



Criminal Appeal No. 5 of 2023

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. JUSTICE WOLFFE
CASE NUMBER 18 of 2019**

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12
Date: 20/03/2026

Before:

THE HON IAN KAWALEY, THE PRESIDENT

**THE HON SIR ANTHONY SMELLIE, JUSTICE OF APPEAL
and
THE HON NARINDER HARGUN, JUSTICE OF APPEAL**

Between:

WINSTON PAYNTER

Appellant

- and -

THE KING

Respondent

The Appellant appeared in person¹

Mr. Adley D. Duncan of Department of Public Prosecutions, Counsel for the Respondent

Hearing date: 5 March 2026

Date of Judgment: 20 March 2026

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¹ Mr. Bruce Swan initially appeared and argued the first three grounds of appeal.

Whether the appellant did not have a fair trial as a result of the conduct of his counsel at trial; admissibility of the drug analyst's report other than under section 31 of the Misuse of Drugs Act 1972; whether the "agreed facts" can be challenged on appeal; whether the absence of a defence expert deprived the appellant of a fair hearing; whether the trial judge was obliged to give a good character direction; whether a police officer's evidence of drug trafficking modalities admissible as expert evidence

JUDGMENT

NARINDER HARGUN JA:

1. On 9 March 2023 Winston Paynter, the Appellant, was convicted by a unanimous verdict of the jury of two offences namely (i) Possession of a controlled drug contrary to section 6(3) of the Misuse of Drugs Act 1972 (the "MDA"); and (ii) Possession of ammunition without a license contrary to section 3(1)(a) of the Firearms Act 1973. On 12 April 2023 he was sentenced by Wolffe J to a term of imprisonment of 25 years in all. He now appeals against conviction before this Court.

The Case against the Appellant

2. As noted by Wolffe J (the "**Judge**") in the Sentencing Ruling dated 11 April 2019 members of the Bermuda Police Service ("**BPS**") had cause to stop the Appellant's work van on Middle Road in Warwick Parish and as they were doing so saw the Appellant place a white plastic bag behind the passenger seat and to the rear of the van. Upon searching of the rear of the van the white plastic bag was found to contain a manila envelope which later the same day was discovered to contain a magazine. The magazine was opened and was seen to contain two heat sealed packages which each contained a brown substance/powder inside. An examination by Ms. Chalsey T. Symonds, a drug analyst at the Central Government the Laboratory (the "**Government Laboratory**"), revealed that one of the packages contained 232.8 grams of the controlled drug diamorphine (heroin) with 31% purity and the other contained 138.5 grams with 56% purity. Accordingly, the total amount of heroin seized was 371.3 grams.

3. A police officer having expert knowledge of the trafficking of controlled drugs, DS Bhagwan of the BPS, gave evidence that on the streets of Bermuda 371.3 grams of heroin would yield over 49,000 3 milligram "decks" each of \$20 in value, with an overall total retail price of \$998,186.

4. On 11 April 2019 police officers conducted a search of the Appellant's residence located at 10 North Shore in Devonshire Parish and seized several items which were entered in evidence at trial. The items seized included a white cutting board, a black digital scale, a Coca-Cola cherry bottle, envelopes of same dimensions as that found in the Appellant's van and Ziploc bags containing additional smaller Ziploc bags. An envelope found at the Appellant's home also had on it, the same sender address as the sender address seen on the envelope found in the plastic bag in the back of the Appellant's van. The Coca-Cola bottle was examined by Ms. Symonds of the Government Laboratory and was found to contain several empty pink capsules and visible powder. The bottle was found to contain diphenhydramine, which is available as an over-the-counter medication in a registered pharmacy.

5. During the search the police officers also seized a shoebox on a shelf in the kitchen closet which contained six 9 mm rounds of ammunition in poor condition but as later found by the firearm expert, was still capable of being fired correctly.

6. It was the prosecution case that the Appellant was the occupant of 10 North Shore Road and that he had daily and frequent access to that property. Accordingly, the jury could infer that he knew of everything that was in the premises, including the ammunition and all the other items that might be associated with the envelope which was in the van, and which contained the diamorphine. The prosecution contended that there was a similarity with the sender address on the envelope from his house with that on the envelope in the van which contained diamorphine and that, as DS Bhagwan also opined, the small Ziplock bags which were in the Appellant's premises were used in trafficking, each to measure and put a deck of heroin to maintain uniformity in the weight for distribution. Further DS Bhagwan also testified that in the United States a new trend in trafficking, diphenhydramine (Dormin) is used as a cutting agent for heroin to increase the volume and maximise profits. He had not yet however, seen that trend emerge in Bermuda.

7. The prosecution also contended that if the jury accepted that the white cutting board, the digital scale, the 17 bottles of Dormin sleep aids, the Coca-Cola bottle with empty Dormin capsules and the Ziploc bags, which were found at the Appellant's premises, can be used in the preparation and packaging of controlled drugs, then the jury can infer that the accused knew that the envelope in the van contained a controlled drug.

The Evidence of the Appellant

8. The Appellant gave evidence at trial and stated that he did not know anything about the white plastic bag, the envelope or the items that were found in his premises. The Appellant stated that prior to and on the date that the items were seized from his house,

his cousin, Tre Jared was staying there and on the night of 10 April 2019, he left the van at the residence so that Mr. Jared could use his tools. The Appellant also said that he suspects that Mr. Jared, who was “*rough around the edges*” and may have something to do with drugs may have put the envelope with the heroin in the van. The Appellant further stated that he knew nothing about any of the items which were seized from the 10 North Shore residential property.

9. The Appellant’s case was that he in fact lived at 11 Poinciana Road with Ms. Anna Lambert and their son. He further stated that because 11 Poinciana Road was a small property, it was not unreasonable for him to have some of his belongings at the 10 North Shore property.

10. The Appellant denied any knowledge of the ammunition shoebox in the kitchen at 10 North Shore because. He maintained that when the ammunition was found in April 2019, he was living with Ms. Lambert at 11 Poinciana Road and 10 North Shore property was occupied by his cousin, Mr. Jared.

Grounds of Appeal

11. The grounds of appeal filed by the Appellant are set out in a document headed “*Appellant’s Grounds of Appeal*” dated 6 August 2025. The written submissions filed on behalf of the Appellant dated 28 January 2026 seek to argue the following four grounds of appeal.

Ground 1: That the Appellant had not had a fair trial for the reason that the trial counsel failed to identify and challenge the Government forensic analyst not having been gazetted prior to having produced and or signing her report.

12. The Appellant contends that the Crown’s case that the brown substance/powder inside the two heat sealed packages contained 238.8 grams of the controlled drug diamorphine (heroin) with 31% purity and 138.5 grams with 56% purity depended entirely on the Interim Report dated 12 April 2019 and the Certificate of Analyst 4 September 2019 produced by the Government forensic analyst, Ms. Symonds. In his affidavit filed in the Appeal proceedings the Appellant states that after conviction he discovered that Ms. Symonds was not a duly appointed or gazetted analyst when she conducted the examination on 12 April 2019. He says that the official appointment shows an effective date of 1 March 2020. The Appellant submits that in the circumstances Ms. Symonds’ evidence in the form of the analyst’s certificate under section 31 of the MDA and the Misuse of Drugs (Form of Analyst’s Certificate) Regulations 1974 is a nullity and inadmissible.

13. The Appellant submits that the failure to detect that the appointment of Ms. Symonds as Government analyst had not been gazetted by the time she prepared her report was the result of serious failures by his trial counsel (Mr. Marc Daniels) which deprived the Appellant of statutory protections, undermined the admissibility of the sole scientific evidence, and rendered the conviction unsafe under the principles articulated in *Day v R* [2003] EWCA Crim 1060, *R v Adams* [2007] EWCA Crim 1 and the House of Lords decision in *Clarke and McDaid v R* [2008] UKHL 8.

14. It appears that, as correctly submitted by Mr. Duncan on behalf of the Respondent, this ground is advanced on an incorrect factual premise that the evidence of Ms. Symonds was admitted at trial on the basis that it was a certificate (hearsay document) under section 31 of the MDA. Section 31 of the MDA indeed sets out the conditions for the admissibility of the analyst's certificate and provides:

“Certificate of analyst

31 (1) Without prejudice to section 29 of the Evidence Act 1905, but subject to subsection (2), in any proceedings for an offence under this Act a certificate in the prescribed form purporting to be signed by an authorised analyst and certifying any substance specified in the certificate to be a controlled drug or to contain such proportion of a controlled drug as may be so certified shall, on its production by the prosecution, without further proof be prima facie evidence of the matters so certified and of the qualification of the analyst.

(2) Subsection (1) shall not apply to a certificate tendered on behalf of the prosecution—

(a) unless a copy thereof has been served on the accused not less than ten days before the trial; or

(b) if the accused not less than five days before the trial has served notice on the prosecution requiring the attendance at the trial of the person by whom the certificate was signed.

(3) In this section “authorised analyst” means a person authorised by the Minister by notice in the Gazette to analyse any substance for the purposes of this Act.”

15. Section 31 is concerned with the procedure and conditions for the admission of the certificate as evidence of the matters contained therein. Had the prosecution sought to tender Ms. Symonds' certificate as documentary evidence then the conditions set out in section 31(3) would have applied, including the requirement that the authorised analyst's appointment be gazetted by the Minister.

16. However, section 31 does not seek to and has no application to the admissibility of evidence (including expert evidence) other than by means of production of a certificate under section 31(1). It is open to the prosecution to seek to admit scientific evidence by other means including (i) by calling the expert witness in the ordinary way; (ii) proof of a written statement under the section 29 of the Evidence Act 1905; (iii) proof by formal admissions under section 30 of the Evidence Act 1905; and (iv) admission of expert reports under section 81 of the Police and Criminal Evidence Act 2006. If Ms. Symonds evidence is sought to be adduced by the prosecution by any of these means, the fact that her appointment has not been gazetted by the Minister is entirely irrelevant to its admissibility or credibility. The requirement under section 31(3) of the MDA that the appointment of an authorised analyst be gazetted by the Minister is only relevant if the prosecution seeks to produce the authorized analyst's certificate as documentary evidence under section 31(1).

17. However, in this case the prosecution did not seek to produce the analyst's certificate under section 31(1) of the MDA. The results of her analyses were admitted by the Court as an agreed fact. The jury was provided with a document headed "AGREED FACTS" dated 6 March 2023 signed by Prosecution Counsel and Defence Counsel (Mr. Marc Daniels). The document records:

"The following facts are agreed between the prosecution and defence and are therefore formally admitted pursuant to section 30 of the Evidence Act 1905:

1. The continuity of all prosecution exhibits is not disputed.

3. The contents of Police Exhibit bag B110238, depicted in photograph 14, were examined by the Central Government Laboratory and found to comprise the 2 heat-sealed packages of brown powder. One weighed 238.8 grams and contained approximately 31% of the controlled drug time Diamorphine. The other weighed 138.5 grams and contained approximately 56% of the controlled drug Diamorphine.

4. The White Cutting Board (Exhibit 2) was examined by the Central Government Laboratory and gave positive results in tests for the presence of the controlled drug delta-9-tetrahydrocannabinol (one of the psychoactive compounds found in Cannabis).

5. The Black AWS scale (Exhibit 3) was examined by the Central Government Laboratory for the presence of a controlled drug with a negative result.

6. The Coca-Cola Cherry bottle (Exhibit 5) was examined by the Central Government Laboratory. It was found to contain several empty pink capsules and

a visible powder. The bottle was found to contain Diphenhydramine, which is available as an over-the-counter medication in a registered pharmacy.

7. Exhibit 8 was examined by the Central Government Laboratory and found to comprise 17 boxes of “Dormin Sleep-Aid” capsules. Each box contained a sealed bottle of 72 capsules, each labelled “Dormin 25mg”. One capsule from each bottle was analysed and found to contain Diphenhydramine.”

18. During the summing up to the jury the Judge summarised the position in relation to the evidence of Ms. Symonds:

“Then, members of the jury, we had the agreed facts, and you have copies of the agreed facts. I’m not going to go through them in detail because you have that document and, as I said earlier, the agreed facts are between the prosecution and the defence. You can accept or reject those facts as you would any other piece of evidence in this case but bearing in mind that these are facts which are not disputed by the prosecution and the defence.

The envelope contained - these were some of the agreed facts - the envelope contained to heat sealed packages, one weighing 238.8 grams of heroin and 31% purity and the other weighted 138.5 grams with 56% purity.”

19. I should briefly record that the Appellant asserts that the “Agreed Facts” were submitted by Mr. Daniels without his knowledge, consent, review or input and contrary to his expressed instructions. Mr. Daniels has filed an affidavit dated 5 of August 2025 responding to the criticisms of his conduct of the trial. Mr. Daniels’ response in relation to the Appellant’s assertion that the “Agreed Facts” were submitted without his authority are set out at paragraphs 59 to 72 of his affidavit:

“59. The Appellant has not specified what “Agreed Facts” that he did not agree upon.

60. However, I wholeheartedly dispute that I did not afford the Appellant the opportunity to review the proposed agreed facts and that I did not obtain his approval before executing the agreed facts.

61. On 5 March 2023, Crown Counsel Richards sent me proposed Agreed Facts by email.

62. At 7:06 am, I sent an email to the Appellant attaching those proposed Agreed Facts. I told the Appellant that I was ok with the proposed facts and asked him if he had any thoughts to add or amend [see: Exhibit MGD-1]

63. *At 9:08 am, on 6 March 2023, I sent a subsequent email to Crown Counsel Richards stating that: “My client wants you to add a paragraph that there was no body camera footage available and no photographs taken inside of North Shore Road please”*

64. *I rely on this evidence that I did share the proposed Agreed Facts with the Appellant and the offered commentary, which I acted upon.*

65. *The Crown also wanted to add to the Agreed Facts that the Appellant’s address was situated at 10 North Shore Road, which they alleged the Appellant had confirmed during the course of his cautioned interviews; and which was reflected in the custody record.*

66. *However, I confirmed that this was an issue in dispute and one that could feature in cross examination. To the best of my recollection, that detail was not included in the Agreed Facts.*

67. *I highlight this email to demonstrate that throughout the trial process, I would send the Appellant by emails with the Crown Counsel and invite them to instruct me in every instance.*

68. *The Appellant would either call me, or come to the office, and provide me with his instructions. We would meet prior to the commencement of the proceedings, during the 11:00 am break; lunch break; and after hours to discuss his instructions on a daily basis.*

69. *I therefore reject that the agreed facts were submitted without Mr. Paynter’s “knowledge, consent, review or input” and contrary to his “express instructions”.*

70. *I appreciate that the Appellant attests that he instructed me to put certain details into the Agreed Facts, which I did not do; however, I remain unclear as to what those details are that he is asserting that I failed to insert.*

71. *Respectfully, the Agreed Facts were read into Court, such that he would have heard them and could have commented if there was something inserted that troubled him, or something that was left out, which he felt should be inserted.*

72. *I believe that I provided the Appellant with a copy of the Agreed Facts. If there was any issue with the Agreed Facts, we could have sought to file further Agreed Facts; or seek leave to amend them.”*

20. I should note that Exhibit MGD-1 produces a copy of an email from Mr. Daniels to the Appellant at 7:06 am on 6 March 2023 which shows a Word attachment with the description “*Paynter Agreed Facts docx*”

21. Having regard to the contents of Mr. Daniels’ affidavit this Court has no reason to doubt that his account of what took place in relation to “*Agreed Facts*” is the correct one. I accept Mr. Daniels’ evidence that he obtained the Appellant’s approval before executing the document. It is to be further noted in this regard, in addition to the directions set out at [18] above, that in his summing up to the jury in the presence of the Appellant, the trial judge is recorded at page 106 of the Record of Appeal, as directing the jury as follows in relation to the Agreed Facts: “You can accept or reject those facts as you would any other piece of evidence in this case but bearing in mind that these are facts which are not disputed by the prosecution or the defence”. No objection was then raised by or on behalf of the Appellant.

22. Mr. Daniels accepts that at the time of the trial he was unaware that Ms. Symonds appointment as authorised analyst had not been gazetted. For reasons given earlier this issue had no relevance to the admissibility of evidence as agreed facts (admissions) under section 30 of the Evidence Act 1905. Mr. Daniels accepts that he decided not to challenge Ms. Symonds evidence and explains at paragraph 75 and 76 of his affidavit:

“75. I had no reasonable basis, at that time, to challenge her expertise or findings that would warrant reducing her as a witness, hence why I saw no value in calling her.

76. I believe that at the time that her evidence was to be reduced to an agreed fact...”

23. Mr. Daniels further states that he dismissed the Appellant’s request to call Ms. Symonds for cross examination as he did not consider any merit in challenging her on issue of continuity. He also did not see any merit in calling Ms. Burgess, the Property Management Unit officer, to address issues of continuity.

24. Before this Court Mr. Swan for the appellant highlighted what appears to be a discrepancy between the statement of Ms. Burgess and Ms. Symonds. He pointed out that Ms. Burgess’ statement confirms that she provided to Ms. Symonds a number of items referred to in her report. However, there is no mention of the two heat sealed packages containing brown coloured powder.

25. I would note two points in relation to this apparent discrepancy. First, Ms. Symonds confirms in her report that “*on 12th April, 2019, the following items were received at the laboratory from Property Management Unit Officer PC 309 Burgess and were examined...(1) An intact Police Evidence bag number B110238 labelled: “Two (2) heat*

sealed packages brown coloured powder: Seized/Produced From OAS 1 (27M091337) 1643/11-4-19””

26. Second, it is formally agreed in the “*Agreed Facts*” that “*The continuity of all prosecution exhibits is not disputed*”. In the circumstances, I do not consider that there is any credible doubt that Ms. Symonds received the 2 heat sealed packages containing brown coloured powder from Ms. Burgess, as in effect had been agreed.

27. Counsel for the Appellant relied upon several authorities in support of his submission that the alleged failures on the part of Mr. Daniels rendered the trial process unfair or unsafe including *Clarke and McDaid v R* [2008] UKHL 8, *Day v R* [2003] EWCA Crim 1060; and *R v Adams* [2007] EWCA Crim 1.

28. In *Clarke and McDaid*, the House of Lords was concerned with the issue whether the absence of a signed indictment at the outset of and during most of the trial had the legal effect of invalidating the proceedings and, if so, whether such invalidity was cured by the late signature of the proper officer. In this factual context Lord Bingham held at [14] that:

“In our judgment it is now wholly clear that whenever a court is confronted by the failure to take a required step, properly or at all, before a power is exercised (“a procedural failure”), the court should first ask itself whether the intention of the Legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk the court must decide whether it is just to allow the proceedings to continue.”

29. In my judgment the procedural failure relied upon by the Appellant in this appeal (whether evidence of an authorised analyst can be adduced where there has been a failure to gazette the appointment) is not in the same category as the procedural failure in *Clarke and McDaid* (whether an unsigned indictment is a legally valid indictment). As noted earlier, any failure to gazette the appointment of the authorised analyst has no impact upon the prosecution’s ability to adduce the evidence of that analyst by means other than the production of the certificate under section 31(1) of the MDA. Moreover, there can be no question about the expertise and competence of Ms Symonds for the purposes of conducting the analyses and rendering the report of her results. By the time of the trial, her appointment as analyst had, in fact, been gazetted.

30. The appellant relies upon *Day v R* contending that the case is directly relevant to his appeal because a viable, determinative defence was ignored by his counsel. The submission again is based upon the erroneous contention that the failure to gazette the appointment of

the authorised analyst (Ms. Symonds) had the result that there was no admissible proof of chemical composition to support the drug charge. It is of note that in relation to an allegation of incompetent representation by counsel generally Buxton LJ held at [15]:

*“While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. **We accept that, following the decision of this court in Thakrar [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.**”* [Emphasis added]

31. The Appellant also relies on *R v Adams* contending that it is directly relevant because in his case explicit instructions from the Appellant on a critical issue was disregarded, to have the analyst produced to give live evidence as to challenge the continuity of her evidence. I have already dealt with the issue of continuity and why I do not consider there is any credible doubt that Ms. Symonds received the 2 heat-sealed packages containing brown coloured powder from Ms. Burgess at [24]-[26] above.

32. Mr Duncan referred the Court to the decision of the Caribbean Court of Justice in *Lashley v Singh* [2014] CCJ 11 (AJ) emphasising the limited scope of the challenge based upon incompetence of counsel. At [12] and [13] of the majority Judgment (Nelson, Saunders and Hayton JJ) the Court held:

*“[12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that **the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such a strategy, which is to he or she would contest, the evidence to be called, and the questions to be put in chief or in cross examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness box and to rely on their unsworn evidence***

*[13] A conviction can only be set aside on appeal if in assessing counsel’s handling of the case, the Court concludes that there has not been a fair trial or the appearance of a fair trial: see **Boodram v The State** [2002] 1 Cr. App. R 12,19.*

Hypothetical examples of such incompetence were given by the Privy Council In Bethel v The State (No. 2) (2000) 59 WIR 451,460 as follows:

“It is not difficult to give hypothetical examples of how such a situation might occur. An obvious example would be if the accused had the misfortune to be represented by counsel whose judgment was proved to have been impaired by senility, drugs or some mental disease. Another example... is of counsel conducted the defence without having taken his client’s instructions.” [Emphasis added]

33. Having regard to these authorities a challenge based upon the incompetence of counsel at trial is only likely to succeed in exceptional and extremely rare cases. In this appeal the Appellant criticises Mr Daniels for not detecting that Ms. Symonds’ appointment as authorised analyst had not been gazetted. As I have held earlier this criticism is misplaced as the evidence of the analyst was admitted as an admission under section 30 of the Evidence Act 1905 and as already mentioned, there can be no question as to her qualifications and competence.

34. The Appellant also criticises Mr. Daniels for executing the *Agreed Facts* without his knowledge and authorisation. I have found this allegation to be factually unfounded. I find, as Mr. Daniels states in his affidavit, that he executed the *Agreed Facts* with the Appellant’s full knowledge and consent.

35. The Appellant criticises Mr. Daniels for not cross-examining Ms. Symonds and Ms. Burgess in relation to the continuity of exhibits. Mr. Daniels was entitled to take the view that there was nothing in the continuity point and decide not to cross-examine the witnesses. Given the evidence from the Report of Ms. Symonds at [25] above and the agreed fact that continuity of all prosecution exhibits was not disputed, any criticism of Mr. Daniels, in my judgment, is misplaced. I consider that all the criticisms advanced by the Appellant in relation to Mr. Daniels’ conduct under this ground, taken as a whole, does not cast any doubt on the fairness of the trial or the safety of the Appellant’s conviction.

GROUND 2: The Appellant had not had a fair trial for the reason that the trial judge erred in admitting the purported expert evidence of DS Bhagwan relating to diphenhydramine when significant prejudice resulted from the late admission of DS Bhagwan’s evidence.

36. The appellant states that Ms. Symonds was not a legally authorised analyst for the purposes of section 31 of the MDA on 12 April 2019 and therefore her report was incapable of constituting a valid statutory analysis under section 31 of the MDA. DS Bhagwan’s evidence relating to the existence of diphenhydramine relied entirely on Ms. Symonds report as to the scientific basis of his conclusion. The Appellant contends that DS Bhagwan’s evidence in this regard stands or falls with the report of Ms. Symonds. The

Appellant submits that DS Bhagwan's opinion that diphenhydramine was found rested on a report that was unlawful, unverified and incapable of supporting expert conclusions.

37. The Appellant also submits that the admission of DS Bhagwan's expert evidence concerning diphenhydramine was erroneous because its reliance on non-scientific, open-source internet material contrary to the standards required for expert evidence under *R v Reed* [2009] EWCA Crim 2698 and *Myers, Brangman and Cox v The Queen* [2015] UKPC 40. The Appellant also criticises Mr. Daniels for not obtaining an independent expert. The Appellant states that he instructed Mr. Daniels to obtain an expert and to require the analyst to attend but Mr. Daniels did not pursue Legal Aid to secure a defence expert and instead relied upon open-source Internet material.

38. In relation to the admissibility and reliability of Ms. Symonds report I would repeat what has been said in relation to this issue under Ground 1 at [14] to [21] above. The factual position is that Ms. Symonds examined the contents of the Coca-Cola bottle containing red capsules and concluded:

“This item was examined and found to contain a plastic “Coca-Cola Cherry” bottle containing several empty pink capsules adhering to the bottom of the bottle and a visible powder. The bottle and the adhering pink capsules were analysed and found to contain Diphenhydramine. Diphenhydramine in this preparation is controlled under the Pharmacy and Poisons Act 1979 as an over-the-counter medication available for sale in a registered pharmacy.”

39. The expert opinion of Ms. Symonds, as expressed in [38] above, was not adduced in evidence pursuant to section 31 of the MDA but was adduced in evidence as an admission pursuant to section 30 of the Evidence Act 1905. In relation to this issue the “*Agreed Facts*” stated:

“The following facts are agreed between the prosecution and defence and are therefore formally admitted pursuant to section 30 of the Evidence Act 1905:

6. The Coca-Cola Cherry bottle [Exhibit 5] was examined by the Central Government Laboratory. It was found to contain several empty pink capsules and visible powder. The bottle was found to contain Diphenhydramine, which is available as an over-the-counter medication in a registered pharmacy.”

40. In the circumstances, DS Bhagwan could properly rely upon the evidence of the Ms. Symonds that the pink capsules and visible powder in the Coca-Cola cherry bottle was found to contain diphenhydramine.

41. The ability of police officers to give expert evidence in Court is well established provided the officer has the necessary expertise. Thus, in *Myers, Brangman and Cox* [2015] UKPC 40, Lord Hughes, speaking for the Board, held at [57]:

“Police officers have been accepted as expert witnesses in several different contexts and in many common law jurisdictions. A simple example is the police officer who has special training (and considerable experience) in the investigation and reconstruction of road traffic accidents. He may well be as much an expert in his field as any consulting accident engineer, and he is accepted as such routinely in both civil and criminal trials: see for example R v Oakley (1980) 70 Cr App R 7, where Lord Widgery CJ held in emphatic terms, at p 9:

“... we would like to make it quite clear straight away that there is no question of a police officer being prevented from giving evidence as an expert if the subject in which he is giving evidence as an expert is a subject in which he has expert knowledge, and if it is restricted and directed to the issues in the case.”

In such a case the expertise in question is as to the behaviour of motor cars, the effects of road surfaces and the like. In other cases, however, a police officer has been permitted to give expert evidence about criminal behaviour. An example is evidence of the customary practices of drug users, in relation to such matters as packaging, methods and quantities of usage and supply, and prevailing price: see R v Hodges [2003] EWCA Crim 290, [2003] 2 Cr App R 247, in which this type of evidence was held admissible. Evidence of the practices, mores and associations of gangs, whether general or particular, is in a similar category. It has been received in several jurisdictions and there can in principle be no objection to it being given by a police officer, providing that the ordinary threshold requirements for expertise are established, and providing that the ordinary rules as to the giving of expert evidence are observed.” [Emphasis added]

42. Expert evidence from a police officer, as with any expert, will only be admissible as expert evidence if (i) it relates to a subject matter in respect of which the Court requires expert evidence in order to determine a relevant issue; and (ii) the officer in question has the necessary qualifications to be in a position to render an expert opinion. The Court is unlikely to accept mere anecdotal evidence as rising to the threshold of admissible expert evidence. Thus, in *R v Sekhon* [2014] 1 S.C.R. 272, the Supreme Court of Canada held that the anecdotal evidence of a police officer that during the course of his involvement in approximately 1000 investigations into the importation of cocaine he had never come across a blind courier - a courier who does not know the commodity that he is transporting, was inadmissible.

43. The Appellant submits that the evidence of DS Bhagwan does not meet the threshold of expert evidence because of its reliance on non-scientific open-source internet material.

It is necessary to analyse the evidence of the DS Bhagwan to determine whether this submission by the Appellant is factually valid. The use of internet open source by DS Bhagwan is indicated in the following passage from his evidence:

“I noted diphenhydramine, a controlled drug under the Pharmacy and Poisons Act 1979, was seized in this case. My internet open-source resource revealed that diphenhydramine is a sedative medication mainly used to treat allergies, insomnia and common cold symptoms. It is also commonly used for tremors in Parkinson’s and nausea. It is taken by mouth, injected into a vein, injected into a muscle or applied to the skin. It is packaged and commercially sold in the form of capsules.” [Emphasis added]

44. It will be seen from the passage in the previous paragraph that the use of the internet open-source resource relates to the common uses of diphenhydramine for medicinal purposes. The common use of diphenhydramine is background information but was not a relevant issue at trial. The relevant issue at trial was whether there was a practice of using diphenhydramine as a cutting agent in the distribution of heroin. In relation to that issue DS Bhagwan’s evidence was that on 28 September 2022 he had attended and completed an online course on current drug trends hosted by the National Criminal Justice Training Center of Fox Valley Technical College USA. He stated that the subjects taught included the recent drug trafficking trends, packaging and distribution. As a result of attending this course he had learned that diphenhydramine is used in the United States as a cutting agent for heroin. He accepted that he did not know that this was also a trend in the distribution of heroin in Bermuda. Accordingly, it seems reasonably clear that the source of DS Bhagwan’s evidence relating to the use of diphenhydramine as a cutting agent was the recent online course he had attended dealing with the current drug trends posted by the National Criminal Justice Training Center. In the circumstances I do not consider that this evidence can be objected to on the basis that it is mere anecdotal evidence.

45. DS Bhagwan’s evidence in relation to the use of the diphenhydramine as a cutting agent in the distribution of heroin was relevant in relation to the count relating to the possession of controlled drug with intent to supply. Its probative value was diminished as DS Bhagwan was unable to confirm whether the practice of using diphenhydramine as a cutting agent existed within Bermuda. However, I accept Mr. Duncan’s submission that the jury had to assess this evidence in conjunction with the other circumstantial evidence presented at trial. The quantity and value of the drugs which Ds Bhagwan said indicated the intent to supply, the white cutting board, the digital scale, the Ziploc bags, the 17 bottles of Dormin sleep aid and the Coca-Cola bottle with empty Dormin capsules. In considering the probative value of DS Bhagwan’s evidence in this regard the proper approach is not to look at this evidence in isolation but as a constituent part of the entire circumstantial evidence presented in relation to the drug charge. The

weight to be attached to this evidence was of course, a matter of inference, as they were properly directed by the trial judge, a matter for the jury having regard to other admissible evidence in the case.

46. In considering any unfairness to the Appellant by the admission of this evidence, it is relevant to take into account the very careful direction the Judge also gave in relation to how the jury should view expert evidence. The Judge reminded the jury that:

“Remember, you are the sole judge of the facts, and you are entitled to assess and accept or reject any such opinion as you see fit. It is up to you to give such weight to the opinions of the expert witnesses as you think they should be given and whether you thought them impartial or partial to either side and the extent to which their opinion accords with whatever other facts you find proved...it is up to you to decide what weight or importance to give to expert opinion or indeed whether you accept their opinion at all. It is also important to remember that an expert’s opinion is based on what the expert witness has been told of the facts. If those facts have not been established to your satisfaction, the expert’s opinion may be of little value.”

47. It is also to be noted that in summing up the evidence of DS Bhagwan the Judge expressly brought to the attention of the jury that DS Bhagwan said, *“there is no information that diphenhydramine is being used in Bermuda as a cutting agent”*.

48. In all the circumstances the Judge was entitled to admit the evidence of DS Bhagwan in relation to the use of diphenhydramine as a cutting agent. This part of his evidence was not based upon open-source internet resource but as a result of attending a relevant training course. The evidence was relevant to the drug charge. The weight to be attached to the evidence, considering all other circumstantial evidence and the directions given by the Judge, was a matter for the jury.

49. It was accepted by the prosecution that the expert evidence of DS Bhagwan was served at the late stage. The Judge assessed this issue and took the view that the defence counsel dealt properly with this evidence. In this regard it is to be noted that the relevant part of DS Bhagwan’s evidence was his statement that diphenhydramine is used as a cutting agent in the illicit drug trade in the United States. No credible basis has been suggested by the Appellant that this statement by DS Bhagwan may be materially inaccurate, and it was open to the jury, given the notoriously close connections between drug trafficking in the United States and Bermuda, to have considered this evidence to be relevant..

50. In all the circumstances and having regard to the matters outlined above, this ground of appeal is dismissed.

GROUND 3: The absence of a defence expert deprived the appellant of a meaningful opportunity to challenge the prosecution case.

51. The Appellant states that without a defence expert he was unable to test the reliability of DS Bhagwan’s conclusions, challenge the scientific basis of the opinion offered, analytical methodology, or most importantly address deficiencies in the evidential foundation. The Appellant complains that the way the defence was conducted constrained the ability to mount an informed and effective challenge to the prosecution’s expert.

52. The Appellant further states that Mr. Daniels failed to apply for Legal Aid funding to retain a defence expert, despite explicit instructions from the Appellant. The Appellant submits that the decision of Mr. Daniels to proceed in the circumstances in this criminal trial constituted a material irregularity, denial of effective representation and deprived the Appellant of a fair hearing enshrined in the Bermuda Constitution.

53. In relation to this criticism of Mr. Daniels it should be noted that the Appellant approached Mr. Daniels on the 16 February 2023 to say that he wished to change counsel from Mr. Richardson to Mr. Daniels, 5 days before the commencement of the trial on 21 February 2023. The Court granted Mr. Daniels a short adjournment until 23 February 2023, and the jury was sworn on 1 March 2023. It is in those circumstances that Mr. Daniels states in his affidavit that:

“55. I cannot recall telling the Appellant that we “lacked time and resources to pursue this expert evidence”. However, it was a practical reality that I was confronted with during the trial. I did not have an expert witness that I could call upon and discuss these issues during the course of the trial, prior to my cross-examination.

56. Moreover, I was working with a Legal Aid budget. The committee meets weekly and it would have been very difficult to obtain approval for an expert, identify an expert, and have a report produced during the course of the trial. I do not believe that I made an application to Legal Aid to try and get an expert as I did not even have one in mind.”

54. In the circumstances it is unreasonable to criticise Mr. Daniels for failing to have the services of a drug expert. Furthermore, as Mr. Duncan correctly submits, the Appellant’s principal defence at trial was his lack of knowledge of the drugs or ammunition. The Appellant has not put forward any credible reason to challenge the evidence of the analyst, Ms. Symonds, or the evidence of DS Bhagwan relating to diphenhydramine being used as a cutting agent in the United States. The evidence of Ms. Symonds that the two heat sealed packages contained diamorphine (heroin) was admitted, in the circumstances as discussed above, by the Appellant in the Admitted

Facts pursuant to section 30 of the Evidence Act 1905. In the circumstances, I am unable to accept that the Appellant's inability to obtain an independent expert affected the fairness of the trial.

GROUND 4: The trial judge erred in failing to give a good character direction to which the Appellant was rightly entitled. In the circumstances of this case where the Appellant's credibility was an important issue it is impossible to conclude that the jury may not have rendered a different verdict.

54. In considering this ground it is relevant to note that the issue whether the Judge should give a good character direction and what form it should take was the subject of an exchange between the Appellant's counsel, Mr. Daniels, and the Judge:

"Mr. Daniels: So, I do not think we can put forward that he has good character and no convictions of course.

Judge: Mm-hmm

Mr. Daniels: But I think when, is to say that he does not have these particular convictions and that you may take that into account.

Judge: he does not have any convictions.

Mr. Daniels: in relation to drug or firearm related offenses, which you may take into account and give such weight as you consider appropriate.

...

Judge:.. That he has, you have not heard any evidence in relation to him being convicted of any drug-related or firearm offenses and that this is information which you can take [into] consideration.

Mr. Daniels: And give such weight as you deem fit when assessing the evidence against him.

Judge: Give such weight as you deem fit, then assess the evidence.

Mr. Daniels: Okay... "[Emphasis added]

54. It is reasonably clear that the direction which the Judge gave accorded with what had been suggested by Mr. Daniels. The actual direction given by the Judge was:

"Now, members of the jury, you have heard no evidence that the accused has been convicted of offenses relating to drugs or firearms. This is information which you can take into consideration when considering all the evidence in this case and what weight you attach to it is simply a matter for you."

54. As Mr. Daniels rightly accepted the Appellant was not entitled to a good character direction since he had previous convictions. Mr. Daniels position accords with established law in relation to this issue. In *Hunter v R* [2015] EWCA Crim 631 Hallett J held at [72]:

“It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction. A defendant who had a record of previous convictions or has a bad character of some other kind is not entitled as of right to a good character direction; it matters not for this purpose who has adduced the evidence and whether the bad character evidence is relied upon as probative of guilt.”

55. Further, where a defendant does not have an entitlement to a good character direction, it is a matter of discretion for the judge to determine whether any part of the direction should be given and what form it should take. Hallett J so held in *Hunter* at [82]:

*“In any event, a defendant with previous convictions or cautions to his name has no entitlement to either limb of the good character direction. It is a matter for the judge's discretion. **The discretion is a broad one of the "open textured variety" referred to in Aziz at page 489A whether to give any part of the direction and if so on what terms. It is not narrowly circumscribed.** The judge will decide what fairness dictates. Fairness may well suggest that a direction would be appropriate but not necessarily. Where a judge has declined to give a modified good character direction to a defendant in this category, this court should have proper regard to the exercise of discretion by the judge who has presided over the trial.”* [Emphasis added]

56. In the circumstances I am unable to accept the Appellant's submissions that the Judge failed to give a proper direction as to his character. Given his previous convictions the Appellant had no entitlement to a good character direction. This was accepted by Mr. Daniels. The direction which the Judge gave reflected the form suggested by Mr. Daniels. In any event, having regard to the legal position stated in *Hunter*, I am satisfied that in giving that direction the Judge did not err in law and that it did not result in any unfairness to the Appellant.

Additional Grounds of Appeal

57. A number of other grounds of appeal are set out in the document headed *“Appellant's Grounds of Appeal”* which have not been argued in this Court, and it is assumed that they are no longer pursued. However, for sake of completeness these grounds of appeal are noted below and dealt with summarily.

GROUND 1(e)

58. It is alleged by the Appellant that he did not receive a fair trial because there was a failure to advance a no case to answer submission in respect of Count 2 (possession of ammunition) after the close of the defence case on the basis that the Crown had not produced any evidence, which proved that the Appellant had knowledge of the

ammunition presence. Given that it was the Crown's case that the ammunition was found in the premises occupied by the Appellant it would not appear that there was any proper basis upon which Mr. Daniels could have advanced a no case submission on Count 2 of the indictment.

GROUND 2

59. It is said that the Judge erred in law by failing to properly scrutinize the analyst's report of Ms. Symonds prior to admitting it into evidence, which resulted in a potential injustice against the Appellant. As set out in this Judgment above, the Judge did not admit the analyst's certificate into evidence. The evidence was admitted by means of admissions made in a document headed "*Admitted Facts*" pursuant to section 30 of the Evidence Act 1905. No error of law was made by the Judge.

GROUND 3

60. It is contended that the Judge erred in law by failing to adequately direct/instruct the jury as to the evidence, which was admissible in respect of each Count of the indictment. It appears that the Judge gave the jury full and fair and accurate directions on the evidence.

GROUND 5

60. The Appellant states that the Judge erred in law when he misdirected the jury on the law regarding the presumptions that apply in respect of each of the offences on the indictment, which resulted in miscarriage of justice. It appears that the Judge provided accurate judicial directions on the applicable statutory presumptions.

FOUNDATIONS 6 and 7

61. The Appellant contends that the Judge erred in law by failing to direct the jury to render a not guilty verdict in respect of Counts 1 and 2 at the close of the prosecution case and/or at the close of the defence case due to the failure of the Crown to prove beyond a reasonable doubt the guilt of the Appellant. In my judgment it was open to the jury to properly return convictions against the Appellant on each count on the whole of the evidence adduced by the prosecution at trial.

GROUND 8

62. The Appellant asserts that the Judge failed to provide an adequate response to the jury's questions, which caused prejudice to the Appellant and potentially resulted in a miscarriage of justice. The Record of Appeal does not appear to reflect or record any questions posed by the jury to the Court or any answers provided by the Judge to the jury.

GROUND 9 and 10

63. In relation to ground 9 the Appellant alleges that the Judge failed to grant credits for the time spent on qualifying curfew. In relation to ground 10 the Appellant contends that the Judge misguided himself when sentencing the Appellant by applying both sections 27B and 27F of the MDA which resulted in a sentence that was manifestly excessive and not proportionate to the offence. It appears from the Sentencing Ruling that the Judge expressly stated that the Appellant's time in custody shall be taken into consideration (paragraph 36(ii)). Further, it appears from a full review of the Sentencing Ruling that the Judge accurately and appropriately applied sections 27B and 27F of the MDA.

DISPOSITION

64. For the reasons set out in this Judgment I would dismiss all grounds of appeal pursued by the Appellant. I should add that none of the grounds raise any reasonable doubt that the conviction of the Appellant is unsafe.

Sir Anthony Smellie JA

64. I agree with the careful consideration of all grounds of appeal and with the conclusions reached both by Hargun JA and the President, and that the appeal should therefore be dismissed.

Ian Kawaley P

65. I also agree that this appeal should be dismissed for the reasons set out in Hargun JA's Judgment above. Nonetheless, I would like to add a few short observations of my own.

66. As regards Ground 1, the implicit practical underpinning of the complaint was that if trial counsel and the Appellant had been aware of the fact that Ms Symonds was not a certified analyst when she signed the "Certificate of Authorised Government Analyst", the concession that the powder was heroin would never have been made. This suggestion was wholly unrealistic. Because if the certification point had been raised at trial, the Prosecution would have simply called Ms Symonds to give oral evidence to confirm the conclusions recorded in the Certificate at a time when her certification had not been Gazetted. Perhaps because the answer to this suggestion was so obvious, the more technical and legally misconceived complaint was advanced about the Certificate being invalidly relied upon. As Hargun JA has pointed out, the Certificate was not relied upon because of the concession which was understandably made before trial.

67. As regards Ground 2, there is nothing unusual in drugs cases about reliance being placed on a Police expert about material being found, whether cutting agents or packaging materials, which Police experience suggests are used in drug trafficking

operations in Bermuda or abroad. Mr Swan made the best point which could be made, namely that DS Bhagwan's experience about what was potentially a cutting agent was not grounded in local practice. But this was ultimately not sufficient to justify excluding the evidence altogether at trial for two main reasons. First, American experience is obviously potentially relevant to Bermuda because of the close ties between the jurisdictions in many social respects. More importantly still, this was simply one of several pieces of circumstantial evidence which the jury were free to make of what they wanted, as the Judge properly directed. He gave both the standard direction about circumstantial evidence and a specific direction in relation to DS Bhagwan's evidence. No complaint was made about the directions given to the jury in this regard,

68. Because of the severity of the sentence appropriately imposed on the Appellant, it is understandable that he should wish to pursue every possible avenue in testing the safeness of his conviction. Overall, having carefully considered every point taken on his behalf and by the Appellant himself (who addressed Ground 4 in person), the Prosecution evidence accepted by the jury at trial (unanimously in respect of Count 1) was overwhelming. I am bound to agree that no legally recognised form of injustice has occurred.