabricated from the movement statement.

[23] The defence also alleged that the oral statements were fabrications and concoctions and the appellant never participated in a pointing out exercise. And finally, the other evidence, that is, the circumstances referred to earlier, did not implicate the appellant in this offence and were merely coincidental. In general, it was the appellant's defence that the police did not carry out proper investigations, but rather, rushed to judgment and were bent on pinning this crime on him.

[24] The Crown based its case on four pillars: firstly the written statement, secondly the oral statements, thirdly the pointing out exercise and fourthly, the evidence of the circumstances leading up to the incident of the burnt house and injured parties, which the Crown invited the jury to infer were connected

to the offence. These circumstances provide evidence of the appellant's motive, namely, it was no coincidence that the appellant was involved in all these events. The Crown's case was that the appellant deliberately caused the fire which led to Martina's death.

[25] From the above factual matrix outlined by the trial judge, the following appeal arose.

**The Grounds of Appeal**

[26] The articulated Grounds of Appeal are as follows:

1. The ruling of the Learned Trial Judge that the written confession was admissible following the voir dire was wrong as a matter of law because:

    i. In the exercise of her discretion, while making a finding that the appellant was unlawfully detained in excess of 24 hours, 10 hours of which was without any refreshment whatsoever, she failed to treat his unlawful detention as an unwarrantable exercise of arbitrary power by the police which required that she exclude evidence of the confession statement.

    ii. In the exercise of her discretion to admit the written confession, the Learned Trial Judge gave too much weight to its probative value in the contra-distinction to its prejudicial effect because it was obtained in circumstances of impropriety and in contravention and breach of the law namely **section 116** of the **Evidence Act Cap. 121 of the Laws of Barbados**.

2. As a matter of law, the conduct of the Learned Trial Judge during the voir dire involved serious procedural irregularities which caused her ultimate ruling in the voir dire to be unjust because she persistently intervened during submissions advanced by the Defence which amounted to an exercise of bias against the Appellant.

3. As a matter of law, the summation of the Learned Trial Judge involved serious procedural irregularities which caused the verdict to be unjust because in the course of her summation:

    i. The Learned Trial Judge gave more weight to the case advanced by the prosecution than the defence mounted by the Appellant, as borne out by her directions to the jury which ultimately rendered the jury's verdict unjust.

    ii. The Learned Trial Judge substituted the jury's fact finding exercise with her own, drawing the conclusion that the Appellant committed the offence, and, that the Appellant acted under provocation during the commission of the offence, when in fact these were findings that only a jury could make.

    iii. And, immediately thereafter issued directions to the jury that they could find the Appellant guilty of manslaughter by reason of provocation which amounted to undue pressure on the jury.

4. The decision of the Learned Trial Judge to recall the jury and to make enquiries without then eliciting responses and instead providing an alternate to find a majority verdict in relation to manslaughter, amounted to an imposition of pressure on the jury which was both a serious procedural irregularity and a breach of the law resulting in injustice to the Appellant.
In the circumstances as set out above, the verdict is therefore unsafe and the conviction must be quashed.

5. Notwithstanding and without prejudice to the above, should the Honourable Court of Appeal dismiss the appeal against conviction herein, the sentence pronounced by the Learned Judge is excessive in all the circumstances and unjust."

[27] The enumerated Grounds are addressed seriatim.

**Ground 1**

[28] Ground 1 criticises the trial judge's decision, at the conclusion of a voir dire in the case at bar, to admit the appellant's incriminatory written statement as wrong in law. It is in effect a critique of the exercise of her statutory discretion and common law discretionary powers. Counsel's critique that the trial judge should have found this written confession inadmissible is posited on two grounds:

(i) That having found that the appellant was unlawfully detained for in excess of 24 hours, 10 of which without any refreshment whatsoever, the trial judge should have found this to be an unwarranted exercise of arbitrary power which required the exclusion of the statement; and

(ii) That the trial judge gave too much weight to the probative value of statement as opposed to its prejudicial effect because it was obtained in circumstances of impropriety and in breach of **section 116** of the **Evidence Act**.

[29] We feel constrained to point out that, as worded, this Ground was limited to the trial judge's ruling on the voir dire. Submissions made by counsel for the appellant and answered by counsel for the respondent spoke to the judge's summation. Counsel for the appellant submitted that the standard of proof for

the admission of the statement was proof beyond reasonable doubt. He relied on the cases of **R v Brijlall BB 1983 HC73** per **Williams J**, **R v Patrick Valentine Barry (1992) 95 Cr. App. R 384 (R v Barry)** and more particularly on the Australian authority of **R v Stafford (1976) 13 SASR 392** in which **Bray CJ** observed that the test which had to be employed was whether the prosecution proved beyond reasonable doubt that the confession was obtained voluntarily, and on the facts of the case that the unlawful detention was "an outrageous and unwarrantable exercise of arbitrary power" and determined that "a conviction obtained by the aid of a confession made after the arbitrary and unlawful acts of the police in the present case is a conviction obtained at too high a price".

[30] We propose to start by looking at the exercise by the trial judge of her discretion, both common law and statutory, in view of her finding of law, on common law and statutory authorities, that the court's determination on the voir dire was whether the written statement obtained from Desmond Yard was obtained voluntarily or not.

**The Section 116 Discretion and the Common Law Discretion**

[31] The entirety of **Division 9** of the **Evidence Act** is devoted to outlining the court's discretion to admit and/or exclude evidence and the considerations to be taken into account by a court when doing so. It starts with **section 114**

which articulates the balancing act or weighing exercise that the courts generally must undertake as follows:

> "114. Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence."

[32] **Sections 115** and **116** appear to speak specifically to criminal proceedings.

**Section 115** provides:

> "115. In criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the accused, the court may refuse to admit the evidence."

[33] **Section 116 (1)** and **(2)** speak to the court's discretion to exclude improperly obtained evidence and specifically confessions. **Section 116 (1)** provides:

> "116. (1) Evidence that was obtained
>
> (a) improperly or in contravention of a law, or
> (b) in consequence of an impropriety,
>
> shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

[34] **Subsection (2)** speaks specifically to confessions as follows:

> (2) Without limiting subsection (1), where
>
> (a) a confession was made during or in consequence of questioning; and
>
> (b) the person conducting the questioning knew or ought reasonably to have known that

(i) the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(ii) the making of a false statement was likely to cause the person who was being questioned to make a confession,

but nevertheless, in the course of that questioning, the person conducting the questioning did or omitted to do the act or made the false statement, evidence of the confession, and evidence obtained in consequence of the confession, shall be taken to have been obtained improperly.

[35] **Subsection (3)** sets out seven matters that a trial judge must take into account when making the determination as to whether to admit or exclude an improperly obtained confession. The subsection provides:

"(3) For the purposes of subsection (1), the court shall take into account inter alia, the following matters:

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the gravity of the impropriety or contravention;

(e) whether the impropriety or contravention was deliberate or reckless;

(f) whether any other proceeding, whether or not in a court, has been or is likely to be taken into relation to the impropriety or contravention;

(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law."

[36] While counsel for the appellant grounded his submissions in **section 116** of the **Evidence Act**, **Division 3 sections 68** to **77** dealing specifically with Admissions or Confessions, is also relevant and was taken into account by the trial judge in the voir dire. **Section 71** is directly relevant as it addresses the issue of the reliability of a confession by an accused person. It provides as follows:

> "71(1) This section applies only in criminal proceedings and only in relation to evidence of a confession made by an accused.
>
> (2) Evidence of a confession is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected.
>
> (3) For the purposes of subsection (2), evidence that the confession is true or untrue is not relevant.
>
> (4) For the purposes of subsection (2), the matters that the court shall take into account include
>
> (a) any relevant condition or characteristic of the person who made the confession, including the age, personality and education of the person and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the confession was made in response to questioning
>
> (i) the nature of the questions and the manner in which they were put, and
>
> (ii) the nature of any threat, promise or representation made to the person questioned."

[37] The trial judge took into account both these provisions as can be seen from her ruling on the voir dire where she stated at page 508 and onwards of the transcript of evidence:

> "Having regard to the manner in which defence counsel framed his objection to the admissibility of the written statement, the Court was satisfied that in making a determination as to whether the written statement should be admitted or not, the Court on the voir dire would be required one, for the purposes of **section 71** of the **Evidence Act**, to determine as a preliminary fact whether the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected, and two, for purposes of **section 116** of the **Evidence Act** to determine as a preliminary fact whether the confession is evidence that was obtained improperly or in contravention of the law or in consequence of an impropriety."

[38] The trial judge also paid regard to the common law principles governing the admissibility of confessions on which the rules of evidence in our jurisdiction remain grounded.

[39] The trial judge adverted to the interplay of the two sections **72** and **116** when she stated as follows:

> "The discretion to exclude, improperly obtained evidence which is conferred by section 116 of the Evidence Act is obviously much broader in scope than section 71 which is limited in its scope to consideration of issues surrounding the voluntariness of the statement. Not surprisingly therefore when a court is asked to consider the admissibility of a confession it is invariably also invited to consider the exercise of its discretion under section 116 to exclude the confession on the basis that the confession is evidence that was improperly obtained or obtained in contravention of the law or in consequence of an impropriety."

[40] Stated otherwise, the interplay of these provisions shows quite clearly that an unlawful detention, if so found, does not automatically render the confession illegal and inadmissible. The interplay of the sections requires the court to embark on a balancing exercise: see **Ali Mohammed v The State TT 1998 CA 15** and **Thornhill v Attorney General of Trinidad (1974) 27 WIR 281**.

[41] The trial judge in said ruling addressed both the common law test as well as the statutory test in her determination of whether to admit the statement when she stated at page 512 of the transcript:

> "Where, as in the current case, the admissibility of a confession is in issue, the burden of proof will rest on the prosecution on the voir dire to prove such preliminary facts as are necessary to satisfy the judge that the confession was given voluntarily in the common law sense, in that it was not obtained from the accused by threats, promises or by violent oppressive or inhuman or degrading conduct exercised or held out by a person in authority.

[42] In the context of **section 71** of the **Evidence Act**, she expressed the view that the prosecution on the voir dire will, in discharging the burden of proof, also be required to prove such preliminary facts as are necessary to satisfy the judge that:

> "the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected."

[43] The trial judge rightly observed that the standard of proof required was proof beyond reasonable doubt. She adopted the 'broad common sense approach' of

the English case of **R v Barry** despite the fact that this case was decided in the context of the United Kingdom Police and Criminal Evidence Act 1984. Firstly, she asked herself: in what circumstances was the alleged confession obtained? The trial judge reviewed the evidence in the voir dire before answering this question bearing in mind the common law and statutory considerations (**section 13** of **the Constitution**, **section 71(4)** and **section 116** of the **Evidence Act** and the **Judges' Rules**). After reviewing the evidence and outlining the inconsistencies in the evidence of the appellant, it was her reasoned conclusion that the accused was not a credible witness. The judge accepted the evidence of Sergeants Gibson and Dottin as representing the circumstances in which the confession was made.

[44] She turned next to the question: Was the confession given voluntarily? And were the circumstances in which the confession was obtained such as to make it unlikely that the truth of the confession was adversely affected? She found as a matter of fact, having reviewed the Crown's evidence on the voir dire, that the statement was voluntarily given and that for the purpose of **sections 116** and **71**, it was unlikely that the truth of the confession was adversely affected by the circumstances in which the confession was made. On a review of all above, the trial judge stated her satisfaction that the Crown had established beyond reasonable doubt that the confession was voluntarily given

by the appellant; and further, was not obtained in circumstances of oppression in which his will was sapped or sleep deprivation or lack of proper refreshment as alleged.

[45] It is clear from the trial judge's ruling at the culmination of the voir dire, found at pages 506 to 554 of the record, that she applied both the common law approach and the statutory provisions and in so doing, showed a correct awareness of the interplay between **sections 116** and **72** of the **Evidence Act**.

[46] The trial judge, in our view, applied the correct common law and statutory test to the evidence presented before her in the voir dire when she ruled the confession statement to be admissible.

[47] There is no merit in this Ground.

**Ground 2**

[48] This Ground was a complaint that the trial judge persistently intervened while defence counsel was making his oral submissions at the close of the voir dire. This Ground submits that as a matter of law, this was a serious procedural irregularity "which caused her ultimate ruling to be unjust". Essentially, it was the contention of counsel for the appellant that this amounted to an exercise of apparent bias against the appellant.

[49] We are of the opinion that it is significant that there was no such complaint of intervention when the witnesses in the voir dire were giving their evidence or

were being cross-examined. Also significant, is the fact that the appellant gave evidence in the voir dire and was cross-examined. There is no complaint that there was interference or intervention by the trial judge during this process. Additionally, only one such complaint is made of the trial judge during the conduct of the trial at page 104 to 106 of the record. We shall speak to that below.

[50] Counsel for the appellant relied on the Privy Council authority of **Peter Michel v The Queen [2009] UKPC 41** a case in which an appellant appealed against a conviction on the grounds of an unfair hearing as a result of the number and character of the judge's interventions in the course of the trial. The complaint was of continual interruptions of the evidence, of prosecution witnesses as well as the appellant himself in evidence in chief as well as cross-examination. The interventions were numerous and hostile and displayed outright scepticism and incredulity as to the defence being advanced. A significant part of the interventions amounted to cross-examination by the judge. In the words of the law lords, "the questioning was variously sarcastic, mocking and patronising." Counsel for the Crown acknowledged that the interventions were both excessive and inappropriate, confining their arguments to the question whether the Court of Appeal was

nevertheless entitled to conclude that these interventions did not result in the trial being unfair.

[51] The law lords adopted as the test in judicial intervention cases what have become known as the "**Hamilton Grounds**", adumbrated in the Court of Appeal case of **R v Hulusi (1973) 58 Cr. App. R 378**, which adopted **Lord Parker CJ's** statement of principle in **R v Hamilton (unreported, 9 June 1969)** as follows:

> "Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate … Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; **those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury ... The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.**"

[52] Counsel for the defence relied on the second test.

[53] Once again we are constrained to point out that this ground as worded limited itself to the interventions of the trial judge during the voir dire, but counsel in

his submissions went wider than this in stating that the "frequency and intensity of the interventions by the Learned Trial Judge in this case, prohibited and fettered counsel from properly presenting and developing the defence of the appellant, especially during the voir dire stage."

[54] Counsel submitted further that the trial judge interrupted defence counsel on no less than 51 occasions during the voir dire and described these interruptions as being masked as interruptions in the interest of understanding.

[55] At page 422 to 423 of the record can be found this statement made by the trial judge during the voir dire and which typifies the trial judge's explanations of these interventions. It came during the course of an application by counsel for the appellant to recall a police witness for further cross-examination:

> "Mr. Khan, lets face it. We don't have much time in this case, let's put it that way, and so if I'm interrupting, I am interrupting in the interest of understanding. It is all very well for me sit--- and I am not reprimanding, I am just talking as I like to do sometimes. It is all very well for me to sit, listen, take up papers, everybody hands up things and then I have to go away and understand what is being said to me. I like to move along now because the time is short. I want to move along and to understand what the submission is. So that is why I have intervened, to understand. So you can proceed, and I am going to intervene once again to try to get an understanding. That's going to be my approach on this application, rather than just, as I said listen, don't ask anything, go away, take away the document, go sit down in the dead of night to read all of this stuff and then I haven't got a feedback. So I am going to move along with feedback. Understood, from both of you".

[56] Regrettably, counsel for the defence concluded that this was directed at him when, in our opinion, it was not.

[57] And again at page 430:

> "... I am not interrupting you, I am trying to interact with you so as to move it along, based on what I am reading."

[58] Two other occasions were specifically referenced by counsel for the appellant: the first at pages 104 to 106 of the record when the witness Curtis Prescod was being cross-examined by the defence. This example can be easily disposed of as it merely reveals the trial judge correcting counsel for the defence who was attempting to put an alleged inconsistency to the witness and seeking clarification on what he was putting to the witness. This was clearly an example of the trial judge controlling the proceedings and procedure and controlling the admissibility of evidence.

[59] The third incident arose when prior to submissions on the voir dire, counsel for the defence sought to recall a police witness for further cross-examination and the trial judge made comments of similar import as those set out at paragraph [55] above.

[60] The gist of the Crown's response to this ground was an examination of the process of the voir dire and the conclusion that in that process counsel for the appellant was in no way prohibited from presenting and developing the defence of the appellant. It was a process whereby the trial judge exercised

her discretion to rule oral and written statements admissible after hearing the evidence relevant to the same, namely allegations of improprieties by the police in the investigation of the matter generally, but specifically into the taking of a written confession statement and hearing the submissions of the parties.

[61] In answering this Ground counsel for the Crown relied on the seminal authority of this Court on this very point, **Colin Wooding v The Queen Cr. App No. 9 of 2002 (unreported decision of 4 October 2005)**. In that case **Simmons CJ** at paragraph [13] of the Court's judgment, stated the applicable test on excessive interventions in the following terms:

> "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."

[62] Counsel for the Crown examined the interruptions complained of under the heads of controlling the admissibility of evidence, controlling the proceedings and procedure, seeking clarification and judicial discourtesy. Counsel concluded that an overwhelming majority of the interventions/interruptions were for clarification and/or assistance, and the minority for controlling the proceedings and controlling the admissibility of the evidence.

[63] On a review of the interventions complained of, we are in agreement with the opinion expressed by counsel for the respondent. There was no judicial discourtesy. There was no evidence that the trial judge held a bias against the appellant or his counsel. There was no interruption of the appellant when he was giving his evidence or while he was being cross-examined, nor for that matter during the evidence in chief or cross-examination of the other witnesses in the voir dire. There was no cross-examination of the witnesses. In short, there was no interruption of the flow of evidence.

[64] In our view the judge's interventions were perfectly proper and typified the purposes identified by **Ross LJ** in **R v Tuegel 2002 Cr App R 361** which are a "duty to ask questions which clarifies ambiguities in answers previously given or which identify the nature of the defence, if this is unclear."

[65] We are persuaded as to the sincerity of the trial judge's statement as outlined at paragraph [55] above and that this Ground cannot be sustained.

**Grounds 3 and 4**

[66] Counsel for the appellant dealt with these Grounds jointly in an admission by him that they were proximate. Generally, these two Grounds spoke to "serious procedural irregularities" by the trial judge and more specifically than the other Grounds, these "serious procedural irregularities" primarily related to the content of the summation and to a lesser extent, in Ground 4, the process

undertaken and directions given when the trial judge recalled the jury before the verdict was rendered. Counsel for the appellant submitted with respect to both these Grounds that the "serious procedural irregularities" resulted in an injustice to the appellant and an unjust verdict.

[67] Ground 3(i) is worded in very broad terms , and in our estimation calls for a review of the entirety of the summation in a general way. The complaint, as set out in its entirety above, is to the effect that the trial judge gave more weight to the case advanced by the prosecution than the appellant's defence.

[68] At Ground 3(ii), the complaint is, in summary, that the trial judge usurped the jury's fact finding function by drawing the conclusion that the appellant committed the offence under provocation, when in fact these were findings that only a jury could make.

[69] Ground 3(iii) is an allegation that the trial judge issued directions to the jury that they could find the appellant guilty of manslaughter by reason of provocation which amounted to undue pressure on the jury.

[70] Ground 4, in our opinion, approaches the same complaint from another direction by taking issue with the trial judge's recall of the jury and ultimately giving them the majority direction on manslaughter. In counsel's complaint, this was an imposition of pressure on the jury which was a serious procedural irregularity and a breach of law resulting in injustice to the appellant.

[71] We propose to address these combined Grounds under three main heads: the summation generally, the direction on provocation and the recall of the jury.

**The Summation**

[72] This head generally speaks to the adequacy of the summation and whether its effect was to the prejudice of the appellant.

[73] In general, counsel for the appellant submitted that the trial judge expressed her opinions to the jury and the fact that she qualified these expressions of opinion with the statements "this however is a matter for you" and/or "if you find that", did not detract from the fact that she had usurped their function. It was counsel's view that by expressing her opinion the trial judge undermined the fairness of the trial. Counsel for the appellant further submitted that the jury was coached during the summation and manoeuvred to adopt a verdict which would be acceptable to the trial judge.

[74] It was the submission of counsel for the Crown that, considered as a whole, the trial judge gave the jury adequate directions which eliminated any possible prejudice to the appellant.

[75] We note that the trial judge correctly directed the jury as to the judge and jury's separate functions as can be seen at page 861 of the record and that she repeatedly reminded them of their role as arbiters and finders of the facts. It can be seen at page 862 of the record that the trial judge specifically directed

the jury as to how they should deal with the various expressions of opinion that they would hear in the courtroom and how they should treat with such. At page 954 of the record she was at pains to direct them on how to deal with her expressions of opinion when she cautioned them that:

> "If I express opinions on the facts or emphasize any particular aspect of the evidence, do not adopt my opinion unless you agree with it. If I do not mention something that you think is important, you should have regard to it and give it such weight as you think fit. Always remember when it comes to the facts of the case, it is your judgment and your judgment alone that counts."

[76] One of the most important findings to be made by the jury, namely, the circumstances of the taking of the confession statement and how they the jury should approach this evidence, was addressed in this way by the trial judge at page 923 of the summation:

> "Now, Mr. Foreman and members of the jury, even though the written statement, Exhibit "C", was admitted into evidence by me, as the finders of the true facts in the trial, you will be required to consider the circumstances in which that statement was taken and determine for yourselves whether the written statement was obtained from Desmond Yard in circumstances which were deliberately unfair to him and breached his rights as well…his rights under the Constitution as well as under the Judges' Rules.
>
> If you accept what Desmond Yard told you in his unsworn statement about his being beaten bad, manhandled by a group of policemen and about his being forced to sign a prepared written statement, you will have to throw out all the oral and written statements which the police have attributed to the accused man because, clearly, Sergeants Gibson and Dottin would have lied because they both told you that he had signalled his wish to give

> a written statement to police but, and had in fact dictated one freely and voluntarily to police and was not beaten to make it..."

[77] This was not the only time that the trial judge directed the jury, in such terms, as to how they should approach the challenged written confession statement.

[78] The trial judge also adequately directed the jury as to how they should approach the oral statements allegedly made by the appellant and directed them in accordance with **section 137** of the **Evidence Act** as to how to deal with these statements recorded in the police officers' notebooks but not initialled by him. This can be seen in its entirety at pages 930 to 936 of the trial record, specifically at page 933 line 5 and onwards where she directed the jury, inter alia:

> "So with respect to those oral statements allegedly made by accused yard, according to Dottin and Gibson, it would be your task as judges of the facts to determine, firstly, whether the words were indeed spoken, and secondly, that is question (sic) of whether you believe Dottin or Gibson. Were the words spoken? Do I believe Dottin and Gibson that they were? If I do, well, then move on to the next question. What do they mean?"

[79] At no time did the trial judge, in our opinion, tell the jury what their finding of fact should have been. Also, those circumstances where the trial judge expressed her opinion merely represented her assessment of uncomplicated facts addressed to an issue.

[80] Also, in view of the fact that the case for the Crown relied on evidence of various facts and circumstances which related to the crime and the accused man, from pages 875 to 880 of the trial record it can be seen that the trial judge gave the jury a careful direction on circumstantial evidence. The trial judge also assisted the jury in this regard by outlining the evidence of facts and circumstances to which they should pay regard.

[81] We are satisfied that there is no merit in the criticism as to the adequacy of the summation or to the allegation that it resulted in prejudice and unfairness to the appellant.

**The Direction on Provocation**

[82] The gravamen of Grounds 3 and 4 centres around the trial judge's direction on provocation.

[83] The fallacy inherent in these several grounds is the, at times implicit and at others, overt assertion that the trial judge should not have directed the jury on provocation and that by so doing, the trial judge was telling the jury that they should find the appellant guilty of manslaughter by reason of provocation.

[84] There is no merit in this assertion for two significant reasons.

[85] Firstly, the offence with which the appellant was charged is the common law offence of murder. At common law, provocation reduces murder to manslaughter. In a case of murder, the prosecution has the burden of

disproving provocation. A direction on murder includes a direction on manslaughter and formed the seventh ingredient of murder in the direction given by the trial judge. At page 903 of the trial record, the trial judge stated:

> "Mr. Foreman and members of the jury, let us now examine the seventh ingredient. That is, the accused... it must be proved to you that the accused man's act was unprovoked. The prosecution must prove at the time of the killing the accused was not acting under provocation. He did not lose his self-control, he was not provoked by anything to lose his self-control, that is what has to be proved to you.
>
> Mr. Foreman and members of the jury, you must be satisfied beyond reasonable doubt feel sure that when the accused man did the act which the Crown says resulted in Martina Gittens' death, he was not acting under provocation."

[86] The trial judge went on to explain the meaning of provocation to the jury using the following extract from the case of **Duffy v R [1949] 1 ALL ER 932**:

> "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

[87] The second and equally compelling reason why the trial judge had to direct the jury on provocation, is statutory. **Section 5** of the **Offences Against the Person Act, Cap. 141 (Cap. 141)** encapsules the common law. It reinforces the responsibility of the trial judge to direct the jury on provocation, whether or not it forms any part of the case for the defence, as long as there is evidence

which raises this defence. Thus, **section 5**, which the trial judge read to the jury, provides as follows:

> "Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked, whether by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[88] The trial judge then explained to the jury the test to be applied and reviewed with them the evidence for their consideration, both as it related to the case for the prosecution and as it related to the case for the defence. The case for the prosecution was that the appellant's actions were deliberate, unprovoked and unlawful, and that he did not lose his control. The trial judge reviewed the evidence that gave rise to provocation and advised the jury as required by the common law and by statute. Thus at page 907 of the record, the trial judge directed the jury as follows:

> "Mr. Foreman and members of the jury, although the defence case is that the accused man is innocent because he was at home sleeping at the time of the fire, and therefore could not have done the acts which resulted in Martina Gittens' injuries and her subsequent death, if you reject his alibi and accept the contents of the written statement, based on the law of provocation that I have just outlined to you, the issue of provocation has arisen for your active consideration in this case in the following way:"

[89] The trial judge rightly considered that provocation had arisen in the evidence before her and she drew this to the attention of the jury. There was much evidence in this regard pointed out to the jury by the trial judge as follows:

(1) the evidence disclosed by the appellant in his unchallenged movement statement that he had been engaged in an "on and off" (stormy) relationship with Martina for three years and that they were always arguing about different things;

(2) that the appellant also freely disclosed in the said movement statement that he and Martina had separated one month after she became pregnant by him and that she had become involved with another man while pregnant with his child;

(3) the appellant's disclosure that after a three month separation during which he moved to St. Lucy and himself became involved in another relationship, that Martina had telephoned and asked him to come back and to try and work things out and that the appellant had ended his new relationship and gone back to Shop Hill and Martina;

(4) that following a harmonious relationship during and up to one month after the birth of baby Zaria, the relationship floundered after the appellant was accused of interfering with Martina's sister and the appellant forbidden from entering the home;

(5) thereafter the relationship became so difficult and strained that it ended two weeks prior to the incident in the car by which time Martina had informed the appellant that she 'was talking to another man but only as a friend';

(6) the afternoon of the visit to the clinic was punctuated by a quarrel in the car over Martina being in conversation on her cell with another man, prompting the appellant to say: That pussy is still mines;

(7) the second altercation outside the clinic over the missing cell phone, her threat to call the police and the appellant's answering threat;

(8) the evidence that Martina was seen using the telephone outside the clinic possibly following through on her threat to call the police and get the appellant locked up and was "cursing and getting on bad" , so much so that Curtis Prescod would not allow both parties in the car;

(9) that following a call to Martina he apologised and made up with her and visited her in her bedroom after the family had gone to bed, but that things devolved quickly into another quarrel in which she asked the appellant to leave, told him that she didn't want him, that he was a pauper and that other men would give her what he couldn't;

(10) according to the written statement the final act of provocation occurred when the appellant told Martina that even if he had his last cent in his

pocket he would give her and make her right, to which she responded: "What that got to do with it?"

(11) according to the written statement another argument followed this statement and the appellant was asked to leave the house.

(12) according to the written statement when the appellant left Martina's home to return to his own, in his words "his head was hot".

[90] This evidence, when looked at over the continuum starting with the stormy fractured relationship, culminating on that tragic night in an outright rejection of the appellant by Martina for another man after he had clearly given up so much for her and given her his all, provided powerful evidence of provocation which the trial judge was duty bound, both at common law and by statute, to place before the jury. This is evidence which preceded the further evidence in his written statement, which detailed the deliberate actions of the appellant in taking up a pet bottle filled with gas from his home, returning to Martina's house by a route described in the said statement and tossing the now lighted bottle of gas through Martina's bedroom window into a room occupied by her and her baby and a house full of sleeping persons.

[91] On the evidence above, it was open to a jury properly directed on provocation and how to deal with this evidence, to find the appellant guilty of manslaughter and not murder.

[92] We have reviewed the exchanges highlighted by counsel for the appellant at pages 1079 lines 7 to 20, page 1081 line 8 to 25 and page 1086 line 21 to 25 of the record. We are satisfied that looked at separately and in the full context of the entirety of the summation, these directions do not constitute the trial judge's direction to the jury that the appellant committed the offence and that he did so under provocation.

[93] There is no merit in this claim.

**The Recall of the Jury**

[94] This area is captured primarily by Ground 4, which in essence takes issue with the judge recalling the jury and giving them the majority direction on manslaughter.

[95] At the close of the summation before sending the jury out, the trial judge duly informed them that the law permits her in certain circumstances to accept an alternative verdict of manslaughter when the time arises. The jury retired at 5:42 p.m.

[96] The law in this jurisdiction, **section 41** of the **Juries Act Cap. 115B**, mandates as follows:

> "41. (1) Subject to section 43, in the trial by jury of any criminal offence or of any civil action or matter, the jury shall not be kept in deliberation longer than 3 hours unless

> (a) the Judge determines that a longer period of deliberation is warranted in the circumstances; or
>
> (b) at the end of that period an application is made to the Judge, with the concurrence of a majority of the jurors, for further time, which application shall be granted by the Judge.
>
> (2) The Judge, in granting an application under subsection (1), shall allow such further time as he thinks reasonable having regard to the nature and complexity of the case."

[97] The trial judge at the culmination of her summation gave the jury a clear direction on the possible verdicts of the case, inclusive of an alternative verdict at the appropriate time. After almost two hours of deliberation (1 hour and 53 minutes to be exact) the trial judge recalled the jury. She enquired on them whether they needed further directions and asked further:

> "Is there any possibility of your reaching a unanimous verdict, if you had more time?"

[98] The foreman's reply was "No ma'am." This was clearly understood to be the response to the query as to whether they needed further directions because, immediately thereafter, the trial judge exhorted them to retire again and to continue to attempt to reach a unanimous verdict. She went on, quite rightly, to advise them that now was the time that she could accept a majority verdict on manslaughter if they were unable to reach a unanimous verdict on murder.

[99] Counsel for the appellant submitted pursuant to Ground 4, that the majority verdict direction from the judge was pre-emptive and pressured the jury to

reach a verdict of majority. In effect, he argued, that the jury was effectively limited to finding the appellant guilty of manslaughter by reason of provocation. Or as set out in Ground 4, this "amounted to an imposition of pressure on the jury which was both a serious procedural irregularity and a breach of law resulting in injustice to the Appellant."

[100] It was for this reason that counsel argued that the verdict was unsafe and unsatisfactory. We do not agree.

[101] There is no merit in this Ground.

**Ground 5**

[102] Under this Ground the appellant submitted that the sentence of the Court was excessive. Counsel has submitted that the trial judge exhibited a bias against the appellant which led to his sentence being excessive.

[103] Counsel for the Crown submitted that the trial judge exercised her discretion judicially, acted on correct principles of law and that the sentence reached was not manifestly excessive.

[104] It is noted that the appellant was found guilty of manslaughter by reason of provocation by a jury of his peers, for which the trial judge sentenced him to a term of imprisonment of 25 years. The trial judge rightly credited the appellant with the time spent on remand and post-conviction which at the time

of sentence totalled 6 years and 45 days, thereafter ordering that he serve a further period of 18 years and 320 days.

[105] The sentencing trial of the appellant commenced in October 2014 with the reading in of the Pre-Sentencing Report ordered by the trial judge in August 2014. Family members and the community expressed surprise at the appellant's involvement in a crime of this nature, as he was generally characterised as non-confrontational and peace-loving. He had no criminal antecedents and there were no reports of behavioural challenges while growing up or in his adult years. The mothers of three of his four children all characterised him as a good father to his children with whom he enjoyed a good relationship as well as with their mothers. The Report spoke to an assessment of his criminogenic needs and opined that he was at a low risk of reoffending. It spoke also to his remorse. Evidence of the remand time was given by the prison authorities on this date and accepted by the appellant, as correct. A good report of the appellant was given by the prison authorities as to his time spent there up to the time of sentencing. He functioned in a position of trust.

[106] One character witness, a friend from his community, was called by the appellant's defence.

[107] In mitigation, counsel for the defence stressed, inter alia, the lack of premeditation and the inevitable conclusion from the evidence that it was an impulsive and out of character reaction by the appellant. Counsel advocated the applicability of guideline 4 of **Pierre Lorde**, that is, a range of sentence of less than eight years to 12 years.

[108] On the other hand, the Crown argued that there were only two mitigating factors, the provocation and the expression of remorse, which paled into insignificance beside the aggravating features of this case. The Crown advocated a range of sentence of 16 to 20 years and beyond.

[109] In her sentencing remarks, the trial judge paid due attention to her sentencing obligations pursuant to **sections 35** to **41** of the **Penal System Reform Act, Cap. 139**. In accordance with the same, she addressed Offence Seriousness and concluded that the offence was so serious that only a custodial sentence was justified. She adopted and applied the **Suratan Sentencing Guidelines** to the facts of the case before her: that is, certain assumptions were made in the favour of the appellant, namely, the loss of control, that he was caused to lose his control, that in the circumstances meticulously outlined by the trial judge it was reasonable that he would have lost control and the circumstances surrounding his actions on the night in question were such as to make his loss

of self-control sufficiently excusable to reduce the gravity of his actions from murder to manslaughter.

[110] She considered and meticulously enumerated the aggravating and mitigating factors, greatly highlighting the paucity of the mitigating factors. The trial judge took into account **section 6** of **Cap. 141** which provides for a sentence of life imprisonment for the offence of manslaughter, but recognized the **Pierre Lorde** guidelines for cases of manslaughter in determining what sentence to impose. The trial judge observed that the **Pierre Lorde** guidelines established that the statutory penalty of imprisonment for life is to be reserved for the most serious and grievous manslaughter offences.

[111] It is here that the trial judge concluded that the special and exceptional facts of this case took it outside the parameters of the four categories of **Pierre Lorde**. She recognised and observed that a sentencing judge's discretion is not fettered by the guidelines when dealing with special or exceptional cases. She opined that the range of sentences in the guidelines "are woefully inadequate to enable the Court to do justice in this case." The judge was of the view that the guidelines, "with their obvious bias towards death caused by a firearm, do not appear to have anticipated such a horrendous situation, a horrendous death by fire as has been disclosed by the special and exceptional facts of this case falling near the top end of the manslaughter scale."

[112] We stop here to make the observation that the guidelines do not in our opinion reflect a bias towards death by a firearm in the manner interpreted by the trial judge. Their stated intention was to advocate tougher sentences where the offence involves the use of a firearm.

[113] In an exercise of her discretion, and in accordance with her finding that the special and exceptional facts took the case outside the guidelines, the trial judge determined that 30 years was the appropriate starting point in this sentencing process. After a reference to the mitigating factors, the provocation and loss of self-control, the lack of antecedents, the expressed remorse and the positive pre-sentencing report, the sentencing judge imposed a sentence of 25 years.

**Discussion and Analysis**

[114] We are of the view, for the reasons discussed below, that there is some merit in this final Ground of appeal.

[115] The case outlined by the Crown and evidently accepted by the jury, reveals egregious and abhorrent circumstances resulting in the death of Martina Gittens. The Crown's case outlined an act of unspeakable cruelty, savagery and callous disregard of human life. On these facts the appellant, sometime after 1:00 am, in the 'dead of night' when Martina's household was at its most vulnerable, prepared an incendiary device, took the time to lock off the water

supply (whether before or after we do not know), and threw this device through the window of the bedroom occupied by his 'former' girlfriend and his infant daughter and left them to perish. The evidence of Martina's burn injuries shows that she died a painful death after, in all likelihood, 4 days of suffering. The entire house burned to the ground and exposed all the occupants to injury and death.

[116] Not much emphasis was given to it at the trial because the prosecution clearly did not want to prejudice the jury against the appellant, but it is evident that baby Zaria herself suffered physical injuries.

[117] Three children lost their 22-year-old mother. Her siblings and parents lost their loved one. Ms Natalie Gittens, Martina's sister and the person having custody of her three children, told the court that her sister's death and the loss of their house plunged the family into despair and forced them to start their lives afresh. They all lost their home. The children and some of the family members have had to undergo professional counselling to address the emotional scars caused by this incident.

[118] The aggravating factors were egregious indeed!

**The Starting Point**

[119] The trial judge used a starting point of 30 years. The starting point is a notional point within the normal range, from which the sentence may be increased or

decreased to allow for the aggravating or mitigating features of the case (attributable to the offender) see **R v Saw and Others [2009] EWCA Crim 1, per Lord Judge CJ at para 1**. Thus, the starting point is reached after objective evaluation of the aggravating and mitigating factors relative to the offence as well as an objective analysis of the seriousness and characteristics of the particular offence. **Dana Seetahal** in her learned text **Commonwealth Caribbean Criminal Practice and Procedure, 3rd Edition**, explains how the starting point is determined in the following terms at page 329:

> "In **Tyack v The State, PC Appeal No. 60 of 2005**, delivered March 29, 2006 the Privy Council clarified that the proper starting point in sentencing is the normal range of sentences for the particular offence and not the maximum sentence."

[120] Thirty years is not the normal range for manslaughter in this jurisdiction. It is more proximate to the upper range and beyond and to a life sentence. In fact, it is clear that the trial judge fixed her starting point outside of the normal range of sentence for manslaughter. In short, there was no consideration of the previous decisions of this Court.

[121] The much criticized **Pierre Lorde** guidelines, arising from a 20-year sentence for manslaughter, reduced to 12 years by a Court of Appeal presided over by **Simmons CJ**, are still the sentencing guide to the range of sentences in manslaughter cases in this jurisdiction. As stated therein by **Simmons CJ**, the ranges in the guidelines were determined by an examination of 40 previous

decisions of this Court between 1992 and 2005. They reflect a heavier punishment where death was caused by a firearm as opposed to other weapons such as knives etc., but they are fundamentally an uplift from **Bend and Murray v R CCR App Nos. 19 and 20 of 2001 (unreported decision of 27 March 2002)**, a guide to sentencing in manslaughter cases prior to **Pierre Lorde**. The guidelines are in fact, and as stated therein by **Simmons CJ**, the effectual starting point. He stated at paragraph[22] as follows:

> "[22] These paragraphs indicate that the bottom of the scale for a grave case of manslaughter without the use of a firearm is 16 years and the top of the scale is 20 years. But then the court must consider all the circumstances of the offence including the aggravating and mitigating factors in arriving at a sentence that is commensurate with the seriousness of the offence. In other words, having arrived at the starting point the judge should then take account of the aggravating and mitigating factors which will take the period of custody above or below the starting point."

[122] In **Pierre Lorde**, this Court observed that the starting point should have been 16 years in prison, but after weighing the aggravating and mitigating factors, the sentence was varied downward.

[123] An examination of more than 15 further decisions of this Court for the period 2009 to 2019 has not revealed any noticeable upward or downward trend in the ranges outlined in **Pierre Lorde**. 16 to 20 years still appears to be the range for a grave case of manslaughter.

[124] The issue of 'starting' point was also addressed by the **Caribbean Court of Justice (CCJ)** in the **Teerath Persaud v R [2018] CCJ 10 AJ (Teerath Persaud)**, a case of grave manslaughter originating in Barbados, in which the appellant was sentenced to a term of imprisonment of 25 years. Their Honours had this to say at paragraphs [45 to [46].

> "[45] This approach, which means that the aggravating features are built into the starting point but mitigating factors are not taken into account, has been applied by other courts in the Commonwealth: see e.g. *R v Hooker*. Another approach to the starting point takes into account the aggravating and mitigating features of both offence and offender: *Nadia Pooran v The State*. Still other cases suggest that the starting point signified the opening position before any consideration of aggravating and mitigating factors are considered: see e.g. *R v Mako*.
>
> [46] Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender. Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point. Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point. Where appropriate there should then be a discount

> for a guilty plea. In accordance with the decision of this Court in *Romeo da Costa Hall v The Queen* full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed."

[125] Ultimately, in **Teerath Persaud** the final sentence was influenced by the Parity Principle and by the sentencing of the appellant's co-accused by **Worrell J** who began with a starting point of 20 years. It is noted that this starting point, as determined by **Worrell J** took into account all the aggravating factors from which the judge made deductions for mitigating factors resulting in a sentence of 16 years imprisonment. The **CCJ** in **Teerath Persaud**, having regard to the seriousness of the crime, considered the appropriate starting point to be 25 years.

[126] We are satisfied that the starting point in this matter should have been between 18 and 22 years, before the trial judge addressed the aggravating and mitigating factors of the offender. This is Guideline 2 of **Pierre Lorde** which provides:

> "2. In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exist, the range of sentence should be 18 to 22 years."

In this regard, we have taken into account the objective seriousness and characteristics of the offence, in this context, a death by burning.

[127] While we concede that guidelines are not meant to be followed statutorily, we nonetheless find the guidelines useful in these particular circumstances.

**Excessiveness of the Sentence**

[128] In considering whether the sentence of the trial judge was excessive we must also look to the special and exceptional facts that, in the trial judge's opinion, took this matter outside of the guidelines and resulted in the trial judge's starting point of 30 years.

[129] It is here noted, as already well established by this Court, that it will only intervene to quash a sentence if it can be shown that the sentence imposed was manifestly excessive, disproportionate or inadequate or if the judge applied wrong principles or failed to comply with some statutory or procedural requirement, or was wrong in principle.

**Special and Exceptional Circumstances**

[130] This Court at paragraph [36] of **Pierre Lorde** recognised that from time to time there may be special or exceptional facts which fall outside the established guidelines and that the judgment should not be construed as fettering the discretion of judges to deal with those special or exceptional cases as the justice of the case requires.

[131] In this regard, we note that the sentencing judge stated that there were special and exceptional circumstances. The narrative suggests that the special and exceptional circumstances are rooted in the aggravating features of the case which in the opinion of the trial judge "placed this offence firmly on the

borderline of murder and near the top of the manslaughter scale." We however find this statement to be at odds with her finding, in applying the **Suratan** guidelines, that she started from the assumption that the appellant's "loss of self-control in the circumstances outlined was reasonable in all the circumstances, even bearing in mind that persons are expected to exercise reasonable self-control over their emotions …"

[132] Despite this, there was no clear identification of the special and/or exceptional facts taking this case outside of the **Pierre Lorde** guidelines.

**The Role of the Provocation in the Sentencing Process**

[133] A jury having found an accused guilty of manslaughter by reason of provocation, a sentencing judge in conducting the sentencing exercise and applying principles of individualised sentencing must revisit the circumstances of the provocation. Such an exercise is critical to a determination of the length of sentence.

[134] An assessment of the degree of the provocation as shown by its nature and duration is a critical factor in the sentencing decision. Was it a low degree of provocation, a substantial degree of provocation or a high degree of provocation? Such a finding is directly linked to the sentence range, with a low degree of provocation pushing the matter to the top of the range. And alternatively, a high degree of provocation pushing the sentence to the lower

end of the range: see **Current Sentencing Practice: Sweet & Maxwell Volume 3**.

[135] A sentencing judge must analyse/assess the intensity, extent and nature of the loss of control in the context of the provocation that preceded it; consideration should also be given to whether there was a significant lapse of time between the provocation and the killing and its impact on a finding of culpability. In short, there will usually be less culpability when the retaliation to provocation is sudden: see paragraphs [24] to [26] of **Pierre Lorde**.

[136] The trial judge listed in the sentencing remarks a continuum as it relates to the provocation, leading up to the final argument where the appellant was rejected by Martina and called a pauper. There was no assessment of the impact of the provocation on the appellant over a period of time or for that matter on the last occasion. What was his mental state at the time of the killing? While the trial judge outlined a clear continuum over the period of the relationship, it did not appear to mitigate the severity of the sentence and factor into an assessment of his mental state. There appears to have been no consideration of the fact that the manslaughter arose out of a "family relationship" and that there was no history of domestic violence in that relationship. Post-offence behaviour is also a relevant consideration, as motivation should be considered by the sentencing judge. (see p. 1174)

[137] With respect to the other mitigating factors, the trial judge spoke to the expressed remorse of the appellant as the only other mitigating factor besides the provocation , but consideration should have been given also to his previous good character and his reputation for being peace-loving and non-confrontational, the lack of evidence of premeditation, the good pre-sentencing report, the assessment of his criminogenic needs and the professional assessment that he was at low risk of re-offending. In short, that he poses little or no risk to the public generally.

[138] These were all factors that should have been taken into consideration in determining the length of the appellant's sentence, and which, in our opinion, appeared to have been given insufficient consideration and weight by the sentencing judge.

**CONCLUSION**

[139] It appears to us that while the trial judge gave due consideration to the correct principles in her sentencing remarks, she fell into error when having found in her analysis that it was reasonable for the appellant to have lost his self-control in the circumstances of provocation outlined, she could still conclude that this case was on the borderline of murder and near the top of the manslaughter scale. Insufficient attention was paid to the provocation in the sentencing phase and to the mitigating factors as they related to the offender.

[140] We are also of the view, stated above, that the trial judge incorrectly determined a starting point of 30 years.

[141] On a review of the circumstances of this case, we are of the view that this was a grave case of manslaughter by provocation, but that the sentence was not proportionate. In our opinion it was excessive.

[142] The starting point should have been between 18 and 22 years.

[143] Having weighed the aggravating and mitigating factors both of the offence and of the offender, we are of the view that the appropriate sentence in this case is 20 years in accordance with this Court's jurisdiction to alter sentences under **section 14** of the **Criminal Appeal Act, Cap. 113A**.

**DISPOSAL**

[144] The appeal against conviction is dismissed.

[145] The appeal against sentence is allowed. The sentence of 25 years is quashed and a sentence of 20 years substituted therefor.

**Justice of Appeal**

**Justice of Appeal**

**Justice of Appeal (Ag.)**