



# THE COURT OF APPEAL FOR BERMUDA

CRIMINAL APPEAL NO. 31, 34, 35 of 2005

**BETWEEN:**

**KI-ROY KINTA BUTTERFIELD  
JAHCAI DANIEL MORRIS  
TAHIR NESTA BASCOME**

**Appellants**

**and**

**THE QUEEN**

**Respondent**

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Before: Zacca. P  
Nazareth, JA  
Sir Murray Stuart-Smith, JA

Date of Hearing: 5, 6 and 7 March, 2007  
Date of Judgment: 23 March, 2007  
Date of Reasons for Judgment:

## **REASONS FOR JUDGMENT**

### **Nazareth JA**

On 25 October, 2005, in the High Court, the three Appellants, Ki-Roy Kina Butterfield (“Butterfield”), Jahcai Morris (“Morris”) and Tahir Bascome (“Bascome”) were convicted by Greaves J sitting with a jury of the following offences, all committed on 4 April at Wellington Oval, St. George’s Cricket Club, on 15 December, 2004 and sentenced as follows –

### **Butterfield**

- (1) The attempted murder of Tarik Foster (“Foster”) – sentence ten years’ imprisonment.
- (2) The attempted wounding of Everest Trott (“EJ”) with intent to cause grievous bodily harm – sentence four year’s imprisonment.
- (3) Possession of an offensive weapon, a knife, in a public place, namely Wellington Oval, without lawful authority or reasonable excuse – sentence two years’ imprisonment.
- (4) Going armed in public with a knife, without lawful occasion, in such manner as to cause terror to persons present- sentence twelve months’ imprisonment.

### **Morris**

- (1) The attempted murder of Foster – sentence ten years’ imprisonment.
- (2) Possession of an offensive weapon, a knife, in a public place, namely Wellington Oval, without lawful authority or reasonable excuse – sentence two years’ imprisonment.
- (3) Going armed in public with a knife, without lawful occasion, in such manner as to cause terror to persons present- sentence twelve months’ imprisonment.

### **Bascome**

- (1) The attempted murder of Foster – sentence ten years’ imprisonment.
- (2) Possession of an offensive weapon, a machete, in a public place, namely Wellington Oval, without lawful authority or reasonable excuse – sentence two years’ imprisonment.
- (3) Going armed in public with a machete, without lawful occasion, in such manner as to cause terror to persons present- sentence twelve months’ imprisonment.

The sentences were all ordered to run concurrently.

All three of them appealed to this Court. Shortly before the appeals were heard, Morris abandoned his appeal against conviction. Having heard the appeals, we gave judgment on 23 March, 2007, dismissing Butterfield's appeal against conviction and sentence, and affirming the sentences appealed; dismissing Morris's appeal against conviction and sentence, and affirming the sentences appealed; and dismissing Bascome's appeal against sentence, and affirming the sentences appealed.

We also ordered that the Appellants' time in custody prior to trial and time in custody since conviction to be taken into account. We reserved our reasons for judgment and now hand them down.

The facts were that, on the afternoon of Sunday, 4<sup>th</sup> April, 2004, a large crowd attended the Friendship Cup Match at Wellington Oval, St. George's Cricket Club. The second half of the second match was disrupted by a group of young men armed with a variety of weapons, machetes, a sword, knives and a baseball bat, who attacked another group of men. The attacks were carried out blatantly in sight of the large crowd in a succession of attacks which were described as being made in four waves. They commenced in the vicinity of the scoreboard and ended in the Clubhouse where the main target of the attacks, Foster was left bleeding and semi-conscious on the floor. The attackers, including the Appellants, were known and recognized by some of the individual spectators who witnessed them carrying out and actively participating in the attacks. Two of these spectators were policemen, one of whom D.C. Swainson, got a professional photographer covering the two matches to focus upon the attacks. Likewise, there was a video recording being made of the matches which was similarly focused upon the attacks when they disrupted the game.

The photographs, printed in colour, were of remarkable clarity enabling identification of the attackers and also showed clearly weapons being carried and at times brandished and used. The video, too, captured the actions of the attackers in motion, indeed, showing,

for instance, machetes being used to slash those being attacked. The relevant photographs were exhibited in evidence and likewise the relevant parts of the video were displayed. Significant sequences of the latter were matched to the former in Mr. Mahoney's submissions for the Respondent at the trial and in this Court. Combined with the witnesses' evidence, the effect was to produce an overwhelming case against the three Appellants.

The evidence and the exhibits point to the attacks originating in the following way. Foster and some of his friends were sitting near the scoreboard watching the football match when Latchie, one of Butterfield's brothers, and like him also from Ord Road approached Foster and bumped him. This led to a fight between them which others from Ord Road, armed with machetes and other weapons, joined. Foster retreated to a wall to protect his back. He was rescued by one of his friends who pulled him up and dropped him near the goal posts where he was again surrounded by armed men, including Latchie, who attacked him from the rear. Foster was again rescued, this time by another of his friends, Everest Trott ("EJ") who jumped down and used a length of wood ("the two by four") which he had been sitting on to beat off the attack. He struck down Latchie to prevent him chopping Foster from the rear with a machete.

The attackers then turned on EJ who used the two by four to keep them at bay. Another friend Kuma Smith jumped down to assist EJ. They ran to the side of the scoreboard where EJ was attacked by a group including Butterfield, who stabbed him with a knife.

Foster, for his part, was trying to get away and was attacked near the goal posts by a group of men, including Morris, who was armed with a large knife, with fearful, large serrations, described as "gothic" type. The group also included Bascome, who chopped at him several times. Foster testified that he lay on the ground at this time with his knees up to his chest to protect himself. More than one witness referred to him being in a fetal position. He said that Butterfield pushed apart the group, jumped on him, pushed up his head and stabbed him with his knife below his neck. Then others came to his aid and he made his way to the car park and bleachers near the Clubhouse. There he was attacked

repeatedly by a group including Morris who had a knife and Bascome who had a machete. Kuma Smith came to Foster's rescue and eventually both ran into the Clubhouse chased by the group, including Morris and Bascome, who were still carrying their weapons. The latter soon emerged and later Foster was found inside unconscious and bleeding on the floor and was taken to hospital.

His injuries were listed in the following way. "Multiple stab wounds over most of his torso, laceration over the occipital area, a half centimetre puncture wound of the suprasternal notch with subcutaneous emphysema, a puncture wound to the 7<sup>th</sup> intercostal space, lacerations to the right upper forearm and left forearm, lacerations to the right hand involving the index finger with extensor tendon involvement, multiple small superficial stab wounds on the left side of the abdomen, small superficial wounds over the left elbow, a single stab wound over the centre of the sternum, a 5 centimetre laceration over the right forearm and a fairly deep laceration over the right 2<sup>nd</sup> metacarpophalangeal joint."

The main thrust of the submissions on behalf of Butterfield and Bascome made respectively by Ms. Christopher and Mr. Bailey are similar. They attacked the identification of the two Appellants as being dock identifications and also contended that individual *Turnbull* directions were necessary but not given. However, the record and evidence show that the identification in court was simply a formality and that the Appellants were previously known to the witnesses. Moreover the photographs and the video, the provenance and, more particularly, the probity of which were not and could not be seriously questioned, provide compelling identification. If, indeed, a *Turnbull* direction was necessary, this was given in detail by the Judge at the beginning of and recalled later in his summation in the context of identifications.

The other general thrust of the submissions sought to undermine the convictions on a procedural and due process basis. It was said that the Judge made frequent prejudicial comments against Defence Counsel and the Appellants, erred in failing to hold Prosecution Counsel adequately to account for persistent leading questions, was difficult

with Defence Counsel and, therefore, biased in these and other similar respects. Having seen the passages in the record that were relied upon, and having considered the submissions, we had no hesitation in rejecting these submissions.

It was also submitted that because of a perceived threat to the jury, the Judge should have invited submissions from Counsel. This followed a remark by a member of the public when a lady juror was leaving the court room and almost fell; it was to the effect that it would be good if all the jurors fell. When this came to the notice of the Judge, he enquired into the matter and satisfied himself that the juror was content to continue and that there was no risk of bias. There was plainly no merit in this submission. Likewise, it was submitted that the Appellant's Defence and right to a fair trial was prejudiced by the Chairperson of the jury, who was observed in a conversation with a senior police officer in the vicinity of the Court during the Trial. This, it was suggested, posed a real danger of bias. This, too, was dealt with by the Judge who subsequently interviewed the Chairperson and was satisfied that it was simply a chance meeting with a friend that resulted only in greetings and that sort of exchange. That it should nonetheless have been made a ground of appeal, yet again demonstrated the lack of substance in the multiple grounds raised on behalf of the two Appellants contesting their convictions.

Butterfield's Amended Notice of Appeal contained no less than fifteen grounds. Two were abandoned by Ms. Christopher. The remainder, as indicated, were without merit and do not even warrant adumbration in this Judgment. But Ms. Christopher did make one submission which, while apparently not included in any of the grounds of appeal, did initially appear to have some potential. The video recording, included a time display in minutes and seconds, and this prompted Ms. Christopher to submit that Butterfield was shown at a point before he dashed into the group attacking Foster and only two seconds later shown again at another point behind the goal. She argued that, to get to the latter, he would have had to push apart the group, get down to Foster on the ground, push back his head, stab him below the neck and get to the further point behind the goal net. This, she said, was simply not possible and established that Butterfield could not have stabbed Foster, as Foster alleged. However, the video sequence relied upon ended at the point

that Butterfield appeared to be dashing into the group and it is not clear what followed immediately after. There was no evidence about the effect of that on the time display. It was also notable how fast the attackers seemed to move around the field. Foster's evidence that Butterfield jumped upon him does seem to be consistent with the video images showing Butterfield dashing into the group with his dreadlocks flying behind him.

In this uncertain situation, it was questionable whether the submission could be accepted as casting doubt upon Foster's evidence. This was a matter for the jury. It followed that the submission failed.

The grounds and submissions concentrated upon the attempted murder charge for obvious reasons, but they also extended to Butterfield's latter three offences. Accordingly his entire appeal against conviction failed in respect of all the four offences of which he was convicted.

Turning then to Bascome, his defence was that he was not at the scene, and was wrongly identified. Given the nature and strength of the evidence of his identification, in particular, the photographs that show him very clearly, the jury were fully entitled to reach their verdicts against him, and it would have been very surprising had they not. The main thrust of the submissions made by Mr. Bailey on his behalf has already been addressed in conjunction with those made on Butterfield's behalf and rejected. Although here too, they were directed primarily to the attempted murder charge, they similarly extended to the second and third offences charged. In any case, the remainder of Mr. Bailey's submissions plainly had to be rejected, and with them Bascome's appeal against conviction of all three offences charged.

#### The Appeals against sentence

These, for obvious reasons, were concerned almost entirely with the ten year sentences for attempted murder. It was submitted at the trial by counsel for all three Appellants, who also appeared for them below, that the appropriate range of sentence for attempted murder was between six to ten years. The Judge observed that the cases cited by the

Crown showed a range generally between ten to twenty years; and those by the Defence a range between six and about fourteen years. He concluded that a sentence of ten to fifteen years was not unreasonable.

The Judge took a serious view of the offences of attempted murder, pointing out that the jury were satisfied that the three accused intended to kill Foster. Butterfield's clear intent, he considered, was demonstrated when he plunged a knife into Foster's upper chest near his throat. As regards Bascome, the Judge referred to his repeated attempts, which could be clearly seen, with the machete in his hands in the group surrounding Foster, as he searched for a spot to place his blows. Bascome's intent, he said, was then demonstrated, and might only have been prevented by the awkwardness of the length of the machete and possibly to avoid injury to the others. In the case of Morris, the Judge pointed to his pursuit of Foster even after Foster had been in retreat. Foster, he continued, fell several times, yet Morris pursued him with his horrible-looking knife in his hands. The determination on his face shown by the photographic evidence could only convince one of his intention to kill Foster. If there was any mitigating factor, he thought, it was the degree of injuries sustained.

The Judge also pointed to several aggravating circumstances, the Appellants' arrogant disregard for law and order and the police officers present; the terror to which women and children were subjected; the blatant attacks, the hunting down of the victims, the brandishing and use of large bladed weapons in the face of a large crowd assembled to view an important social event; and the public outrage they caused. In the Judge's view sentences that were both penal and deterrent were called for. He was right in our view.

Before us, counsel for the three Appellants appeared to resile in part from the range of sentence they had contended for below. They submitted that the proper sentence is six to eight years and invited the court to give consideration to several new English authorities, which they said were not cited before the Judge. Most of these authorities and those relied upon below were concerned with conduct that occurred in a domestic or similar situation, very different from that in the present appeals. We did not find them of any



significant assistance, and particularly not in approving any range of sentences, which we were invited to do. However, taking them into consideration in conjunction with the aggravating features identified by the Judge, we concluded that the sentences imposed for the offences of attempted murder were appropriate in the particular circumstances, and clearly not manifestly excessive. It followed that the appeals against sentence also failed and had to be dismissed.

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Nazareth, JA

I agree

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Zacca, President

I also agree

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Sir Murray Stuart-Smith, JA