The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 4 & 5 of 2009

Between:

ANTOINE HERBERT ANDERSON
-and-
PHILIP ANTHONY BRADSHAW

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, J.A.
Stuart-Smith, J.A.

Date of Hearing: 1 & 2 March 2010
Date of Judgment: 2 March 2010
Date of Reasons: 18 March 2010

Appearances: Ms. Shade Subair for Appellant Anderson
Mr. M. Daniels for Appellant Bradshaw
Mr. C. Mahoney & Ms. T. Burgess for Respondent

Reasons for Judgement

Zaca, P.

1. The Appellants Antoine Anderson and Philip Bradshaw were charged jointly on an indictment containing two counts, the first for Murder and a second count for Wounding with intent to cause grievous bodily harm. They were convicted on both counts and were sentenced to life

imprisonment on count one and ten years' imprisonment on count two, sentences to run concurrently.

2. They have both appealed against their convictions, and at the close of the hearing of the appeal the Court dismissed the appeals and affirmed the convictions and sentences. We promised to put our reasons into writing and this we now do.

3. The case presented by the Crown was as follows:
On the evening of the 24th December 2007, one Jakai Harford was shot and injured. He is the half brother of Tyeasha Cameron, the sister of Antoine Anderson and the wife of Phillip Bradshaw.

4. On the evening of 26th December 2007 both appellants left their residence at 30 Curving Avenue on a bike. Appellant Anderson was the rider and Appellant Bradshaw was the passenger. There was evidence from Malika Gumbs and Danielle Scraders that when the appellants left 30 Curving Avenue on the bike, appellant Bradshaw was wearing Melika Gumbs' black jacket with a hood and brown fur.

5. At about 8:30pm a group of young men involving the deceased Aquil Richardson were in the driveway in front of Gladstone Butterfield's house at 1 Horseshoe Road, a short distance from where Jakai Harford was shot and injured.

6. Shortly thereafter, a motor cycle with two persons alleged by the prosecution to be the two appellants, both wearing dark clothing, helmets with face visors and ski masks rode up to Horseshoe Road. There was brown fur on the hood of the jacket being worn by the man who the prosecution alleged to be the shooter.

7. The motor cycle came to a stop and the person on the back pulled a gun and started firing at the persons who gathered. Acquil

Richardson fell to the ground. The shooter got off the bike and went to where Richardson was on the ground and fired two shots at him. He returned to the bike which rode off. It was observed that the shooter was wearing white sneakers. Acquil Richardson died as a result of gun shot wounds and one Lavar Smith received gun shot injuries to his legs.

8. Both Appellants returned to their residence at 30 Curving Avenue at about 10:30 pm. Tyeasha Cameron was waiting on her husband Appellant Bradshaw to take her to work. She said to them, "you know Acquil got shot and she hoped that they did not have anything to do with it." Neither of the Appellants responded. Appellant Anderson was seen with a black, woolly ski mask with the eyes and mouth cut open.

9. Appellant Anderson told Malika Gumbs that if the police asked she was to tell them that he was at home from seven to ten. Bradshaw drove his wife to work and returned still wearing Malika Gumbs jacket. On the morning of the 27th December Appellant Bradshaw whilst driving his wife's car got into an accident. On 3rd January 2008, Anderson gave the police a false alibi which was in the terms of what he had told Malika to say to the police.

10. On the 2nd January 2008, the police went to Anderson's mother's apartment where he sometimes lived. Items of clothing and two masks were seized by the police. On 21st February 2008 police went to Bradshaw's residence.

11. On 28th February 2008 the police arrested both appellants at 30 Curving Avenue. The Ford Focus, Bradshaw's wife's car, and other items were taken by the police. The prosecution alleged that gun shot residue was found on Malika's jacket, in the car, in the apartment at

30 Curving Avenue and a white-beige sneaker belonging to Bradshaw. Gun shot residue was also found on a pair of jeans found at 30 Curving Avenue. DNA analysis indicated that Anderson could not be ruled out as a person who had worn those jeans. Gun shot residue was also found on a pair of black dickey pants belonging to Anderson and a navy blue pants found on a second search at Anderson's mother's residence.

12. In March 2008 a conversation between Anderson and his child's mother was secretly recorded whilst he was in custody at Westgate Prison. On that same day a conversation between Bradshaw and his wife Tyeasha was secretly recorded at Westgate. It was the prosecutions case that both appellants appeared to be making remarks which could be interpreted to suggest an involvement in the murder of Acquil Richardson.

13. Appellant Anderson's defence was one of alibi. He stated that he was not at Horseshoe Road on the night of the killing but was in St. Georges. He denied that he had told Malika to tell police that he was at home form seven to ten. He also denied that Tyeasha had spoken of the shooting of Acquil Richardson. His explanation for the presence of gun shot residue was that he had fingered the bullet holes on the car in which Harford was shot and he had leaned against it.

14. In his defence appellant Bradshaw said that he too, had touched the car and opened the doors of the car in which Harford had been in. He denied being at Horseshoe Drive at the time of the shooting. His defence was also one of an alibi. He denied that he was wearing Malika Gumbs Jacket but that he was wearing a black and gold jacket.

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15. For the appellant Anderson an amended notice of Appeal containing nine grounds were filed on 23 February 2010. The appellants were convicted on 20 February 2009. The original grounds of appeal filed on 5th March 2009 did not contain the amended Ground 9 which alleged defective representation by Mr. Ben Nolan QC who appeared at the trial on behalf of Anderson. When the matter came up for hearing before us on 1st March 2010, Ms. Subair for the appellant indicated that she wished to make an application to further amend Ground 9.

16. The proper procedure would be to file affidavits setting out the grounds of defect, then to be served on the Crown and then to be sent to Mr. Nolan for his comments in a sworn affidavit.

17. An affidavit was sworn and dated 1st March 2010 by Ms. Subair, counsel for the appellant and filed on 1st March 2010 on the morning of the hearing of the appeal. The Crown had not been able to respond to any of these allegations not having being served with any affidavit of Mr. Nolan as would be required.

18. To seek a further amendment to ground 9 and to have the required documents produced would have involved an adjournment of the hearing. The Court was of the view that the late filing of ground 9 and the late affidavit to amend Ground 9 was not in the interest of justice and ruled that the hearing would continue. The Court in the circumstances exercised its discretion in refusing leave to argue Ground 9.

Ground 1:

> *During the appellant's evidence, junior Crown Counsel for the prosecution, Mis Takiyah Burgess posted two entries on the internet. The first was posted early in the afternoon and said: "Takiyah is in Court ready for the*

lies". The second was posted at 16:47 the same afternoon when the appellant had virtually completed his evidence in chief. It read: "Takiyah is listening to a pack of lies". The internet site (Facebook) carried the same entries until the morning of the 12th February when they were removed by the Order of the Trial Judge.

19. It was submitted by Ms. Subair that the Trial Judge ought to have discharged the Jury on the ground that there was a real risk that members of the jury may have seen or had their attention drawn to the website and had been influenced by it. There was no evidence that any of the jurors had accessed this web site. Ms. Burgess had some 400 friends on her website. However it was argued that it was possible for friends of her friends and so on, in effect for anyone, to access the website.

20. The Learned Trial Judge in a ruling refusing the application to discharge the jury stated at pg 1663 of his summation:

In the absence of a clear indication that the primary material was accessible to a member of the jury, I refuse a discharge. I would revisit that if on auditing the list it turns out that a member of the jury is on the list. Indeed if it turned out that a jury member is on the list of Miss Burgess's Facebook friends I would in any event order a discharge. But in the absence of that I refuse. I appreciate that this sort of thing has a viral effect, in that it can multiply through the community, but the further it goes form the original publication, the more like gossip it becomes, and the gossip that a junior prosecutor is saying that he is lying, I don't think carries any weight or not sufficient weight to justify discharging the jury.

I will at the opening of my summing up , give them the standard warning about listening to gossip and rumour or anything they hear, and if there is anyway that anyone wants me to reinforce that, I will consider submissions as to that effect.

21. Subsequently, there was an exchange between Counsel Mr. Nolan and the Judge as follows:

> *Mr. Nolan: Ms. Christopher has had the jury list handed to her by your associate and as far as she can, she's compared the jury list with the list of her friends on the Facebook site. There are no obvious surname matches, but the process is limited by the fact that, apparently, people on face book use pseudonyms and nicknames and street names and so on, whilst may not positively identify them. So to the extent that it can be audited, it has been but we do--- we do make that observation by way of caveat, but we won't—*
>
> *The Court: yes*
>
> *Mr. Nolan: The only way really to find out is to read the list of Facebook friends to the jury and I really don't advocate that.*

The Learned Trial Judge gave a general warning to the jury as promised at the commencement of his summation. We are unable to say that the trial judge wrongfully exercised his discretion. We would recommend that in giving this warning the Trial Judge should now include a general reference to publication on the Internet.

22. **Ground 2:**

> *During the course of cross-examination of the accused leading counsel for the Crown suggested to the defendant that he could be head on the covert tape recording to confess to murder saying "I killed Acquil." It was submitted that this statement was not substantiated and it was prejudicial to the accused right to a fair trial.*

In our view the jury had an opportunity to read the transcript of the recording on the tape and to see that these words were not recorded on the tape. The appellant had denied that he had used any such words.

The suggestion was not evidence in the case and the learned trail judge had told the jury that they should only consider the evidence which had been presented in court. We find no merit in this ground of appeal.

23. **Ground 3:**

> *Alternately to ground 2, the suggestion of what was heard in the covert tape should have been robustly rejected by the learned trial judge and wholly rebuked in summation. By directing the jury that they were free to make up their own minds as to what was said in the* passage under consideration the learned trial judge *was tacitly adding judicial approval to what was a grossly unfair development in the trial.*

It was never challenged that the transcript was not a fair and accurate recording of what was on the tape. The learned trial judge at page 2323 of the summing up stated:

> *What Mr. McColm says is not itself evidence. What he thinks he hears on the tape is not evidence. Not just because he is counsel and counsel aren't allowed to give you evidence but also with great respect to him, Mr. McColm is not a Bermudian and has not been in* Bermuda very long and may not be very familiar with *the Bermudian accent. That's why they called a police officer to deal with the tape.*
>
> *Nevertheless he has made that suggestion and you have to consider it. You can only use what he said there against Anderson if you are absolutely sure that it said "I killed Acquil". You can only use it against him in t hat sense if you are absolutely sure. You may well think that, giving the difficulty of hearing the tape, at that particular point, and the way the prosecution had previously treated it, you may well think you could never be absolutely sure that that's what he says at that point. But, members of the jury, in the end it is a matter of fact for you.*

24. We find no fault with the way in which the learned trial judge dealt with the matter. It cannot be said that the appellant was denied a fair trial. This ground of appeal fails.

25. Grounds 4 and 7 deals with the admissibility of evidence.

Ground 4:

> *The Learned trial judge erred in law in admitting evidence that the appellant encouraged the continuance of a physical attack between the appellant's sister, Tyeasha Cameron and one Melinda Johnson. This evidence was wholly irrelevant and without probative value to the Crown's case. Moreover the prejudicial effect of this evidence was such that it must have left the jury with an impression that the appellant was of a previous violent and bad character.*

We do not accept that this evidence would have been interpreted in this way by the jury. The evidence was admissible and was part of the history of the case. This ground of appeal of appeal is without merit.

26. **Ground 5:**

> *The learned trial judge erred in law in admitting Malika Gumbs evidence that the appellant's sister, Tyeasha Cameron uttered disparaging remarks about the appellant's character stating that the appellant is "ignorant" in a context which suggested that she thought him to be capable of committing a murder. Further, the crown led evidence that Ms. Cameron chastised the co-accused, Anthony Bradshaw, for having kept company with the appellant which implied that the appellant was of bad character.*

We need only say that the interpretation by the appellant is far fetched and cannot be accepted. This ground of appeal is also without merit.

27. **Ground 6:**

> *The learned trial judge erred in law in admitting Malika Gumbs evidence that she "knew the appellant to be a dangerous person before this (the commission of the*

offences on the indictment) took place and that she did not feel safe around him.

These statements had no probative value to the Crown's case and could have only had the effect of causing the jury to believe that the appellant was known to be a violent offender and is likely to commit the offence on the indictment.

28. This evidence was disclosed in cross-examination of the witness Malika Gumbs by the appellants Counsel Mr. Nolan. There was no objection made by Counsel nor was any application made to the judge. It was submitted by Ms. Subair that this evidence would have led the jury to say that the appellant was a person of bad character. We do not think that this evidence was such that it would have influenced the jury in arriving at the verdict which they did. This ground of appeal fails.

29. **Ground 7:**

The learned trial judge erred in law in admitting evidence from Detective Constable 2175 Rickson Wiltshire that the appellant replied, "no, no, it's a new year…" in reply to being questioned whether or not he had anything illegal at his premises. This evidence ought to have been edited to omit "it's a new year" as this portion of the appellant's reply was strongly prejudicial and without probative value to the Crown's case. The admission of this evidence must have left the jury with an impression that the appellant was a man of bad character and previous criminal conduct.

The answer was given to a question as to whether he had any firearm on the premises. No objection was taken by Counsel and in fact during the evidence in chief of the appellant, Counsel asked the same question and received the same answer. However the appellant went on to explain it was more of a joke because his mother had a cabinet with pirate guns and they were joking about that. There was no application to edit the answer given by the appellant. The judge could

not be faulted for allowing the evidence to stand. This ground of appeal also fails.

30. **Ground 8:**

> *The learned trial judge erred in law in admitting evidence that the appellant made "no comment" interviews when questioned by the police. Minimal probative value is added to the Crown's case by the admission of this evidence and there is a high risk that the jury will in fact draw adverse inferences from the repeated silence of the appellant during the investigation stage, despite the provision of a direction to the jury to refrain from drawing such adverse influences.*

This evidence was admissible and a direction to the jury as to the consequences of the appellant's answers was a sufficient direction. This ground of appeal is without substance.

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31. Six grounds of appeal were advanced by Mr. Daniels on behalf of the appellant. These were as follows:

Ground 1:

> *That the learned trial judge erred in law through the exercise of his discretion, by admitting evidence, which is more prejudicial then probative, namely the overt tapes, taken from the Westgate Correctional Facility, together with transcript produced in support thereof, and the admission of expert testimony to further bolster such evidence arising from the covert tapes, thereby causing a substantial risk that the trial taken as a whole is unsafe.*

The trial judge was not in error in the exercise of his discretion in admitting the tape in evidence. There was no suggestion that the transcript of the tape was not an accurate recording of what was on the tape. Evidence was called to say what the words in the transcript

meant as the appellant was a Jamaican and was speaking in what is called Jamaican patois. There is no reason to suggest that the admission of the tape and the transcript would make the verdict unsafe.

32. **Ground 2:**

> *Next the learned trial judge erred in law, by failing to discharge the jury, on the application of Anesta Weekes Q.C. for the appellant Bradshaw, when the Court was notified that unedited transcripts which contained highly prejudicial information, had been provided to the jury, and returned to the jury room to read the contents thereof while legal arguments were being made.*

On 1st March 2008 in an interview by the police with the appellant, the following question and answers appears at line 27 of page 19:

> *Q: Did you ever possess a gun in Jamaica?*
> *A: No.*

It was agreed that certain portions of the transcript would be edited. Ms. Weekes for the appellant indicated on the transcripts the portions she wished to be edited. This was handed to Crown Counsel. It appears that Ms. Weekes omitted to indicate on the transcripts that this question and answer was to be edited. She took full responsibility for the omission. The transcript had been handed to the jurors. It is not clear whether the jurors had read the transcript which included the question and answer. There was a real possibility that they may have read it. The transcript was retrieved from the jurors.

33. On an application by Ms. Weekes to discharge the jury, the trial judge in the exercise of his discretion refused the application. The trial judge ruled that this was a matter which could be adequately dealt with by a direction. Ms. Weekes agreed with the judge on the form of the direction which he said he would give to the jury.

34. At V7, page 1220 of the transcript, the following direction was given to the jury:

> *There is a passage in what is left of this interview about which I need to give you a direction at this stage.*
>
> *Some of you may already have read ahead and seen it, although I have now directed that it will be removed from the transcript, for reasons which I will explain to you in a moment.*
>
> *At one point, in what was left of the interview, D.C. Augustine, this officer, asked Bradshaw,*
>
> *Question: We have information that you had a firearm when you were in Jamaica of which Mr. Bradshaw replied: No I didn't do those things.*
>
> *It is very important that you understand the questions that a police officer puts in an interview are not evidence in the case, unless the person being interviewed accepts them, or acknowledged them as true. In this instance, Bradshaw clearly denied the suggestion, which therefore falls away. When I sum up at the end of the case, I'll be telling you to decide the case only on the evidence that has been led before you in this Court room. And indeed that is the oath you took at the beginning of the case, to return a true verdict according to the evidence.*
>
> *There is no evidence in this case that supports that suggestion about a firearm and you should therefore put it out of your mind, and when considering the case against Bradshaw, you should wholly disregard it and attach no weight to it whatsoever. Now, in order to reinforce that direction, I have ordered that those few lines, those two lines that I have just read out to you, be removed from your copies of the transcript.*

We hold that this was an adequate direction in the circumstances of this case and the judge cannot be faulted in the exercise of his discretion in not discharging the jury. This ground of appeal fails.

Ground 3:

> *That the learned trial judge erred in law, by ruling that the conduct and public commentary of learned Crown Counsel, Takya Burgess, was not sufficiently prejudicial to constitute a bias to defendant's trial.*

35. Mr. Daniels for the appellant adopted the submission of Ms. Subair on a similar ground of appeal argued on behalf of appellant Anderson. However, he submitted that although, when the words were posted on the Internet, the appellant Anderson was giving evidence, it could not be certain that the comments only referred to Anderson. It would also impact on the evidence of Bradshaw.

36. Our reason advanced above in relation to Anderson would equally apply to Bradshaw. In addition whether the comments could be said to refer to Bradshaw is doubtful. In any event even if it applied to Bradshaw, we hold that the general direction given by the trial judge was in the exercise of his discretion and cannot be said to have been wrongly exercised.

37. **Ground 4:**

> *That the learned trial judge misdirected the jury when he interrupted Ms. Weekes Q.C. during her trial speech to the jury in relation to references that Malika Gumbs had been in the company of a male friend, who had been reported to the police in relation to firearm offences, when such evidence had been confirmed during the course of trial by a Crown witness, Detective Constable Beach.*

38. In his summation the trial judge stated at page 2360:

> *You will recall I rebuked Ms. Weekes in her closing speech to the extent that she tried to suggest that the evidence about his fixing guns and so on, what his wife*

> *said, had come from the police. The suggestions that Counsel put to witnesses, unless they are accepted by a witness, are not evidence, or unless they call evidence to back up the suggestion. If a suggestion is put to a witness and denied, it dies; it falls there and has no evidential status unless it is independently backed up. And it doesn't matter where that suggestion came from, because even if it did come from the police, even if it came from his wife, it can't be tested in cross examination in this court before you and that's why I stopped that.*

39. Mr. Daniels submitted that this interruption by the judge caused great prejudice to the appellant. In our view the trial judge is entitled to interrupt counsel when inaccurate remarks are being made. In any event we do not feel that this interruption could in any way be prejudicial to the appellant. This ground is without merit.

40. **Ground 5:**

> *That the learned trial Judge misdirected the jury, on numerous occasions, cited individually in the written submission, throughout the course of his summing-up which led to a substantial miscarriage of justice and which greatly prejudiced the safety of the appellant Bradshaw having received a fair trial.*

The Court has not been referred to any directions which we consider to have been mis-directions on the part of the trial judge which would lead to an unfair trial. This ground of appeal is without merit.

41. **Ground 6:**

> *That when considering the evidence which exists against the appellant Bradshaw, together with the risk of prejudice and bias suffered against him, we invite your Lordships to consider the principle as found in R v Casper and consider whether there is a lurking doubt in your minds that the verdict of the jury should be set aside on the ground that in all the circumstances of the case it is unsafe.*

42. Having considered the evidence presented by the prosecution and the defence and the directions of the trial judge, we find that there was evidence on which the jury could reasonably come to the conclusion, as they did, that the appellant was guilty of the charges. This ground of appeal also fails.

43. It was for these reasons we dismissed the appeals of the appellants Anderson and Bradshaw.

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Zacca, President

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Evans, JA

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Stuart-Smith, JA