# The Court of Appeal for Bermuda

## CRIMINAL APPEAL No 15/15A of 2011

Between:

**DAVID JAHWELL COX**

Appellant

**-v-**

**THE QUEEN**

Respondent

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

**Appearances:** Mr L Mussenden for the Appellant
Ms C Clarke, Ms L Burgess and Ms T Burgess for Respondent

**JUDGMENT**

**Date of Hearing:** **5, 6 & 7 November 2012**

**Date of Judgment:** **22 November 2012**

1. The deceased, Raymond Troy Rawlins, known as 'Yankee', was shot and killed at the Spinning Wheel Night Club, Court Street, Hamilton shortly after midnight on 8/9 August 2010.

2. The defendant was arrested next day and was charged with the murder of the deceased, and he appeared at trial in the Supreme Court before Justice Carlisle Greaves and a jury on 23 May 2011. On 10 June 2011 he was convicted of the offences of murder and of using a firearm, and he was sentenced to life imprisonment with a concurrent sentence of ten years' imprisonment for the firearm offence. He must serve 38 years of his sentence before he is eligible for parole.

3. There was eye-witness evidence that the victim was shot at short range by two men who followed him into the club and who made their escape immediately afterwards in a car which was later found and identified.

4. An eye-witness who had known the appellant for many years identified him as one of the attackers, and there was forensic evidence which connected him with the crime.

5. The prosecution also relied on what was described as 'gang evidence'. That evidence was given by police officers who were members of special police units concerned with criminal gangs who operated, they said, in different parts of Bermuda and who habitually used criminal violence against each other. They said that the deceased was a member of one gang, known as Parkside, and the defendant of another, known as 42nd Street, and that shortly before this shooting, and at another venue, a member of the 42nd Street gang, named Julian Washington, had been attacked by a member of the Parkside Gang (or of the Mid-town gang with which it was associated). That was sufficient to explain, he said, why the defendant, a leading member of the 42nd Street gang, together with another person, had shot and killed the deceased, who was a member of the Parkside gang, in an apparently unprovoked attack on the night in question.

6. The senior and more experienced of the two witnesses, Police Sgt. Rollins, said that "in the last three years [an] ongoing feud between Parkside and the 42nd Gang has escalated to new heights. This escalation has led to numerous acts of violence and murder between both factions", and that this had come to encompass a series of retaliatory attacks, meaning that if a gang member was insulted or assaulted, "that act would be perceived as an act against not just that person, but the entire gang membership", adding that a higher-ranking gang member "may order a lower-ranking gang member to carry out a revenge attack on the opposite gang" which "could be an attack on any of the rival gang membership", not limited to the person who carried the original attack.

7. The second police witness was Detective Constable Shawnta' Edmonson who gave evidence about the earlier shooting of Julian Washington at the Mid-Atlantic Boat Club at about 12:45 pm on the 7th August 2010.

8. Mr John Perry QC, counsel for the Defendant, now the Appellant, submitted at the outset of the trial that the 'gang evidence' was inadmissible and should be excluded. He supported his submission with a document entitled "Objections to gang evidence" which we have seen. The burden of the Submission was that the evidence proposed to be relied upon by the Prosecution to the effect that that there was an ongoing feud between the two gangs, and that the Defendant was a member of the 42nd Gang, could not prove that the defendant was personally involved in the feud, or had any dealings with the deceased, nor was it admissible as evidence that the defendant had a propensity to violence. In his oral submission, Mr Perry contended also that the evidence was inadmissible as hearsay evidence. Miss Clarke, for the Prosecution, submitted that it was admissible as explanatory background evidence and as evidence of motive, and that it was relevant to the issue whether the killing was pre-meditated, as the prosecution alleged.

9. The Judge rejected the defence submission. There was some confusion as to whether he was ruling on the admissibility of the evidence, or as to extent to which it might be referred to in the prosecution`s Opening Statement to the jury. The Judge ruled-

> "The prosecution shall be allowed to make reference to the gang evidence in their opening statement in a limited fashion, that is, to the extent that they may or may not hear evidence about 42nd and Parkside gang, et cetera, in this case."

He then considered the contents of D/C Edmonson`s Witness Statement and excluded part which he held was hearsay. Mr Perry submitted that what was left, which was tendered as 'gang evidence', was not relevant, to which the Judge replied "I overrule you". A subsequent exchange is transcribed as follows-

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|---|---|
| "MR.PERRY: | And my Lord`s ruling it`s admissible- - |
| THE COURT: | The entire evidence ---- |
| MR.PERRY: | ---and does not flout the hearsay rule. Is that my Lord`s – |
| THE COURT: | In my view, no. |
| MR.PERRY: | So be it." |

10. Subsequently, in the course of the trial, both D/C Edmonson and P/Sgt Rollins were called as prosecution witnesses, and in the light of the Judge`s earlier Ruling no further objection was taken to the evidence they gave.

11. Mr Larry Mussenden, counsel for the Appellant (who did not appear at the trial), submits that the evidence was inadmissible as a matter of law and was wrongly admitted, or that the Judge had a discretion to exclude it which he ought to have exercised in favour of the Appellant having regard to its prejudicial effect on the fairness of the trial.

**Other cases**

12. We were told that a similar issue has arisen in other cases heard by the Supreme Court in recent years, and we have heard the arguments in an appeal by Antonio Myers from his conviction in one of them. Essentially the same legal issue arises in both cases, but the facts and circumstances of the two cases are different and separate judgments are called for.

13. This Court held that 'gang evidence' was admissible in *Quincy Brangman v. The Queen* (Criminal Appeal No.1 of 2011) but we are satisfied that that

decision was limited to the circumstances of the particular case and that we should rule on the issue as a matter of principle, both in the present case and in *Antonio Myers v. The Queen* in which judgment is being handed down at the same time as this. The issue was also considered by the Supreme Court in *The Queen v. Royunde Stevens* (2011 No.39) and by the Court of Appeal in *Warner v. The Queen* (Criminal Appeal No. 11/11A of 2011)

**P/Sgt Rollins as "expert"**

14. When Sgt Rollins was called as a witness, before giving his evidence in chief he was asked a number of questions by counsel for the prosecution as to his experience and knowledge of criminal gangs and of gang culture, after which there was the following exchange between counsel and the Judge –

> "MISS CLARKE: My Lord, at this time I would ask that the witness be tendered and accepted as an expert in relation to gang rivalry, gang association, and gang geographical location.
> THE COURT: Declared a gang expert."

Counsel for the Defendant, John Perry QC, did not intervene or comment, no doubt because of the Judge`s earlier ruling that the evidence could be given. When he cross-examined Sgt. Rollins, he asked various questions as to the membership of different gangs and related matters.

**Grounds of Appeal**

15. The first ground of appeal was that the Judge was wrong to permit Sgt. Rollins to give evidence as an expert witness. The second ground involved the wider issue whether the 'gang evidence' was properly admitted. Mr. Mussenden submitted that evidence of gang membership is irrelevant to the issue whether the individual defendant committed the alleged offence, whether murder or other forms of violence, against the particular victim. The fact of membership cannot prove that the defendant committed the particular offence. Further, the prosecution is debarred from leading evidence that the defendant has a bad character and is of a violent disposition or has a propensity to violence; in effect, it was seeking to prove 'guilt by association' which it is not permitted to

do. Alternatively, even if the evidence was of some probative value, it was so prejudicial to the Appellant that the Judge ought to have excluded it in the interests of a fair trial.

16. The Appellant`s submissions may be summarised as follows –

(a) first, the evidence of gang membership etc. was irrelevant to the issue whether the individual defendant shot the particular victim, and it was inadmissible for that reason;

(b) second, the evidence was inadmissible as tending to show bad character and a propensity to violence, as well as being highly prejudicial to the defendant; alternatively, the Judge should have exercised his discretion to exclude it, for those reasons;

(c) third, Sgt. Rollins was not an expert witness, properly defined, and his evidence which had been put before the jury on that basis should be excluded altogether; alternatively, any evidence he gave as to his opinions or beliefs should be exclude, for the same reason; and

(d) fourth, that the Judge by permitting him to be described as an "expert" and by repeatedly calling him such, in a case where other witnesses were scientific experts, properly so called, had created an impression for the jury that his evidence was entitled to greater respect than if he had been called simply as a factual witness.

**Relevant principles and rules of law**

17. These are not in dispute. (1) All evidence must be relevant to an issue in the case, meaning that it must be "logically probative" of a fact or matter that is in dispute between the parties and which one party or the other therefore is required to prove. (2) Witnesses may give evidence only of matters within their own personal knowledge; 'hearsay' evidence is rigorously excluded in criminal prosecutions, subject only to clearly defined exceptions, mostly by statute. (3) One exception to the rule is that 'expert' witnesses may give evidence of their expert opinions based on facts of which they have no personal knowledge, provided that they have relevant qualifications or expertise enabling them to do so. (4) Evidence that the defendant has committed previous offences, or is of

bad character, or has shown a 'propensity to violence', is generally not regarded as relevant to the issue whether he has committed the particular offence alleged against him, and it is therefore inadmissible : *Makins v. AG for NSW* [1894] A.C. 57. (5) Even when evidence of bad character etc. may be regarded as relevant to an issue in the case, the trial judge has a discretion to exclude it, in the interests of a fair trial, when in his view the prejudice caused to the defendant by admitting it would outweigh its probative value to the prosecution case: *R. v. Christie* [1914] A.C. 545.

**Applying the principles**

**(a) Relevance**

18. The first question is whether Sgt. Rollins` evidence was relevant, in the sense of 'logically probative' of an issue in the case. He said that the defendant was a member of the 42nd. Street gang; the deceased was a member or past member of the Parkside gang; there was a bitter feud between the two gangs which had resulted in cases of murder and violence; that there had been a provocative incident shortly before this murder in which a member of the 42nd gang had been shot by a member of the Parkside gang; and that when a gang member carried a revenge or retaliatory attack, the victim might be any member or associate of the opposite gang, whether or not he had been involved in the earlier incident.

19. The Judge explained the relevance of the evidence to the jury, as follows –

> "You have heard of the Defendant`s association with the 42nd. Street gang and how this gang is, or members of this gang appear to be responsible for many other shootings in Bermuda. That evidence really is merely to establish a motive by the Defendant to carry out – let me put it another way. It is merely to assist in establishing a motive why the Defendant carried out this offence with which he`s charged and being tried before you, to establish his opportunity to access the firearm and to carry out the enterprise.
> It is not intended in any way to suggest that the Defendant is in any way responsible for the other shootings that occurred in Bermuda, whether by the 42nd gang or not."

20. In our judgment, the Judge was undoubtedly correct. Without the evidence, the jury would not know of any reason or possible reason why the defendant should shoot the deceased with intent to kill or seriously injure him, something that was relevant to their decision whether or not the defendant was the person who shot him, as the prosecution alleged.

21. We should emphasize that evidence of motive is, by its nature, secondary to other evidence which suggests that the defendant committed the offence with which he was charged. Evidence of motive, on its own, could never identify the defendant as the person who carried out 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.

**(b) Direct or hearsay evidence?**

22. When Sgt. Rollins gave evidence, he said how long he had been associated with the Gang Targeting Unit and the nature of their activities; that he had personal knowledge of the gangs` activities and what areas they controlled; and that he knew from his personal observations that the defendant, the deceased and Julian Washington were involved with them. He also said that when a gang member carried out a revenge or retaliatory attack, the victim might be any member or associate of the opposite gang, regardless of any connection he might have had with the previous incident.

23. Sgt. Rollins was not cross-examined as to extent to which his evidence might have been derived from other officers or from records kept by the Unit, but he said in terms that his evidence was based on his personal knowledge of the individuals concerned and on his own observations of them and of their association with other persons with whom, in his phrase, they "hung out" at properties where the gangs were based. To the extent that his evidence was factual, therefore, it clearly was direct, and there is no basis for excluding it on the ground that it was hearsay. However, there is room for argument as to whether his evidence as to the gangs` attitude to retaliatory attacks – whether the victim might be chosen at random from members or associates of the other gang – was based on his personal knowledge and experience of how gang

members have behaved on certain occasions in the past, or on evidence provided by other officers, or whether he was expressing his opinion based on a mixture of both. That leads to the question whether Sgt. Rollins was entitled to give 'opinion' evidence.

**(c) Opinion/expert evidence**

24. The law distinguishes between 'fact' and 'opinion' evidence, though in a practical rather than a metaphysical way (see *Phipson on Evidence, 16th ed. Para. 33.01*), and the general rule is that opinion evidence can only be given by a person who has the necessary qualifications and experience to form and express a view on the particular issue in question. When that involves what has been called "medical expertise or scientific or commercial expertise" (per Rix L.J. in *Regina v. O* [2010] EWCA Crim.2985 at para. 27) the witness is readily classified as an 'expert' whose expertise must be proved and upon whom certain duties are imposed, for example, that he must give independent assistance to the Court where he is competent to do so (see *Blackstone's Criminal Practice (2012) para.F10.23 "Duty of Experts"*). An expert witness may and usually will have no personal knowledge of the facts of the particular case, and the 'primary' facts in regard to which he expresses his opinion must be proved by factual witnesses before his expert evidence can be admitted –

> "....those who call [experts] as witnesses should remember that the facts on which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked." (per Lawton L.J. in *R. v. Terence Stuart Turner* (1974) 60 Cr.App.Rep.80 at 82).

25. It does not follow from this, however, that a factual witness cannot give opinion evidence when he has the necessary experience and qualifications to do so. In *R v. Trevor Alan Oakley* (1980) 70 Cr.App.Rep.7 a police constable with many years` experience of road traffic duties who was qualified as a road accident investigator and who had attended more than 400 fatal road accidents gave evidence, not only of his observations at the scene of the accident, and produced a plan which he had prepared, but also "gave expert evidence about his theories and conclusions". The ground of appeal was that his evidence

which related to his opinion as an expert was wrongly admitted. The Court dismissed the appeal, holding that –

> "...a police constable was not prevented from giving evidence if the subject in which he is giving evidence as an expert was a subject in which he had expert knowledge and was restricted and directed to the issues in the case.....there was no question at all of his having gone beyond the areas of his competence" (headnote page 7).

His competence was described in the judgment of the Lord Chief Justice, as follows –

> "...a highly experienced police officer who has a very deep and conscious experience of the problems of reconstructing road accidents" (p.9).

26. It is the daily experience of the Courts whether in Bermuda or in England and Wales that police officers are permitted to give that kind of opinion evidence, not only with regard to road accidents but also in cases concerned with the unlawful possession, use or sale of drugs, provided always that they have the necessary expertise and their evidence is relevant to the issues in the particular case. In giving that evidence they are properly regarded as expert witnesses, but that does not mean that they cannot be factual witnesses also, who themselves prove the primary facts on which their opinion is based.

27. In our judgment, Sgt. Rollins was such a witness in the present case. He had personal knowledge of the individuals concerned – the defendant, the deceased and the victim of the earlier shooting who was a member of the 42nd gang – and of the persons they associated with, and of the territories they claimed to control. He was amply qualified by his experience and training to describe the activities and *modus operandi* of the gangs. Nor was it necessary to prove, by direct i.e. non-hearsay evidence, all the sources of information on which his opinions were based. In *R. v. Hodges and Walker* [2003] 2 Cr.App.Rep.15 (noted at [2003] Crim.Law.Review 474) expert evidence was admitted from a police officer of long experience "as to the method of supply of heroin (in £20 bags), the local purchase price, and that 14kg was more than

would have been required for personal use alone". The Court held that the evidence was rightly admitted and that its reception was consistent with earlier authorities, including *R. v. Abadom* (1983) Cr.App.Rep. 472 where Kerr L.J. "identified the need to establish "primary facts" by non-hearsay [evidence] as a pre-condition of the reception of expert evidence". That did not mean, however, that the sources of the drug officer`s expertise were required to be proved as "primary facts", and it was not necessary "to call the various people to whom he had spoken to glean the information before he could give his evidence". The Review editor`s commentary distinguished between "scientific" evidence that might be given by a suitably qualified expert witness, and an officer "who is an 'expert' as to the regular habits of drug users and dealers, in the area where he works" (page 474).

28. For these reasons, in our judgment, Sgt. Rollins was entitled to give "opinion" evidence on primary facts that were proved by direct i.e. non-hearsay evidence given by himself and other factual witnesses, notwithstanding that his expertise may have been based, in part, on information he had obtained from others.

**(d) Evidence of bad character/propensity to violence**

29. The basic rule is not in doubt - such evidence is inadmissible and must be excluded : *Makins v. A.G. for N.S.W.* (above).] However, the rule is subject to exceptions, many now statutory, one of which was expressed as follows by Purchas L.J. in an otherwise unreported case, *R. v. Pettman* (2 May 1985, see *Blackstone`s Criminal Practice (2012)* para.F12.17 –

> "Where it is necessary to place before the jury evidence of part of a continual history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete and incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence".

*Blackstone* describes this as "explanatory evidence" and adds that it was "carefully scrutinised at common law to ensure that it did not become a

backdoor method of smuggling in inadmissible evidence of propensity" citing *R. v. Dolan and Underwood* [1999] Crim. L.R. 227.

30. In our judgment, "explanatory evidence" can be regarded as a kind of evidence that is admissible because of its relevance to the issues in the particular case; without it, by definition, the account put before the jury would be "incomprehensible or incomplete". In the present case, the evidence that the defendant and the deceased were members of or associated with rival gangs, between whom there was an active feud and who resorted to criminal violence in furtherance of their disputes, and that there was recent provocation for a retaliatory attack, was directly relevant to the issue whether the defendant was the assailant in the present case; it was evidence of a motive for an otherwise unexplained murderous attack, in addition to providing evidence of the background to it.

31. "Evidence of motive may also be admissible notwithstanding that it reveals the accused`s criminal disposition" (*Blackstone`s Criminal Practice 2012* para. F1.17 citing *R. v. Williams* (1986) 84 Cr.App.R.299). It is submitted on behalf of the Appellant that "the prosecution was required to adduce evidence of enmity as between the Appellant and the deceased and not on a 'global scale' of one gang against another gang" (Skeleton Argument para.23). Relevance, however, is "a matter to be determined, for the most part, by common sense and experience" (*R. v. Randall* [2004] 1 WLR 56, per Lord Steyn at para.20), and in our judgment, the evidence given by Sgt. Rollins was relevant to the defendant as an individual, in the present case. If it was his motive, the fact that the motive was or may have been shared with others, in our view, is immaterial. In fact, there were two assailants, suggesting that both may have had the same motive as well as the same intention. Further, it would have been wrong, and surprising, if the Judge had excluded the evidence on the ground that in his view, before the prosecution closed its case, the case was strong enough to secure a conviction without it.

<u>English authorities</u>

32. We were referred to two decisions of the Court of Appeal (England and Wales) which support the admission of gang membership when that is relevant to an issue in the case. In *R. v. Mullings* [2010] EWCA (Crim.) 2820 there was evidence that supporter's of two rival gangs were shooting at each other from opposite ends of a street, and that the defendant was present in the street at that time. "It was not suggested that the [defendant] was personally in possession of a firearm but he must have been aware that others in the group were carrying firearms with the requisite intent and he participated in that knowledge and with the same intention. Count 4 was, therefore, put against the [defendant] on the basis of joint possession with intent to endanger life" (paras. 7- 10). The objection was not based on the hearsay rule (see para.20) but on the ground that it was 'bad character' evidence that should be excluded for that reason. The Court held that "whether or not it was strictly bad character evidence [within the statutory provisions] it was, in our view, admissible...since it went to an important issue in the case"(para.33). In the circumstances, however, the judge was not required to give a 'bad character' direction (para.36).

33. In *Regina v. O* [2010] EWCA Crim. 2985 a police officer gave evidence "about the situation of gangs in the locality and so forth [which] was factual evidence [and] entirely admissible as coming from a police officer with local experience". She was also asked about the meaning of certain lyrics which was opinion evidence, a matter on which she accepted that "she was not an expert". The Court held that "if the ground had been properly laid [which it was not] it may well be that [the officer] was capable of being regarded as an expert in that limited sense about the language and patois of South London". In the same passage (paragraph 27) the Court made the comment, quoted above, that "the word "expert" is slightly strange in these circumstances".

Canadian authorities

34. In *H M The Queen v.Hiscock* [2002] BCSC 1833 (Supreme Court of British Columbia),Madam Justice Stromberg-Stein considered a number of judgments of the Supreme Court of Canada (see paragraph 8) and concluded as follows-

> "[14] While the gang evidence may tend to show bad character or propensity, that is not the purpose for which the evidence is led. This evidence is relevant to provide a context or background to consider motive, animus and group dynamics, all of which are relevant to the key issues in this case, causation and parties."

That statement, in our view, could stand as an accurate summary of the relevant law derived from the authorities from England and Wales to which we have referred. However, our perusal of the Supreme Court authorities referred to in the judgment suggests that the law may have developed differently in Canada from England and Wales. For example, the judgment in *Steven Seaboyer v. HM The Queen*[1991] 2 SCR 577 indicates that the rules regarding the exclusion of hearsay evidence and the reception of opinion evidence are less rigid than in criminal proceedings in England and in Bermuda. We do not regard it, therefore, as direct authority for our conclusions, but it is consistent with them.

35. We hold that the evidence was relevant and admissible in the present case notwithstanding the general exclusion of evidence relating to bad character and propensity to violence, which this evidence undoubtedly was.

**(f) Discretion to exclude**

36. The trial judge has a general discretion to exclude evidence which, though technically admissible, would if admitted be so prejudicial to the defendant that it would deprive him of his right to a fair trial. The line of authority extends from *R. v. Christie*[1914] A.C.545 through *Noor Mohammed v. The King* [1914] A.C.182 and *R. Sang* [1980] A.C.402 (see *Blackstone's Criminal Practice (2012) para.F2.1*). The Appellant relies also on section 93 of the Criminal Evidence Act 2006 (cf. section 78 of the Police and Criminal Evidence Act 1984 in England and Wales).

37. The Judge was not invited to exercise his discretion in the present case. Forming our own view, we hold that the evidence was rightly admitted, notwithstanding the substantial prejudice that was caused to the defendant's case. Without it, the prosecution could prove no more than a motiveless killing, and its probative value was high in relation to gang membership and gang

areas and other factual matters. To have excluded it, far from ensuring the fairness of the trial, would have prevented the prosecution from placing the full and complete picture before the jury. Admitting it did not preclude the defendant from placing his defence, including his challenge to the identification evidence and his alibi, before the jury. We therefore reject this ground of appeal also.

**(g) "Expert" appellation**

38. The Judge cannot be criticised for describing Sgt. Rollins as an "expert" witness, nor for requiring proof of his experience and qualifications before permitting him to give evidence as a "gang expert". The authorities both in Bermuda and in England and Wales required him to classify the witness as such.

39. However, it emerges from the same authorities that the term "expert" has been used to describe witnesses who have acquired their expertise from practical experience as well as from specialist education or training. Inevitably, perhaps, the two must overlap. Provided the judge ensures that the source or sources of the witness`s expertise are always explained to the jury, so that they can assess for themselves the weight to give to the opinion evidence, it is immaterial, in our judgment, whether he refers to them as "experts" or uses some other term such as, for example "experienced police officer" as might be appropriate in the present case. At best, "gang expert" is not a particularly helpful term because it fails to identify the kind of expertise which the witness has acquired and which permits him to give opinion evidence on issues in the case. "Expert on gang behaviour" may be worth spelling out.

**Practical suggestion**

40. We conclude this section of our judgment with the practical suggestion that, when the prosecution calls a specialist police officer to give opinion as well as factual evidence, careful consideration should be given to –

(i) the nature of the evidence, distinguishing factual (evidence of primary facts) from opinion evidence;

(ii) what parts, if any, of the factual evidence are based on hearsay;

(iii) establishing the basis on which the officer is entitled to give opinion evidence – his or her experience and qualifications;

(iv) distinguishing (practical) experience from (academic) qualifications;

(v) using terms such as "experienced police officer" or "expert on gang behaviour" rather than "gang expert" *simpliciter*;

(vi) directing the jury as to the scope of the opinion evidence and the basis for permitting it; and

(vii) above all, bearing in mind the potential prejudice for the defendant before permitting it to be introduced.

**D/Con. Edmonson**

41. D/Con. Edmonson said that she had been a police officer for 6½ years and attached to the Serious Crime Unit for the last 3 ½ years. She was involved in the police response to the shooting of Julian Worthington at the Mid Atlantic Boat Club which she said occurred at around 11.45 pm on 8 August 2010 though she had no personal knowledge of the incident. She did not arrive at the Club until about 2 am. She said – "I was assigned [as] the file officer for that shooting, which means I was in charge of compiling all the evidence in relation to that shooting".

42. She also gave evidence that "From our investigations, the Mid Atlantic Boat Club is known to be a place where members of 42nd hang out". She was then asked (by counsel for the prosecution) "And from your investigations, what, if any, theory .....did the Police have in relation to the motive for this shooting?" to which she replied –

> "We found that the Mid-Atlantic Boat Club was targeted because of its.....because of the common knowledge that it is a hand-out spot for the 42nd members."

Counsel for the prosecution then asked further questions about her experience, including, "approximately how many shootings have you been involved in the investigation of?". She replied "I can`t count now. Since 2008, it`s been a lot of shootings" and that she had been involved in them herself.

43. No objection was taken to her being called as a witness, after the initial objection referred to above, and she was cross-examined only to confirm that she had no personal knowledge of the incident at the Mid-Atlantic Boat Club and she could not say who was there at the time.

44. It is clear, therefore, that her evidence included hearsay and that the basis on which she gave opinion evidence, as to the police 'theory' of the crime, was never fully explored. She was not described as an "expert" at any time. There was no specific reference to her in Mr. Mussenden`s submissions on behalf of the Appellant, though he referred generally to evidence given by Sgt. Rollins "and other officers". In these circumstances, it is unnecessary for us to add to what we have said about gang evidence (above), but it was unfortunate that the reasons why hearsay and opinion evidence was admitted from her were not more fully explored.

**Firearms evidence – Appeal Ground 9**

45. Ground 9 of the Appeal was that the Judge was wrong to admit evidence "that the two firearms used in the present case had been used in previous firearm offences in Bermuda - the effect being that the prejudicial value outweighed the probative value of the evidence"

46. The issue can be summarised as follows. Sixteen bullets were fired from two guns into the head and torso of the deceased. There were ten exit wounds and six bullets were recovered from the body. A number of bullets and spent cartridges were recovered from the scene. An expert witness told the jury that five of the bullets were fired from a .38 calibre revolver that was later (December 2010) recovered from the area that the gang evidence witnesses said was where the 42nd gang operated. Eight bullets and 8 cartridges were fired by a 9mm Luger pistol or similar weapon, which was not recovered. In addition, he said that, according to police records, the 9mm cartridges had been fired from the same weapon that was used in five other firearm cases in Bermuda. In three other cases, the weapon was the .38 calibre revolver that was used in this case. Another police officer, D/C. Burgess, was the keeper and collator of the records of firearm offences in Bermuda, including murder and attempted murder. She

said that the same 9mm weapon was used in five other incidents and the .38 calibre revolver in three others, and all eight shootings took place in the Pembroke area which is frequented by members of the Parkside gang. None was in the area of the 42nd Street gang. Noone has been convicted of any of the other killings, and the one person who was charged was acquitted.

47. The Judge summed up the issue to the jury, as follows –

> "This evidence.....is not admitted to show that the defendant, Mr. Cox was responsible for all or any of these other shootings. You must not speculate that he is or may be responsible for any of them at all and you must draw no adverse inferences against him in this respect at all. This evidence is admitted merely to provide for your consideration evidence which the prosecution says establishes that Mr. Cox, by reason of his association with the 42nd Street gang, had access to the firearm, and in particular the pistol, at the material time of the shooting in this case.
>
> .....
>
> It forms part of the evidence tending to support his motive, as suggested by the prosecution, for obtaining the firearm and carrying out the shooting of Mr. Rawlins that night. A practice carried out by gangs in Bermuda, and in particular [the] 42nd Street gang, as described by Sergeant Rollins, the gang expert. A practice carried out against members and associates of the Parkside/Middletown group.
>
> The evidence is in now way intended to suggest to you that Mr. Cox is a bad person or a person of bad character, or that he has any propensity for shooting people and therefore because of that propensity he shot Mr. Rawlins.
>
> It is only for the purpose of establishing his motive; that is, the reason why he shot him, at the time of the shooting of Mr. Rawlins, his opportunity and access to that gun, contrary to his assertions to the contrary."

48. The ground of appeal, stated above, is that the Judge ought to have excluded the evidence because the prejudice it caused to the Defendant outweighed its probative value. It is not suggested that the evidence was inadmissible because irrelevant, nor could it have been. The Judge was not asked to exclude it in the exercise of his discretion. In our judgment, it was

properly admitted, bearing in mind that the Defendant denied in interview that he had access to the, or any gun. The wording of the Summation was not impeccable, but it gave the jury a sufficient explanation of its relevance and why it was admitted.

49. This Ground, therefore, is dismissed.

**Ground 6 – identification evidence**

50. Michael Parsons, whose birthday party was in progress, was near the entrance sometime after midnight and was assisting a lady to leave the Club. He saw Mr. Rawlins, the deceased, arriving with a friend. He was about to give him a drinks ticket when he noticed someone come into the door "in a sort of aggressive manner" and come up behind Rawlins. Quoting from the Summation – "That person was wearing a blue jacket. He saw that person was David Cox. The person like punched or nudged Rawlins causing Rawlins to lean forward towards the lady.....and Rawlins turned back as if to see what it was, and he said he heard a shot followed by another". As for the conditions, – "The lighting was good, with all the lights on .....No dark areas. He recognised the shooter. It was David Cox. He was able to see his eyes, between the hood which was over his forehead and the lower part over the tip of his nose, with the area around his eyes exposed as he demonstrated.....". The Summation continued – "He said he had known David Cox all his life, from the age of 12/13 to his present age of 31.They are good friends. They grew up together.....He used to live close to David and his family....[their fathers were friends]....I just know him. I recognise him by his eyes. He said, I was so sure it was Cox I saw that night because I recognised him. I know who he is and that`s what I saw.....". In cross-examination he said "it was very fast.....say four to five seconds".

51. The Judge gave the jury a comprehensive direction on the subject of identification evidence, which is not criticised. There was a video recording of the incident from which Michael Parsons also identified the Defendant. This was put before the jury as a series of still photographs, and there was evidence as to the time interval between the stills. About these, the Judge said –

"You also saw the imagery.....The stills, by the expert. And you also saw the defendant on the stand. You look at the stills, you look at Man A [meaning the first of the two shooters], and you can look at the Defendant. All of those are matters that you're entitled to observe and take into account.....So they are similar. It is a matter all up to you, as jurors and finders of the facts."

Mr Perry QC objected at that stage that there was no expert to assist the jury in comparing the video images with the Defendant whom they saw in a different setting. The Judge replied that he would return to the matter in greater detail later in his summing up. In his final summary of the evidence, he said –

".....Look at those images.....What do you make of them?
You've seen Mr. Cox on the stand. You've looked at him closely, his build, and all of that. Judged his demeanour and all of that. What do you say?
The prosecution is saying they are the same man. That Man A, that you see in those figures, and that Mr. Cox, you see on that stand, they are the same man. The defence says they are not."

52. The Judge was entitled to leave the matter to the jury on the basis that he did, provided that he made it clear to them that the comparison was a matter for them and not an issue where they might be assisted by expert evidence. Regarding the identification evidence given by Michael Parsons, this was evidence of recognition, not merely identification by a stranger and the jury was full informed as to the circumstances and was fully directed in accordance with the *Turnbull* guidelines. The Judge acknowledged in his Summation that the jury might regard it as no more than a "fleeting glance", thus reminding them of the need to take all the circumstances into account.

**Ground 4 – Forensic evidence**

53. In the yard of the property where Sgt. Rollins said that the 42nd Street gang 'hung out together', the police investigators found four white plastic gloves, three in a trash can and one on the ground nearby. The single glove had traces on it of the Defendant's DNA, and of GSR (gunshot residue). There were traces of GSR on two of the other three gloves. It was possible for the jury to

conclude from the video photographs that both gunmen were wearing white gloves of that type.

54. The Defendant said in his police interview that the presence of his DNA on the glove could be explained by the fact that he had worn it some days previously when he was working on his motorcycle. He denied wearing it in the night of the shooting. There were no traces of oil or grease on the glove.

55. The Judge summarised the case for the prosecution graphically as follows-

> "Too striking to be explained away by mere coincidence, says the Crown. Not another man`s DNA found on that [glove], but the Defendant`s. Two men, with two hands each, two guns, four gloves. Not six gloves, just four. One for each hand, with one bearing the Defendant`s DNA and GSR on it as well. Too compelling to ignore by a verdict of "not guilty", I think the prosecution is saying."

He also dealt with the Defendant`s explanation for the presence of his DNA on the glove.

56. In addition, a cap was dropped in the street outside the Club by the two shooters when they made their getaway in a stolen car that could be recognised by a defective rear light. The car was stolen the previous day from the area where the 42nd Street gang operated, and it was found abandoned in the same area on the day after the shooting. The Defendant`s DNA was found on the cap and he accepted that it was his but he denied wearing it on the night in question. He did not explain who else might have done so. The fact that it was found in the area regarded as Parkside gang territory was significant, because the Defendant said in interview that he would never go to that area, suggesting that, if it was worn by him, he had a special reason for going there. There were also GSR particles on the cap. Understandably, the Judge observed to the jury that the DNA evidence on the cap "strongly suggesting that it was worn by him, [was] evidence capable of standing by itself to implicate the Defendant".

57. The submission for the Appellant is that the Judge misdirected the jury by reminding them of this evidence in the way that he did, as if he was

presenting the prosecution case. But, as appears from the passage quoted above, his technique throughout the Summation was to state, first, the case for the prosecution, and secondly, the case for the defence on the issue in question. That cannot be objected to, provided it was done fairly, as in our judgment it was. The problem for the defence was that the Defendant had no explanation for the presence of his cap at the scene, with his DNA (and others') on it, and his attempted explanation for his DNA on the glove was negatived by the absence of any oil or grease stains on it.

The Judge was entirely justified in describing this as evidence which could stand alone to implicate the Defendant in the shooting.

**Ground 10 –No case to answer**

58. The Court gave leave during the course of the hearing to add as an additional ground that the Judge was wrong to reject the defence submission at the end of the prosecution case that there was no case for the defendant to answer and that the charges should therefore have been dismissed at that stage.

59. There was no objection, nor could there be, to the admission of the identification evidence (Ground 6) or the DNA and GSR evidence (Ground 4), save that the weight of the latter depended to some extent, but not entirely, on the admission of 'gang evidence' also. (If that evidence had been excluded, the jury would not have known that the property where the gloves were found was the place where members of the 42nd gang "hung out together", but that did not alter the fact that they were found and that the identified 'get away' car was found in the same area.)

60. On the basis that the 'gang evidence' was properly admitted, it is abundantly clear that the prosecution evidence established a case for the Defendant to answer. We would also agree with the Judge`s observations which are complained of in his Summation to the effect that the jury was entitled to convict the Defendant from the evidence of identification and the forensic evidence, standing on their own. The Defendant was recognised by a long-standing friend who was an eye-witness to the shooting; the Defendant`s DNA

was found on the cap worn by one of the shooters; his DNA together with traces of GSR was present on one glove found near three other gloves, two with GSR on them, in the area where the getaway car was found on the following day, and where one of the weapons used in the shooting was found later.

61. The Judge was entirely correct to dismiss the 'no case to answer' submission.

**Grounds 3 and 5**

62. Ground 3 was an allegation that the Judge`s Summation "was unbalanced both in its tone and content with unfairly adverse comment which wrongly prejudiced the case against the Appellant". This was expanded in the supporting Particulars to include the further allegation "that throughout the trial the Learned Judge descended into the arena with the specific intent to bolster or shore up the case for the prosecution" giving thirteen specific examples of when that was said to have occurred, in addition to more than 30 references to passages in the Summation, in support of the allegation in Ground 3.

63. These are serious allegations to make and we have given them anxious and careful consideration. There were numerous occasions when the Judge asked questions or intervened with the object of clarifying evidence that had been given, or in order to obtain the witness`s evidence on further points that as he saw it were relevant and had not been covered. There were occasional indications that he considered that counsel for the prosecution were not bringing out all the evidence that the witness could properly be asked to give. It is correct that the replies to his questions were mostly though not invariably helpful to the prosecution, but that was the nature of the case; the witness`s replies to further questions tended to be unhelpful to the Defendant, and the Judge is not accused of asking leading questions. Rather, they were prefaced by remarks such as "I`d like to clear this up". That said, it was incumbent on the Judge to be careful not to overstep the proper limits of his role.

64. We have concluded that the Judge did not do so, either during the trial or in his Summation. We do not consider that during the trial he exceeded his role

of ensuring that both parties` cases were fully and properly placed before the jury, nor that his Summation was unfairly unbalanced in favour of the prosecution as is now alleged (and as Mr. Perry QC indicated at the time). To the extent that a full recital of the evidence gave the appearance of favouring the prosecution case, which was the cumulative effect of the evidence that had been given. We reject the submission that the Judge acted unfairly towards the Defendant, either during the trial or in his Summation.

**Ground 8 – Alibi**

65. The Defendant said that he went to the Mid-Atlantic Boat Club on the previous evening (August 8th) on a motor cycle he borrowed from a friend, Julian Washington, who went there separately by car. When he was there he heard a shot. He learned later that Julian Washington was the victim. He said that he left the Club and flagged down a friend who drove him to Claytown, Bailey`s Bay. There he saw two male friends before going to a girl`s house, from where he returned to one of the male friends, and later went back to the girl`s house where he stayed the night. Next day he heard that the police were looking for him and he presented himself at the police station. He denied going back to Court Street or to the Spinning Wheel Club, and he said "he never shot Yankee Rawlins with any gun".

66. Andre Minor was called as a defence witness. He said that he was at the Mid-Atlantic Boat Club on the night in question but he was not aware that there was a shooting of Julian Washington. As he was leaving, around midnight, he saw people scrambling and he was asked for a lift "by David". However, he said that he did not know David and has no relationship with him whatsoever. He hadn`t seen him or had any contact with him since dropping him off at Shelly Bay. In cross-examination, he confirmed that he did not know where 'David' went after he dropped him off, and his veracity was not challenged. The defence contended, therefore, that the prosecution accepted that his evidence was or could be correct.

67. However, there was evidence about the distances and journey times involved between the Mid-Atlantic Club and the Claytown area and the

Spinning Wheel Club where the later shooting took place. The prosecution case was that there was sufficient time between the two incidents for the Defendant to travel by car to Claytown and return to Court Street in another vehicle, which they said was the stolen 'getaway' vehicle, by which time the Defendant was accompanied by a friend. Therefore, apart from pointing out inconsistencies between Mr. Minor`s and the Defendant`s evidence, the prosecution did not challenge that the journey took place. On their case, as the Judge put it, "Was it really a trip to Claytown for a girl, or a gun, that has not yet been recovered ".

68. The Judge gave the jury a comprehensive 'alibi' direction, which is not criticised in the appeal. Rather, it is submitted that the Judge was critical of the defence witness and generally dismissive of the alibi defence.

69. In our judgment, the evidence was of marginal relevance to the issues in the case, but the defence was not hindered in placing it before the jury, in any way. This ground of appeal is dismissed.

**Conclusion**

70. For the above reasons, the appeal against conviction must be dismissed. With regard to the appeal against sentence, both parties are agreed that it shall be adjourned until after HM Privy Council has heard and given judgment in the pending *Selassie* appeal. The sentence appeal therefore is adjourned generally, with liberty to both parties to apply for it to be heard.

Zacca, P

Evans, J.A.

**AULD, JA**

**Introduction**

1. I too would dismiss the appeal against conviction for premeditated murder with a firearm for reasons given by the President and Evans, JA in paragraphs 45 to 69 of their judgment. However, I respectfully differ from them, in paragraphs 24 to 44 of their judgment in upholding the Judge's leave to the prosecution to put before the jury "expert" evidence of Mr Cox's membership of, or association with, a gang engaged in retaliatory warfare with another gang. For that reason I take the unusual course in a criminal appeal of writing a dissenting as well as an assenting judgment. In doing so, I gratefully accept and adopt the Majority's summary narrative in paragraphs 1 to 5 of their judgment of the circumstances of the shooting of Mr Rawlins and, in paragraphs 50 to 55 of relevant events preceding and following it, including the recognition evidence of Mr Michael Parsons of Mr Cox as one of the murderers and of the scientific evidence connecting Mr Cox with the murder.

3. The sole issue in the case was whether the prosecution had properly proved to the jury's satisfaction that Mr Cox and another, each armed with a firearm, had on 9th August 2010, at about 12.20 a.m. shot – between them 16 times - Troy "Yankee Boy" Rawlins, as he entered the Spinning Wheel Night Club on Court Street, Hamilton. The intent of both the men participating in the shooting was plainly to murder, for which they must obviously have had some motive. The two men immediately ran away out of the Club and jumped into a waiting car, which sped from the scene.

**The factual and scientific evidence of identification**

4. I respectfully agree with the President and Evans, JA that the prosecution adduced direct and highly cogent probative factual and scientific evidence identifying the appellant as one of the murderers. The evidence in summary consisted of the following:

1) Recognition testimony of Michael Parsons, who was close to the well-lit club entrance, and knew Mr Cox well. He said that he had

recognised him by the familiar way in which he "schrinched" his eyes, notwithstanding that, as shown on a CCTV camera, the lower and upper part of his face were respectively obscured by a zipped up and hooded rain jacket and a peaked cap under his jacket hood.. He was confident in his recognition

2) A CCTV camera at the scene showed the same man so dressed and, in common with his fellow killer, wearing what looked latex gloves.

3) When police arrived at the Club shortly afterwards they found a baseball cap in the street outside the Club on the line of the getaway car, on which later scientific examination showed traces of Cox's DNA and gun-shot residue particles.

4) The CCTV camera had filmed the getaway car as it sped away from the Club. It was found by the police at about 7 a.m. that morning in the rest area of a church in Pembroke. The police rapidly identified it as a recently stolen car. Near to the car the police found four latex gloves. One, on scientific examination, showed traces of Cox's DNA and gun-shot residue and two of the other three showed traces of gun-shot residue.

5) Police scientific evidence showed that the two firearms used in the killing of Mr Rawlins had also been used in other murders on the Island.

**The gang evidence**

5. The remaining question - though now redundant in this appeal in the light of the unanimous view of the Court that the above evidence identified Mr Cox as one of the murderers - is whether, as a matter of principle, gang evidence in its application to an issue of identification as in this case, was properly before the jury. The senior and more experienced of the two police officers put before the jury as gang "experts was Sgt Rollins., He testified that he was experienced in territorial warfare between rival gangs in Bermuda. In a mix of direct and hearsay factual evidence and of what was presented as his

"expert" opinion based on such evidence, he spoke of such gangs, each with access to firearms and with a proclivity to retaliatory use of them against members of the other. He said that: 1) Mr Cox was a member of or associated with one gang and Mr Rawlins, the murdered man, a member or associate of another; 2) both gangs dealt in drugs and were engaged in a running feud, often giving rise to retaliatory violence and murders; and 3) both gangs had had access to and committed firearms offences with the two firearms used in the killing of Mr Rawlins.

6. The Judge admitted that evidence on grounds very close to those expressed in the unreported 1985 England & Wales Court of Appeal case of *R v Pettman*, 1985, CA (5048/C/82), namely that it was explanatory evidence "necessary" to put before the jury as evidence of motive to set the context for the commission of the murder.

**The role and risks of "expert" evidence of gang membership and warfare**

7. Jurisprudence on admissibility in criminal proceedings of so-called "expert" evidence of gang membership in a local context of retaliatory gang warfare has emerged in a number of common law jurisdictions in recent years. It has done so in a piece-meal way and by recourse to different formulae. It is less developed in England & Wales and Bermuda than in other common law jurisdictions, such as Canada where there is legislation specifically directed to the circumstances in which it may be admitted. "Expert" evidence in general has been the subject of recent consideration by common law courts and law reform bodies, including the Law Commission of England & Wales. The more removed from the readily recognizable areas of special knowledge in various fields of medicine, science, engineering and the like, the more difficult it may become, on a case by case basis, for a judge to determine whether the evidence sought to be presented is truly of an expert nature, whether by knowledge or experience, and as to whether and where it moves from direct to hearsay factual evidence to opinion. [see e.g. *Hiscock*, Supreme Court of Canada 27.11.2002] The admissibility of such evidence is highly case-specific and –

importantly – also issue specific, as to its probative value, if any, over any unfairly prejudicial effect that it may have on a jury.

8. Relatively recent common law jurisprudence shows increasing resort by prosecutors to "expert" evidence of gang membership and warfare to bolster mainstream direct and factual evidence in proof of guilt in the context of alleged gangland killings. Some of the authorities set out useful tests for its inclusion or exclusion, but each necessarily focuses on the particular context and issues in the case to which the evidence was directed. The evidence is sometimes advanced in cases where intention is in issue, to which motive of the person charged may well be relevant and probative. Cases approving reliance on such evidence on the *Pettman* basis, that it provides "background" or "explanatory" evidence "necessary" to explain otherwise incomplete or incomprehensible prosecution evidence, are mostly directed to the issue of motive going to the presence or otherwise of mens rea. The *Pettman* approach has now some statutory recognition in England & Wales in the tightly drawn section 103 of Criminal Justice Act 2003, though not in Bermuda. In my view, the notion of necessary explanatory evidence is a slippery concept for application in this context unless: 1) it is approached on a case by case basis and is tightly related to the issue(s) before the jury; 2) it is necessary to advance or support the prosecution on such issue(s); and 3) its probative value is tested rigorously against any unfair prejudice to the defence. My unease about resort to the approach is reinforced by the views of the Law Commission of England & Wales in their recent Consultation Paper No.196 of 2010, and in their Report, *Expert Evidence in Criminal Proceedings* of 2011, both of which rehearse concerns about the disorderly and otherwise unsatisfactory state of the common law on this vexed area of the law of criminal evidence.

9. Now, admission of evidence on the basis of a necessity to put in context or explain a murder, whether or not otherwise clearly evidenced, is a curious piece of reasoning and one, where, as here, capable of substantially and unfairly prejudicing the defence for little or no truly probative purpose. At its best, resort to the notion of "necessity" in this context is sloppy and dangerous

reasoning, putting prosecutors on the horns of a dilemma when considering what evidence upon which they should rely to prove their case, while also having regard to any likely resultant unfair prejudice to the defence. If a prosecution case is evidentially strong without such "explanatory" evidence, but the "explanatory" evidence is also strong and logically probative in its own right or supportive of other evidence on the issue(s) before the jury, the probative value of the prosecution evidence overall may readily outweigh any possible unfair prejudice in its admission into the case. If, however, a prosecution case without such additional "explanatory" material is weak, however probative the latter may be, the probative value and potential prejudice to the defence may be more finely balanced - but turning still on how probative the explanatory evidence is on the issue(s) in the case. There are many permutations of this sort, but, in my view, necessity is a dangerous test for determining any of them.

10. Whatever the nature of value-judgment to be made by prosecutors when assembling evidence for prosecution and for judges when determining its admissibility, unless *Pettman* type propositions are carefully scrutinised by judges with particular reference to the issue(s) for determination, there is risk of a drift into a prosecuting culture of seeking to bolster weak or uncertain prosecutions with doubtfully probative and highly prejudicial padding - as the reports show. If the use of such glosses on well-established common law rules for the admissibility of criminal evidence is to continue, it should be subject to rigorous judicial scrutiny as to relevance and probativeness, and confined to instances: 1) where it has a clear probative effect of its own and/or is supportive of the probative effect of other evidence on the issue(s) the jury have to decide; and 2) always only after carefully balancing its probative value against its unfairly prejudicial effect on the defence.

**Relevant considerations on the appeal**

11. Here, the sole issue for the jury was identification of Mr Cox as one of the murderers, that is, whether the prosecution had proved that he had killed or been a party to the undoubted intentional killing of Rawlins by shooting him. In the circumstances the murderous intent of the two killers was plain, whoever

they were. Motive was, therefore, irrelevant to the jury's task of determining whether the prosecution had proved that Cox was one of them, unless: 1) proof of motive could, on the gang evidence, logically support that identification in accordance with the burden and standard of proof in criminal proceedings, namely sureness; and, in any event, 2) it could do so without the substantial unfair prejudice inherent in the evidence outweighing such probative value it might have had.

12. Mr Cox, in addition to his challenge in this appeal to the validity of his conviction on the direct evidence of fact and scientific evidence as to identification, challenges the admissibility of the gang membership "expert" evidence of Sgt Rollins and DC Edmonson.

13. In my view, he is right to do so for a number of reasons:

1) Sgt Rollins' mix of direct and opinion evidence, even if it were technically admissible as "expert" factual and opinion evidence to establish a motive to kill, was irrelevant and, therefore, non-probative on, the sole issue for the jury – identification of him as one of the killers of Mr Rawlins;

2) Much of his evidence, so far as it purported to be of fact, was, in any event, inadmissible as hearsay and not within any of the permissible exceptions provided by the law;

3) Insofar as his evidence purported to be "expert" opinion going to likely motive of Mr Cox to kill and/or be a party to the murderous killing of Mr Rawlins, the Judge should, in his discretion, have excluded it because it is strongly arguable that it was in or beyond the outer fringes of what qualifies at common law as "expert" evidence. Sgt Rollins' account of gang membership and retaliatory warfare in the localities of which he spoke was not of a sufficiently organised and recognised reliable body of knowledge and experience on which he could form any more authoritative opinion than the generality of others in Bermuda on

issues of motive or, more importantly, as capable of supporting other evidence of identification.

4) At its highest, Sgt Rollins' evidence was only capable of suggesting that Mr Cox was one of a large group of members of a violent gang any one of whom had or may have had a motive to carry out the fatal attack charged. It did not of itself entitle the jury to regard it as surely pointing to him rather than any of his fellow gang-members, so as to provide any meaningful support of other evidence identifying him as the killer. Such evidence would not meet the rigorous test normally required for sureness of evidence or supporting evidence of identification, whether of the *Turnbull* kind in "fleeting glance" cases or otherwise. With respect, the President and Evans, JA, in paragraph 30 of their judgment, in stating that his evidence was

> "directly relevant to the issue whether the defendant was the assailant in the present case; it was evidence of a motive for an otherwise unexplained murderous attack, in addition to providing evidence of the background to it"

do not explain their chain of reasoning for asserting direct relevance to the shooting of Mr Rawlins of the fact that Mr Cox was one of a large number of gang members any one of whom might have had a motive to kill him. Nor do they indicate by what means the *Pettman* type reliance on explanatory evidence could have done so. With respect, unreasoned or unexplained hypothesis of this sort won't do. Only clear demonstration of a chain of reasoning pointing to sureness will.

5) Sgt Rollins' evidence was, in any event, not only irrelevant. It was also, in my view, substantially unfairly prejudicial to the defence so as to outweigh its probative value under common law principles and section 93 of the *Police and Criminal Evidence Act*

*2006* in suggesting previous bad character and propensity to committing serious gang violence of this sort.

14. It follows that I cannot agree with the following proposition in paragraph 37 of the President's and Evans, JA's judgment:

> ... We hold that the evidence was rightly admitted, notwithstanding the substantial prejudice that undoubtedly was caused to the defendant's case. Without it, the prosecution could prove no more than a motiveless killing, and its probative value was high. To have excluded it, far from ensuring the fairness of the trial, would have prevented the prosecution from placing the full and complete picture before jury."

15. I agree with the President and Evans, JA that the direct factual and forensic evidence could have stood alone to implicate Mr Cox in the shooting. However, in my view, it did not matter whether the prosecution might not, but for the gang evidence, have established that he shared with fellow gang members a motive for the killing. On the proven facts the murderers of Mr Rawlins, whoever they were, had an intent to kill him and must have had some motive for it. The existence of neither was in issue. The only issue for the jury was whether Mr Cox was one of the men who carried out the plainly murderous attack, whatever the motive. It follows, in my view, that the probative value of the gang evidence was not "high"; it was nil on the only issue the jury had to address. Nor was the so-called "full and complete picture" probative of anything relevant except the defendant's bad character, the very full exposure of which to the jury was, as the President and Evans, JA have said, of "substantial prejudice to him".

**Conclusion on the Appeal**

16. For the reasons given by the President and Evans, JA and regardless of the "gang" evidence, there was, in my view, adequate non-gang evidence, as summarised in paragraph 4 above, going to the issue of identification, on which the jury could safely convict.

17. Accordingly, I too would dismiss the appeal against conviction, but only on the strength of the non-gang evidence relied on by the prosecution and clearly accepted by the jury.

*Signed* Robin G. Auld

Auld, JA