The Court of Appeal for Bermuda

CRIMINAL APPEAL No 17 of 2011

Between:

ANTONIO DONOVAN DUDLEY MYERS

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, JA
Auld, J.A.

Appearances: Ms E Christopher for the Appellant
Mr R Field, Mr C Mahoney and Ms N Smith for the Respondent

REASONS FOR JUDGMENT

Date of Hearing: **8, 9 & 15 November 2012**

Date of Judgment: **22 November 2012**

EVANS, JA

1. The Appellant, Antonio Myers, was convicted on 28 March 2011 after a trial lasting nine days before the Hon. Justice Carlisle Greaves and a jury of the offences of murder and of using a firearm whilst committing that murder. The verdict was unanimous. On 23 September 2012 he was sentenced to life imprisonment for the offence of murder and to serve a

minimum of 38 years before eligibility for parole, and to ten years' imprisonment, concurrent, for the firearms offence.

2. His appeal against conviction was heard by the Court over three days in November 2012. On 22 November 2012 the appeal was dismissed and the appeal against sentence, with the consent of both parties, was adjourned pending the hearing by HM Privy Council of the appeal in *Selassie vs. The Queen.*

3. Our reasons for dismissing the appeal against conviction were as follows.

The shooting

4. Kumi Harford, the deceased, was shot and killed as he drove his car on Mission Lane in the St. Monica's area of Pembroke Parish, shortly after five a.m. on Saturday 5 December 2009. Two weapons were used to fire at least sixteen projectiles at the car, and the deceased was killed instantly by gunshot wounds to the back and shoulders and by one shot through the head. The shots were fired from at least three positions, from the front passenger's side and from front and rear on the driver's side. Probably there were two assailants.

5. The car was a distinctive colour, described as 'candy blue'.

6. There was evidence from Edwin Darrell, a self-confessed drug addict for about forty-four years who was living in a tent in the Parsons Lane area, that he heard about five gunshots on the morning in question, at a time which he said was about 4.45 a.m., and that later when he made his way towards Parsons Road he met the Defendant, whom he had known since he was a child, who told him that he had finished doing a job, killing Kumi Harford "up in the 42nd." and that he had some clothes for him to get rid of. He said, "That's a tall order, I don't want any part of that" and that the Defendant asked him if he knew any way of getting rid of some clothes. He replied that he knew there were two ways people have done it, "there is some acid or you can burn them". He said the Defendant asked him if he would do it for him and he said no. The Defendant became angry and asked him 'where was Sykie' meaning another drug addict

named Andrew Laws who also lived in a tent nearby. The witness told him, and the Defendant left saying that he would go and see if Sykie would do it for him.

7. Edwin Darrell then went to the "Middle Town, Bottom Road area by the blue house and the yellow house" where he saw the Defendant "and some other guys" – the Defendant and two others whom he identified by name - "in the area where they normally gather" and that in the space between the two houses a fire was burning "with some clothes being put on it". As he climbed the steps towards the Top Middle Town area he heard someone sing out "the man is coming" which he knew meant 'the police', and "there was a lot of scatter as the guys were running away".
8. Two police officers were in police vehicles at the gas station in Paget when they heard a radio report of the shooting, at 5.05 a.m. They returned to their headquarters to collect weapons and headed for the Middle Town area. As they approached, they smelt smoke and came across a fire "at the back of the blue house" on Middletown Lane. They used a fire extinguisher to put out the fire and found a pile of partly-burned clothing which they described as the "contents of the fire". This included a pair of jeans, a jacket, a pair of Nike sneakers and a pair of gloves.
9. Samples of the Defendant's DNA were taken from the clothing, and at the trial counsel for the Defendant admitted that they were his. There were also traces, which the expert witness called by the prosecution said were GSR (gunshot residue), distinguishing that from traces of the fire extinguisher fluid. An expert witness called by the defence contended that GSR evidence was unreliable, and much evidence was directed to the issue whether the GSR traces could have resulted from contamination from other sources after the clothes were in the custody of the police.
10. Andrew Laws ("Sykie") heard the gun shots and later, at about 7 a.m., he went to Middletown where he saw the Defendant and another person whom he identified by name, at the yellow house in Middle Town Lane,

about three minutes` walk from his tent. They were having a conversation and he heard the other man tell the Defendant "He should have brought the fucking clothes to him, Sykie". The speaker was angry, and the Defendant said "Cool it. Cool it. Let it go." As he was leaving, the witness discovered a burnt patch of grass at the back of the blue house. He said in evidence that he had an idea why the clothes would have been brought to him, because it was known that he had got them, nobody would have found them.

11. The defence challenged Laws` evidence, not only on the general grounds indicated below, but also on the specific ground that the area of the fire could not have been deserted at that time, as the witness said that it was.

12. It was suggested to both Darrell and Laws that they had concocted their evidence and gone to the police because a substantial reward, of $100,000, was offered for information regarding this (and other) shootings, which was especially attractive to them because they could escape from their lives as drug addicts living in tents and possibly leave Bermuda altogether. It was alleged that they had seen the advertisements and colluded together.

13. The Defendant elected not to give evidence, but there were two defence witnesses. First, the GSR expert referred to above, and secondly, the Defendant's mother. She lived just next to Middletown with her daughter and other family members. She said that the Defendant usually lived with his girlfriend but stayed at her house sometimes, and when he did so he slept on the couch. She said that she woke during the night and went to the bathroom at about 4.30 a.m. when she saw the Defendant lying on the couch. She did not say whether he was awake or asleep or whether either of them spoke. She returned to bed and slept until about 9 a.m.

14. Her reference to the Defendant's girlfriend was understood to mean a Mrs Wolffe with whom he had lived previously, together with their three-year-old daughter. There was evidence, however, that at the relevant time

he was beginning an association with another lady, Rogernae Lightbourne, who lived with her aunt, named Neika Daily, at what was described as the yellow house at Middletown near where the fire was discovered. He ceased to live with Mrs Wolffe either before or after the relevant date.

The police officers` gang evidence

15. The Judge at the outset rejected a defence submission that "the gang evidence to be given by Sergeant Alexander Rollin" should be excluded; he referred also to the evidence of Det. Const. Vernelle Burgess and of a firearms expert Mr Dennis Maguire. He described the evidence of P/Sgt Rollin as follows –

"It refers to the existence of gangs in Bermuda. It refers to two particular gangs in particular, the Parkside and the 42nd Street Gang, also known as the 42 Gang, how it`s made up and how it operates.

It purports to name the Defendant as a member of one gang, the Parkside Gang, or Middle Town Gang, an offshoot of that Parkside Gang or a subsidy [sic] of that gang; and the 42nd Street Gang, which is a gang which the deceased in this case is alleged to belong [to]".

The defence submitted that the evidence was excluded, as evidence of bad character, by section 16 of the Evidence Act 1905. The prosecution submitted that "the evidence should be admitted as background evidence, and in particular that it is relevant to the issue of motive, the motive of the Defendant, in these circumstances, for the shooting or participation in the shooting of the deceased in this case".

16. The Judge found that the evidence "is relevant to the issue of motive in these circumstances. It is evidence necessary for the prosecution to explain why the Defendant would have participated in the shooting of the...deceased...."(Transcript Day One p.112).

17. P/Sgt Rollin, before giving evidence, was asked about his experience and qualifications. He was a member of the Gang Targeting Unit, which as he later explained consisted of himself and three other officers who

worked closely together, patrolling in uniform together either on foot or in two police vehicles. This, he said, "allowed me to see the – evolution of what we ---we used to call loosely organised groups, and now they've evolved into what we refer to.....as gangs". This experience had enabled him to "get an understanding of the ways they identify themselves, their geographical locations and structures within the gangs". In addition, he had received "formal training" both locally and in Washington from the FBI [of the USA]".

18. On that basis, counsel for the prosecution asked for his evidence to be admitted as that of "an expert in gang intelligence and gang targeting", and the application was granted.

Expert witness

19. Miss Christopher, counsel for the Appellant, for whose careful submissions we are grateful, queried whether P/Sgt Rollin properly attracted the description of an expert, but she did not press this matter in argument, concentrating on whether the evidence was relevant and, if so, whether it was inadmissible or should be excluded as evidence of bad character or of a propensity for reprehensible conduct.

20. For the reasons given in our judgment in the appeal of *David Cox* (majority judgment dated 22 November 2012) we hold that the Judge cannot be criticised for describing P/Sgt Rollin as an expert witness, nor for treating his evidence as that of an expert, as well as a factual witness. We therefore return to consideration of what his evidence was.

Sgt Rollins' evidence

21. Sgt Rollin said that he had known the Defendant for eight years, and had seen him "on almost a daily basis" either on the porch of No.11, Middle Town Lane (the "yellow house" referred to above, though he described it as "peachy") or in the area between that house and No.9 (the "blue house"). He regarded him as an high-level member of the Middle Town gang whose 'turf' was Middletown Lane and adjacent roads and which was associated with the Partkside Gang from the Court Street

area. The deceased, Kumi Harford, was a "high-ranking member" of the 42nd Street Gang which "occupied" St. Monica's Road and "the many side street that come off it". He was asked whether he knew David Cox, whom the jury had heard was involved in an altercation at the Devonshire Recreational Club on the same morning, about an hour before the shooting. He said that he did know him and considered him to be a member of the 42nd Gang.

22. Sgt Rollin answered many questions about other individuals whom mostly he identified from photographs as members of the Parkside and Middletown Gangs. These included one Jahkeil Samuels who he said was a 'shot-caller' of the Parkside Gang, which he defined as "a high ranking member of a gang that will give orders to the lower ranking members of the gang". Jahkeil Samuels is the son of the witness Andrew Laws ("Sykie"). He said that No.11 Middle Town Lane was the home of Neika Daily and of her son, 'Juju' Williams who was a gang member. He was asked in cross-examination about the girl, Rogernae Lightbourne, who also lived there and whom he said he had seen in that area, and in re-examination he said that her brother was a high-ranking member of the Parkside Gang and that he considered that she was a member of that gang. The jury had also heard that Neika Daily was the other person involved in the altercation at the Devonshire Recreational Club, where David Cox had thrown a drink in her face.

23. Regarding gang activities, Sgt Rollin said that he associated the Parkside and Middle Town Gangs with the sale of controlled drugs, as well as acts of violence. The violence could be anything from simple assaults to robberies, up to the use of firearms and attempted murder and murder. In the last three years the feud between Parkside/Middletown and the 42nd Gang had escalated to new heights. "The root cause, the exact root cause is unknown, but I'm.....aware it revolves around the sale of controlled drugs". He added "we've seen a series of attacks, which lead to retaliatory attacks, and this is now a

backward and forward between the gangs....One gang will attack another gang, either a member of the group of - - a group of them, and then that gang will seek revenge on that gang that attacked them. But it ---- it doesn't necessarily have to be the original attacker. And ---- any attack on one gang member will be considered an attack on the entire gang.....We're seeing trends where it may be difficult to attack an actual gang member, and ..... where friends and family may be attacked."

24. Sgt Rollin was asked in cross-examination about a number of individuals, identified by name and from photographs, in relation to where they lived and gang membership. It was suggested to him that he did not know gang members personally, and he replied that he knew them "Very well". Asked "how it worked", he said "I spend a lot of time on patrol and.....I see them more than I do my own family" and there were some whom he knew better than his own family. Asked about his sources of information, he said that informers gave the police "a very small amount", and that he and his colleagues shared information between themselves, keeping computer records. He denied the suggestion that he was reliant on information provided by others.

25. A written report from the firearms expert, Mr Dennis Maguire, said that two weapons were used to fire a total of sixteen [16] shots at the deceased, one of .40 calibre and the other 9mm., and that both weapons had been used in other shootings recorded by the police. D/Const. Vernelle Burgess whose duties were "to develop schedules of data provided by forensic experts..... employed by the Bermuda Police Service" said that six other recorded offences involved the .40 calibre (between 21 February 2009 and 27 November 2010, including three cases classed as murder and three as attempted murder) and two others the 9mm., one classed as murder on 17 December 2009 and one as attempted murder on 21 February 2010. Although arrests had been made, so far as she was aware no person had been charged or convicted of any of the other offences. She was asked whether "from her experience" it would appear

that gang members share the same weapon as they do not have access to multiple weapons, and that firearms available to gang members are usually hidden in an area within easy access of gang members, and she replied "correct" to both questions. These were asked as leading questions, but she added in her own words that all the linked firearm offences mentioned before, with one exception, "were committed in the St. Monica's Road environs of Pembroke Parish". That was in the area of the 42nd Gang and she attributed the shootings to the rival Parkside gang.

26. The cumulative effect of the police evidence, therefore, was that the deceased was a member of the 42nd Gang and the Defendant of the Parkside/Middle Town Gang. The murder took place in the area of the 42nd Gang, and two weapons were used which were also used in eight other cases of murder and attempted murder, all but one in the same area. Some of the victims were identified as 42nd Gang members. There was a bitter feud between the two gangs, and when one gang sought revenge for an attack by the other, the retaliatory attack might be carried out by any gang member and against any member of the opposing gang or its associates. The 'yellow' house at No. 11 Middle Town was where the Defendant and other members of the Middle Town Gang "hang out and carry on the drug dealing" (Summation, page 1569).

27. There was unchallenged evidence that at about 3.30 a.m. on the morning in question, at the Devonshire Recreation Club, there was a dispute between Neika Daily and David Cox (who was, on the police evidence, a member of the 42nd Gang). She threw a bottle at him, which missed; he threw coke in her face, and she was pushed out of the Club by Darrell Wolffe (also known as Israeli Wolffe). Neika Daily and her husband lived at 11 Middle Town (the yellow house) and so did her son, 'Juju' Williams, who was a member of the Middle Town Gang, and Rogernae Lightbourne, who was her niece. Rogernae was at that time associating with, or

beginning an association with the Defendant, and he may have been staying there also.

28. The deceased, Kumi Harford, was present at the Club but may have left before the incident occurred. Later he was seen by a friend near her home at Footbridge Lane, Pembroke, and they went into her house. Shortly after he left she heard some gunshots, which caused her to scream. Another witness said that she saw him sitting in his car and talking to another male, at about 5 a.m. She said that she cautioned him that he should go home because of what had happened at the Club.

Grounds of Appeal – Gang Evidence

29. The principal Ground of Appeal is that the Judge was wrong to permit the Gang Evidence (meaning, the evidence of Sgt Rollin, D/C Burgess and Dennis McGuire: Skeleton Argument para. 37) to be called, and that the evidence given by those witnesses was such that evidence of bad character and a propensity to violence was before the jury, which ought to have been excluded.

30. Miss Christopher, for the Appellant, submits that the evidence

(1) was not relevant to any issue in the case;

(2) failed to connect the Appellant with any alleged rivalry between the gangs or with any violence or retaliatory action between them, nor did it indicate any animosity between him and the deceased;

(3) essentially was hearsay, in that Sgt. Rollin had no first-hand knowledge of their *modus operandi*;

(4) was inadmissible as evidence of the "opinion, inferences or beliefs of an individual police officer"; and

(5) was evidence of bad character, not rendered admissible by any common law or statutory exception to the general rule of exclusion.

31. Miss Christopher's Submissions included, in connection with the test of relevance, a chapter headed "An Excursus: Comparison with Current English Law"(pages 8-22). We agree with her that relevant statutory provisions, both in England and Wales and in Bermuda, provide a useful

parallel to the common law principles on which the submission is based, as does the line of authority on the admissibility of evidence of 'separate offences' in connection with the test of relevance to an issue in the instant case. We agree also that the essential issues are –

(A) Was the evidence relevant to an issue in the case?

(B) If so, should it be excluded as (i) hearsay, or (ii) opinion evidence?

(C) Being evidence of bad character or propensity to violence, should it be admitted either on the ground of relevance ((A) above) or as "explanatory background evidence" in accordance with the principle stated by Purchas LJ in *Pettman's* case (2 May 1985, (5048/C/82)?

(D) If admissible, should it nevertheless have been excluded under the Judge's discretionary power, when it caused prejudice to the Appellant, which outweighed its probative value?

32. These are substantially the issues raised by our conclusions as to the relevant law in our judgment in *David Cox vs. The Queen* (Criminal Appeal No.15 of 2011, judgment dated 22 November 2012, paragraph 17). We therefore proceed to consider them in the context of the present case.

Relevance

33. The Judge directed the jury as follows-

> "The relevance of this evidence therefore relates to the issue of motive.
> The prosecution is saying that it points to the reason and explains why the Defendant and his associates carried out the shooting and killing of Kumi Harford on the morning of the 5th December 2009.
> The officer said that the relationship between these rivals has escalated to the point where there are back and forth retaliations between them. And that an attack on one or his associate is an attack on all and a retaliation need not necessarily be by he who was attacked, but can be by another or others of the gang.

> And retaliations need not be against [him] who had attacked, but can be against his friends, family or associates.
> You may consider that a significant piece of evidence for the prosecution, of understanding the motive issue as it relates to the activity that night of the Defendant."

34. In our judgment, that was an accurate summary of the evidence, and the Judge's ruling that the evidence was relevant to the issue of motive was self-evidently correct. Relevance in this context means "logically probative" of an issue in the case, and it has been said to be a matter of common sense (per Lord Steyn in *R. v. Randall* [2004] 1 WLR 56 para. 20).

34. As regards motive –

> "Although the prosecution do not have to prove motive, evidence of motive was always admissible at common law in order to show that it was more probable that the accused committed the offence charged." (*Archbold(2012) para.13-30* citing *R v. Ball* [1911] AC 47 per Lord Atkinson at p.68).

Miss Christopher did not challenge this as a general proposition, but she contended that "the significant feature of the concept of motive is that it is personal to the actor, and that evidence of the Defendant's association with a gang "cannot provide relevant evidence of D's motive in committing an alleged crime of violence" (Skeleton Argument para. 8(iv)). In our view -

(1) Evidence of motive is, by its nature, secondary to other evidence, which suggests that the defendant committed the offence with which he is charged. Evidence of motive, on its own, could never identify the defendant as the person who took part in the shooting, but when he is identified by other evidence it is clearly relevant to the jury's decision whether he as an individual was guilty of the offence.

(2) The evidence given by Sgt. Rollin (as to the possible motive of a gang member) was relevant to the defendant as an individual in the present case. If it was his motive, the fact that it was shared by others is immaterial. The jury was entitled to find that there were two or more

assailants, and that the otherwise unexplained shooting had the characteristics of a gang attack, both suggesting that they all had the same motive as well as the same intention.

(3) If it necessary further to explain why the 'gang motive' is relevant to the Defendant in the present case, we would add that the Defendant alone had singled himself out by his oral confession to Edwin Darrell and by taking part in the attempted burning of his clothes shortly after the shooting, if the jury accepted the prosecution evidence on those matters, as they were entitled to do.

(4) If it is commented that the evidence of motive was unnecessary, if the jury accepted Edwin Darrell's evidence of the confession, we would prefer to say that the evidence of motive was relevant because it might assist the jury in determining that issue, and that the Judge would have been wrong to exclude it on the ground that in his view the prosecution had a strong case without it.

35. The ground for admission as "explanatory background evidence", in our view, depends on the same issue of relevance, and we shall consider it here. By definition, the evidence must be 'necessary' to give the jury a "complete and comprehensible picture" of the prosecution case, to which we would add "bearing in mind the prejudice that its admission will cause to the accused" though that may be where the issue as to admissibility overlaps the Judge's discretionary power to exclude the evidence in any event.

36. In our judgment, the gang evidence was admissible on this ground also. Without it, the jury would have heard evidence of the oral confession and of the clothes-burning, both unexplained and with no explanation for either from the appellant or on his behalf. Evidence of the previous incident at the Devonshire Club, if not also excluded, might lead the jury to infer that some 'gang motive' was the reason for what they might regard as a 'gang killing' in any event. The gang evidence in our view was the cement that bound the prosecution case together, and

without it the jury would have been deprived of what was 'necessary' to provide them with a "complete and comprehensible picture". With it, there was a possible motive or reason why the Defendant should confess to the killing, and a possible link between the events of that night. It was for the jury to decide whether they were sure that the explanation was correct.

Hearsay and Opinion

37. Sgt. Rollin said that his evidence was based on personal knowledge and experience of the individuals and the gangs involved, save to the limited extent that his colleagues and possibly, to a small extent, police informers may have contributed to police records matters that he had not experienced himself. His evidence in this case in our view supports the conclusions that we reached in *David Cox vs. The Queen* (above) and we do not repeat our reasons here. We hold that to the limited extent that he gave opinion evidence he was entitled to be classed as an expert witness and to give what might otherwise be regarded as hearsay evidence.

Explanatory background evidence

38. See paragraphs 36-37 above.

Judge's discretion

39. The Judge was not invited to exercise his discretion, as distinct from ruling as the admissibility of the evidence as a matter of law, but the issue has been raised in the appeal. In our judgment, having concluded that the evidence was admissible, on the grounds stated above, there was no reason why it should be have been excluded as a matter of discretion. There was no extraneous reason why the prosecution should be debarred from presenting their case as they sought to do, and the trial was not rendered unfair for the Defendant by their being permitted to do so.

Conclusion as regards 'gang evidence'

40. We hold that the evidence was properly admitted and that the Judge ought not to have excluded it.

Other Grounds of Appeal

The evidence of Edwin Darrell and Andrew Laws

41. The Judge's Summation is criticised on the ground that he "enhanced the credibility of both witnesses, particularly by adopting the comment "You may think that"". We have read the passages referred to and failed to find any justification for this criticism. We need say no more about it.

42. Specifically, it was submitted "Significantly, nowhere has the learned judge directed the jury on the risk of collusion between both witnesses". The suggestion of misdirection is incorrect. The Judge reminded the jury that Mr. Darrell "denied he lied or made up the story or colluded with Andrew 'Sykie' Laws to lie in order to get the reward or to get out of his predicament" (page 1612) and, in relation to Andrew Laws, that the defence case was that his reason for going to the police "was not noble at all, as he's trying to make out. It was simply for the money. And [what he said] he heard and saw was no more than a lying concoction" (page 1629), and "The purpose of that evidence, I think, is to establish that there was some sort of collusion between the two of them" (page 1630). The witness denied that there was collusion, and the Judge commented "Of course, the defence says the opposite. They're saying they were colluding" (page 1631). There was no evidence of collusion and their reasons for approaching the police separately, as they did, were fully explored in cross-examination and covered in the Summation. In our judgment, no further direction was required.

43. The final ground of appeal under this head was that the prosecution failed to disclose to the defence that Andrew Laws made a report to the police in another case of murder in which he said that a defendant, who was subsequently acquitted, had confessed to him about his involvement in it. In cross-examination, the witness said that the first time he went to the police was in connection with the present matter, and that was correct. He first approached them and was interviewed in January 2010, and again on 28 May 2010. He was interviewed in connection with the

other case on 1 June 2010. The information that he gave them then had come into his possession only in the latter part of May 2010. The prosecution said that that the later report was not relevant in the present case and did not need to be disclosed.

We agree with that submission and we note that Andrew Laws did not give evidence in the present case about any confession by the Defendant to him.

GSR expert evidence

44. Both the prosecution and the defence called expert witnesses as to the significance of GSR traces found in the clothing recovered after the fire, with particular reference to the consequences of fire extinguisher fluid traces being present also. The issue was fully dealt with in the Summation. The Appellant's submission is that the evidence should have been excluded by reason of it having "such an adverse impact on the fairness of the proceedings". We can see no justification for this ground of appeal, and we dismiss it.

Defence Alibi Witness

45. The evidence was given by the Defendant's mother who said that he was at her house at about 4.30 a.m. on the morning in question (see paragraph 13 above). The Judge gave, and repeated, a proper 'alibi' direction. The ground of appeal is that the Judge "eviscerated" the defence by referring to it in his introductory remarks as "a little bit of alibi", and by inferring that if it was not absolute, it was of no consequence at all. The latter arises from a passage where he said "You remember, though, ...defence counsel's address, which was that it was just – if it wasn't a clean alibi, it was evidence tending to show where he was at the time". It is not suggested that the quotation was not correct. What was being addressed, by counsel and the Judge, was the fact that, if the shooting took place at or after 5 a.m., the witness` evidence that he was at her house at 4.30 a.m. was merely evidence, using counsel's

words, "tending to show where he was at the time [of the offence]". We dismiss this ground of appeal also.

Conclusion

46. For these reasons, we would dismiss the appeal against conviction.

Postscript

47. Having read the Dissenting Judgment which follows, we add these comments –

(1) (Ref.paragraph 5) We did not express any view on the question whether, if the gang evidence were excluded, the conviction nevertheless would be safe, because on our analysis it was unnecessary to do so.

(2) If we make what seems to us, with respect, to be the unrealistic assumption that "gang evidence" was withheld from the jury, we agree that nevertheless the evidence was sufficient to support the conviction(s). We note, however, that there is some uncertainty as to the width of the exclusion; whether Sgt Rollin`s evidence, or only part of it (Dissenting Judgment paragraphs 3 and 12(4)) or his evidence together with that of Mr Denis Maguire and D/C Burgess (para. 29 above)? It is unclear also whether evidence of the previous incident at the Devonshire Recreation Club would be excluded also; no such application was made at the trial.

(3) We regard the assumption as unrealistic because the test of relevance is "common sense and experience" (para.34 above), and if the case had been presented without express evidence of gang connections, this Bermuda jury, in our judgment, would have inferred that this otherwise unexplained ambush shooting in the early hours of the morning was a gang killing.

(4) (Ref. paragraph 18) We regard Sgt Rollin`s evidence as essentially direct and factual, and we do not consider that the defence was under any disadvantage in challenging his evidence, so far as it concerned the Defendant, if it was incorrect. In fact, Leading

Counsel opened his cross-examination in that way, but soon realised that it would get him nowhere.

(5) We refer to the Practical Suggestions made in our judgment in *Cox* (paragraph 40) and in particular to the need to distinguish, at the outset, between factual, direct and hearsay, and opinion evidence contained in the police officer`s Witness Statement and to apply well-established rules of evidence accordingly. We doubt whether it is useful to categorise 'gang evidence' generally, without regard to these distinctions.

Signed

Evans, J.A.

Signed

Zacca, P

Auld, J.A.

Introduction

1. I too would dismiss Antonio Myers' appeal against his convictions of murder of Kumi Harford and of the use of a firearm in its commission. I do so on the strength of the direct factual and scientific evidence, summarised in paragraph 7 below, identifying Myers as one of the murderers. Identification was the only relevant issue before the jury. As the Judge put it in the opening remarks of his Summation (Transcript 9, p. 1496), "The defence in this case is, simply, not me, and a little piece of alibi". Such evidence was, in my view, highly cogent on that issue and an ample basis for safe conviction.

2. I agree with the reasons given by the President and Evans J.A. in paragraphs 42 – 47 of their judgment in rejecting various challenges to the Judge's admission of the factual and scientific evidence and as to his directions and non-directions to the jury on it.

3. However, I respectfully differ from them on the issue to which they have devoted, in paragraphs 15-41, most of their judgment, upholding: 1) the Judge's admission of and directions to the jury on a mixture of direct, hearsay and opinion evidence of a senior police officer Sgt Alexander Rollin as "expert" evidence going to Myers' membership of, or association with, a violent gang engaged in retaliatory warfare with another gang ("the gang evidence"); and 2) as to the correctness and adequacy of the Judge's directions on that evidence.

4. Accordingly, I repeat the unusual course that I took in the appeal of David Jahwell Cox (CA No.15/15A of 2011), of writing a dissenting as well as an assenting judgment.

Factual and scientific evidence of identification

5. Unlike the case of *Cox*, in which there had been an unsuccessful defence submission of no case to answer, no such submission was made on behalf of *Myers*. And, unlike in the President's and Evans J.A.'s judgment in *Cox*, where they hold, at paragraph 60, that the jury would have been entitled

to convict him on "the evidence of identification and the forensic (sic) evidence, standing on their own", they have expressed no such view in this case.

6. The sole issue for the jury here was whether the prosecution had properly proved to their satisfaction that Myers, at about 5 a.m. on 5th December 2009, was one of two or more men, each armed with a firearm, who fatally shot Harford as he drove his car on Mission Lane in the St. Monica's area of Hamilton. The intent of the men who participated in that shooting was plainly to murder or at least to do grievous bodily harm, for which they must obviously have had some motive.

7. The direct and scientific evidence relied on by the prosecution consisted of the following:

1) Harford was shot and killed as he drove his car along Mission Lane in the early morning of 5th December 2009.
2) At least two weapons had been used from different positions to fire at least ten shots into the car, killing him instantly.
3) Evidence of Edwin Darrell, a long-standing drug addict, who told the jury he had heard some gunshots at about that time and that, on his way to the scene, had met Myers, who was an old friend. On Darrell's evidence, Myers volunteered to him that he had just killed Harford, that he wanted to get rid of some clothes, and that he asked him to burn them for him. When Darrell refused to do that, Myers left him, saying that he would ask a mutual friend, Andrew Laws, to do it.
4) Shortly afterwards that morning Darrell saw Myers and some others in the Bottom Road area of Middle Town, putting some clothes on a fire and then running away when alerted to the approach of police.
5) When police officers arrived at the fire they saw and pulled from it a pair jeans, a pair *Nike* sneakers and a pair of gloves.

6) Andrew Laws gave evidence of seeing Myers and another man that morning near where the fire had been, arguing about what he, Myers, should have done with the clothes.

7) Scientific examination of the clothes showed the DNA of Myers and also traces of gunshot residue. He admitted at trial, through his counsel, that the clothes were his, but challenged, by expert evidence, the reliability of the gun-short residue evidence, maintaining that it could have resulted from contamination while in the custody of the police.

8) At trial, the evidence of Darrell and Laws was challenged, mainly as an alleged concoction or collusion to secure a reward of some $100,000 being offered for information about this and other shootings, an allegation that they both denied.

9) Myers did not give evidence, but called: i) a gun-shot residue expert, to the effect summarised in sub-paragraph 7) above, and ii) his mother, to say that she saw him lying asleep on a couch in her house at about 4.30 a.m. that morning – that is, about a half an hour before the killing of Harford.

The gang evidence as to motive

8. The Judge, after hearing submissions, allowed the prosecution to call Sgt Rollin to give a mixture of direct and hearsay evidence of fact and by way of opinion as an "expert" on gang "culture" and warfare in Bermuda. He was experienced as a police officer in the investigation of and bringing to justice persons involved in gang warfare, involving the use of firearms, arising out of drug-dealing and territorial disputes. The Judge ruled his evidence to be admissible, notwithstanding that it was likely to include evidence of Myers' bad character as a member or associate of a gang said to be involved in the killing of Harford. The Judge so ruled, on two complementary bases: 1) that, by reason of his training and experience, his evidence of fact and also opinion should be admitted as "expert" evidence on "gang intelligence and gang targeting" in Bermuda; and 2) that it was "necessary" to put this evidence

before the jury as explanatory and background evidence going to the issue of Myers' motive for killing or participation in the killing of Harford – the *Pettman* principle (unreported - 2 May 1985, CA (5048/C/82). There was no defence challenge to this evidence on the basis that it would be unfairly prejudicial to Myers as evidence of his bad character. This, no doubt, as the DPP, Mr Rory Field, observed in his submissions, was because his defence included an attack on the credibility and character of Darrell and Laws, which would inevitably result in his drug-dealing relationship with Darrell going before the jury.

9. The main thrust of Sgt Rollin's evidence was to characterise Myers and Harford respectively as high-level or high-ranking members of rival gangs. He said that both gangs were involved in drug-trafficking and violence to defend their respective territories and markets. He said retaliatory violence between them could be corporately or individually exacted, that is, not necessarily involving those immediately aggrieved in the gang seeking retaliation or those in the rival gang individually responsible for the grievance.

10. There was also evidence from a firearms expert, Mr Dennis Maguire, derived from examination of bullets found in the killing of Harford and those in other unlawful shootings the police had investigated, indicating that they came from the same two weapons.

11. Regardless, for the moment, whether this "gang" evidence was admissible or inadmissible evidence of fact or opinion, its potential relevance, as stated by the Judge in his Summation and the President and Evans J.A, in paragraphs 15 to 41 of their judgment, is that it went to motive and – thence in some way – in support of the direct and scientific evidence identifying Myers as one of the killers.

12. In my view, as in the appeal of *Cox*, that approach is unsound and so also is that based on the *Pettman* principle of explanatory or background evidence necessary to explain otherwise incomplete or incomprehensible aspects of the prosecution case. I say that for the following reasons:

1) if motive were a permissible route to supporting evidence of identification of Myers as one of the killers of Harford, the evidence would have had to show that he and not some other member or members of his gang had a retaliatory motive to kill Harford or some member of his gang. *Cf* the identification issue in *Tiraveanu v R* [2007] 2 Cr App R 295, [2007] EWCA Crim 1239 (a post-*Criminal Justice Act* 2003 case[1]), where Sir John Thomas P, at para. 26, identified the relevance of such species of evidence as going to an issue "whether it was the appellant who had committed the offences *and not some other person*" [my emphasis]. The "gang" evidence here did not do that.
2) Recourse of the President and Evans J.A. in paragraph 35 of their judgment to a general proposition in the 2012th edition of *Archbold* at 13-03, derived from an observation of Lord Atkinson in *R v Ball* [1911] AC 27, at 68, that evidence of motive would be enough to identify him as a matter of *probability,* is, with respect, misplaced. That was a case where the conviction was of incest between brother and sister, where there was clearly no issue of identification, only as to whether they had had an earlier illicit passion for one another. Probability, as standard of proof is alien to the most basic principle of a criminal law in a common law criminal trial, certainly on a critical issue such as identification, where only sureness will do.
3) A judge, when directing a jury as to the relevance and probative value of any evidence should direct the jury as to determinative issue or issues to which the evidence is directed and as to how it is relevant to and probative on that issue or those issues; see *Tiraveanu, per* Sir John Thomas, P, at paras 32 and 37. The trial Judge, in the passage from his direction, set out and approved by the President and Evans J.A. in paragraphs 33 and 34 of their

[1] Under section 101(1)(c), which reproduced the common law *Pettman principle*

judgment, did not give the jury a reasoned explanation of how, in the circumstances of this case, possible shared motive with others could serve as supporting evidence of identification. Nor do the President and Evans J.A. in their words of approval in paragraph 34 or further elaboration in paragraph 35(1) and (2), indicate the logical route by which a jury could rely on possible shared motive with a number of others as supporting evidence on which they could or needed to rely to render them sure of Myers' guilt. Far from it, the President and Evans J.A., in paragraph 35(1), acknowledge that the evidence of motive was secondary to the other evidence, and could not, on its own, have identified Myers as the person who took part in the shooting.

4) My view in short is that the gang evidence, regardless of other objections there may have been to its admissibility, did not provide any evidence, whether as to motive or otherwise capable, to a criminal standard of proof, of identifying or supporting other identification of him as one of the killers. For those reasons, I consider that Sgt Rollin's evidence should not have been put before the jury in the form that he gave it and that such direction as the Judge gave to the jury as to its relevance or otherwise to that issue was incorrect.

Pettman* – Necessary *explanatory or background evidence

13. For similar reasons, the further or alternative recourse of the Judge in his Summation and of the President and Evans J.A. in paragraphs 36 and 37 of their Judgment, to the *Pettman* principle, is, with respect, equally misconceived and unexplained. Why should it have been necessary to put before the jury this prejudicial gang evidence to provide the jury with explanatory background evidence in order to give them a complete and comprehensible picture of the prosecution case on the only issue they had to decide - whether he was one of the killers? It was perfectly clear on the factual and scientific evidence summarised in paragraph 7 above that the

shooters of Harford intended to kill him or at least do him serious bodily harm, whatever their motives. In my view, there was no point in, or necessity for, the prosecution to seek to put before the jury Myers' individual or corporate "gang" motive for involvement in support of that evidence of his identification as one of the killers. That is especially so, given that gang evidence fell short of singling him out from his gang associates so as to support the factual and scientific evidence identifying him

Unfairly prejudicial evidence outweighing its probative value – section 93 of the Bermuda Police and Criminal Evidence Act 2006

14. There is also the consideration whether the Judge, in any event, should have excluded this undoubtedly prejudicial "gang" evidence directed plainly to suggesting that Myers had a propensity to commit gang murder and deal in prohibited drugs (see para. 26 of the President's and Evans J.A.'s Judgment) especially given its, at best, marginal relevance and little or no probative force on the central issue of identification. The President and Evans J.A. adverted briefly to this consideration in paragraph 36 of their judgment referring to an overlap with the Judge's "discretionary" power to exclude the evidence in any event. With respect, the Judge has no such discretion. He has a duty at common law and under section 93 of the Bermuda [Criminal Code][2] to exclude evidence where it appears to him, on application by a defendant, that the admission of which "would have such an adverse effect upon the fairness of the proceedings that the court ought not to admit it". See *R v Chalkley & Jeffries* v R [2007] 1 WLR 3049,[1998] 2 Cr App R 295; followed in *Tirnaveanu v R* [2007] 2 Cr App R 295, per Sir John Thomas P, at para 28. There may be little difference in practice between the former discretionary exclusion of evidence on this ground and the statutory duty in section 93 superseding it, but it is now a matter of law, not discretion. In my view, the nil or slender relevant probative value of the gang evidence when put alongside its unfairly prejudicial effect should have prompted the Judge to exclude it pursuant to section 93 of the 2006 Act, or

[2] Reproducing section 78 of the E & W *Police and Criminal Evidence Act* 1984

at least to direct the jury in the clearest terms to disregard its unfairly prejudicial effect as to Myers' bad character. On the contrary, the Judge, in the passage from his Summation set out by the President and Evans J.A. in paragraph 33 of their Judgment, put his bad character at the heart of his misdirection to the jury on motive.

Conclusion on the appeal

15. It does not follow from my views (if correct) on the gang evidence that the convictions are vitiated because the Court of Appeal does not know the jury on what evidence the jury relied in convicting Myers. Many criminal appeals are against conviction where the trial Judge has had to direct them on the evidence as to various alternative or complementary routes to verdict. Often the route taken by the jury will be obvious, though not legally capable of expression in their oracular verdict. Sometimes the route may not be so obvious. But even in such cases the Court of Appeal, given its unavoidable ignorance of the jury's reasons for their decision, is entitled to proceed on the basis that they have considered the Judge's directions and have reached a verdict by one of the routes properly open to them on the evidence. The safety valve for justice is to be found in proviso (a) to section 21(1) of the *Court of Appeal Act* 1964, which provides that the Court may, notwithstanding that they are of the opinion that a point raised in the appeal might [or should] be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred, *i.e.* that the conviction is safe.

16. Here, as I have already said, there was ample and clearly admissible factual and scientific evidence, as summarised in paragraph 7 of this judgment, upon which the jury could safely find, in accordance with the Judge's directions on it, that that Myers was one of the murderers of Harford. The Judge clearly directed them at page 1548 of his Summation that, if they rejected or disregarded the gang evidence going to motive, they could still convict on the basis of the evidence they did accept. And he warned the jury more than once towards the end of his summation not to conclude that

Myers was guilty merely on the strength of the gang evidence; see Transcript 9, pp 1708-1909 and 1719 of his Summation.

17. I would, accordingly, hold, given the strong factual and scientific evidence going to identification and the Judge's warnings, that no substantial miscarriage of justice resulted from the Judge's admission of, and directions to the jury on, the gang evidence.

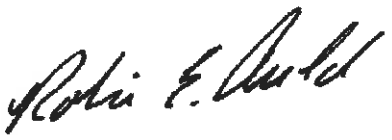
18. I would, therefore, dismiss the appeal against convictions.

Postcript - "Expert" gang evidence – its perils and problems for the defence

19. Whilst it is not necessary for my dissent on part of the Court's ruling on this appeal, I should not leave this judgment without expressing considerable unease about possible unfairness to the defence in the admission of gang evidence of this sort – a mix, as it was, of direct and hearsay factual evidence and opinion based on one and/or other form of evidence. It is not just a question whether Sgt Rollin qualified to be treated as an "expert" witness, entitling him to give both factual and opinion evidence. It will be seen from paragraphs 7 to 10 of my judgment in *Cox*, that I have reservations about reliance by the prosecution on gang evidence of the sort introduced in that case and this. I share with the E W Law Commission[3] a concern about its possible unfairness to the defence arising from the relative forensic weakness and authority of the defence in testing the integrity as well as the accuracy of the prosecution "expert" witness' evidence. How, for example, in such a case can the defence effectively probe and challenge the prosecution "expert's" evidence, whether by cross-examination or calling contradictory evidence? Cross-examination of a police officer as to direct evidence or hearsay or opinion is likely to be met, as it was in some respects here, with bland generalisations or assertions based on a mix of direct knowledge and un-particularised information obtained from others. A defence "expert" in this field, who, even if he could be found, could not realistically or authoritatively compete with his prosecution

[3] See Law Commission Consultation Paper No.196 [2010] and Law Commission Report No. 305 [2011]

counterpart. And there is always the uncomfortable reality that a police officer giving "expert" evidence, certainly of this sort, for the prosecution, is unlikely to be readily perceived as impartial - one of the qualities normally expected of an "expert" witness.



3rd December 2012

Auld, JA