The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos 9 & 11 of 2013

Between:

DEVON HEWEY and JAY DILL

Appellants

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Ms. Susan Mulligan and Mr. Arion Mapp, Christopher's, for the 1st Appellant
Mr. Marc Daniels and Mr. Charles Richardson, Marc Geoffrey, for the 2nd Appellant
Mr. Garrett Byrne and Ms. Maria Sofianos, Department of Public Prosecutions, for the Respondent

Date of Hearing: **2 & 3 March 2016**

Date of Decision: **18 March 2016**

Date of Reasons: **13 May 2016**

REASONS

Appeal against convictions for Premeditated Murder and use of a Firearm - fresh evidence - judge's direction to jury - issues as to alibi - gang evidence - GSR evidence - ss 75 and 77 Police and Criminal Evidence Act 2006 - fairness of trial and summation - appeals against sentence - minimum period to be served.

PRESIDENT

1. On 25 February 2013 these two appellants were unanimously found guilty of the premeditated murder of Randy Robinson and of using a firearm while committing the offence. They were subsequently sentenced by Greaves J, the trial judge, to

life imprisonment with a requirement to serve 40 years before eligibility for consideration for parole. This period was subsequently reduced on appeal to 25 years in the light of the decision of the Privy Council in *Selassie and Pearman v The Queen* [2013] UKPC 29. There were concurrent sentences of 12 years' imprisonment for the firearm offences. These are our reasons for dismissing the appeals against conviction.

Facts

2. On 31 March 2011 at about 8:30 pm, Mr. Robinson walked from his residence on to Border Lane North in Pembroke. As he walked up the hill he was talking on his phone to Demarlo Curtis. Near the top of the hill he spoke to Kevin Busby who was outside his own residence. About the same time the appellants were in the same vicinity on a black Honda Scoopy motorcycle. Mr. Busby could not identify the appellants but he noted they were of slim build, wearing black clothing with black helmets and tinted visors. The Crown's case was that Hewey was the rider and Dill the pillion passenger. Dill pulled out a firearm with his left hand and fired five or six shots at Mr. Robinson. He then pointed the gun at Mr. Busby but did not fire it. It was common ground that Dill was left handed. The motorcycle then travelled at speed down Border Lane North towards Palmetto Road. It exited Orchard Grove narrowly avoiding hitting a pedestrian on the Glebe Road. At some point the appellants may have retrieved a second motorcycle. Mr. Robinson had fatal injuries to the head and chest. He was declared dead at the scene at around 10:25 pm. The cause of death was gunshot wounds. The spent projectiles found in the body were 9mm calibre fired from a Magnum type gun which was probably an automatic weapon. The same gun was used in the murder of David Clarke two weeks later.

3. Hewey had left his house at 7 Palmetto Road around 7:30 pm. He was said by his mother to have been wearing a white t-shirt and jeans. Later he made a call from his cell phone to his home asking his mother (Mrs. Cole) to put their pit bull dog "Terror" out in the yard. This was something he would customarily do if there had been a shooting. As Mrs. Cole was doing this she saw both

appellants coming up the steps to the house. Both were carrying black helmets. It was between 8:30 pm and 9:00 pm.

4. Police officers attended Hewey's house that night and detained both appellants, seizing clothing and various items of property. Following caution on arrest for murder Hewey replied: "Yah alright". Later Dill said to a detective: "I had nuffin to do with this was at the Boat Club having a drink, you know".
5. Two motorcycles were recovered hidden from view in the yard of 5 Palmetto Road, a property adjacent to Hewey's house. These were a black Yamaha Nouvo linked by DNA to Dill and a black Honda Scoopy linked by DNA to Hewey. Both motorcycles were found to carry component particles of gunshot residue (GSR) of varying kinds on the handlebars and passenger grips. Ms. Moniz was the owner of the Honda Scoopy and the girlfriend of Hewey. There was a formal admission that Dill had purchased a Yamaha Nouvo in February 2011.
6. Dill's mother confirmed his cell phone number and said that she had called him at 9:48 pm when he said he was at Hewey's house and that he was going to the Boat Club.
7. Voice notes were found on Dill's phone from three days before the murder. These were about having the will to kill someone and who in the 42nd gang would take on that role. Dill said he was the only one who had the heart to do it.
8. Telephone analysis revealed calls made from both appellants' cell phones to Christopher Parris' cell phone before and after the murder. Parris was considered as the leader of the 42nd gang and the person who would give the orders. The analysis also revealed that he continued to try and make contact with the appellants after they had been arrested.
9. The appellants' clothing revealed the following. A black jacket connected to Dill by DNA had three, two and one component particles of GSR on it. The same was true of his jeans. His pants and sneakers also tested positive for GSR particles. Various items of Hewey's clothing, including a black jacket, tested positive for one and two component particles. Although no three component particles were found on his clothing, the three elements of lead, barium and antimony were all present.

10. Both appellants were interviewed under caution on 1 April 2011. Both made no comment to all the questions. The following day Dill was interviewed again. At first he made no comment but then he raised an alibi saying he was at the Boat Club with Hewey at the time of the murder. From there they travelled to Hewey's house on separate motorcycles, leaving them at 5 Palmetto Road. He said he was wearing a black and red jacket and that he used the Yamaha Nouvo.
11. At the trial Hewey did not give evidence. Dill did and said he went to the Boat Club on his Yamaha Nouvo. Hewey went too on a black Scoopy. They got there about 8:00 pm. He had a drink at the bar with Hewey. When he went outside for a smoke he got a message from his girlfriend asking where he was and if he'd heard anything about a shooting in town and he said he had not. Shortly after that they left and went to Hewey's house. He was shocked about Randy Robinson's murder. He had never had any problems with him. He said he was with Hewey from the time they met up until they were arrested by the police at Hewey's house in the early hours of the following morning.
12. Dill called three witnesses, Mr. White a GSR Expert, his brother Kofi Dill and a man called Clarence Santucci.

Fresh Evidence

13. Ms. Mulligan, who appeared for Hewey on the appeal, sought leave to adduce fresh evidence in a number of respects. First she sought to call Kevin Busby. Mr Busby gave evidence at the trial in the form of a video-recorded witness interview dated 1 April 2011. This was allowed to be played to the jury following a successful application by the prosecution to adduce it based on his fear. As a consequence he could not be cross-examined by the defence. However, although he witnessed the shooting, he did not identify either the rider or the shooter. He did identify the bike as a black Honda Scoopy and said that both the rider and the passenger were wearing dark or black coloured clothing. Hewey took no objection to the playing of the DVD and his counsel at the trial relied strongly on the discrepancy between his evidence and the fact that among the items of clothing seized by the Police from Hewey's house was a

red and grey jacket linked to him by DNA with numerous two and one component particles of GSR on it.

14. At the trial Hewey chose not to give evidence and there was nothing from him to say what jacket he was wearing on the night of the murder. Mr. Byrne for the respondent argued that the picture his counsel was seeking to present at the trial was that he was not wearing the red and grey jacket. Be that as it may, the jury was obviously able to resolve the apparent discrepancy. They could well have been satisfied that whatever jacket Hewey was wearing at the time of the murder, he was the rider of the bike. In short, the fresh evidence sought to be adduced from Kevin Busby does no more that fortify or confirm the evidence he had already given. It is accordingly not admissible.

15. The next limb of the application relates to Hewvonne Brown. In an affidavit by Arion Mapp sworn on 9 November 2015 he says Mr. Brown told him he had heard gun shots and immediately saw two men on a bike ride from Friswell's Hill down Border Lane South towards Palmetto Road. At one point the bike was within a few feet of him but he was unable to identify the people on it as they were wearing black helmets and black visors. Hewey however wass known to him and was not responsible for the shooting. There is no statement from Mr Brown and the evidence is hearsay and inadmissible. There is, however, some background to this in that Sgt. Rollin made a witness statement dated 2 February 2012 in which he said that on 1 April 2011 he had received a telephone call from a man called Hewvonne Brown. He detailed the contents of the telephone call in a witness statement and in an email attached to it. Mr Brown subsequently refused to make a witness statement to the police. Sgt. Rollin's witness statement was disclosed to both appellants on 14 June 2012. We have seen both the statement of Sgt. Rollin and the email. If the email was not received by the defence they could have asked for it. However, it seems doubtful whether the witness saw the bike involved in the murder. He describes a red Airblade and Mr Busby describes a black Honda Scoopy. There was no indication that Hewvonne Brown was prepared to give evidence and what he could say was in any event known at the trial.

16. The third limb of the application relates to Pelealkhai Williams from whom there is an affidavit sworn on 25 January 2015. In it he says the affidavit he swore in November 2012 is true. It is, however, necessary to look at the whole history of what he has said. On 17 February 2012 in an interview with the police he told them that Parris had confessed to killing Robinson during a 45 minute conversation in the presence of the appellants. He gave this information in order to gain credit for a reduction in a pending sentence. On 29 September 2012 he said that what he'd said earlier was untrue from start to finish. He confirmed this in a witness statement on 30 October 2012. On 25 November 2012 he swore another affidavit saying his original story was true, but two days later he said it was a pack of lies. For him now to go back once again to what he said in February 2012 but has twice since rejected cannot be accepted as apparently credible evidence. He has shown himself to be a person who cannot be believed. The test for admitting fresh evidence is not met.
17. The fourth limb of the application relates to Darrion Simons. He was convicted of murdering David Clarke on 17 April 2011 and sentenced to life imprisonment. The firearm used was the same as the one used to kill Robinson a few weeks earlier. Ms Mulligan wished to lead evidence of his conviction and the circumstances surrounding it. The evidence that it was the same firearm was led to support the contention that members of the 42nd gang had ready access to firearms. There was no evidence, and the Crown had nothing to suggest, that anyone other than the appellants killed Robinson. There was no specificity of the evidence Ms Mulligan wanted to adduce, other than the conviction of Simons. In our view this ground fails on the basis that the evidence was not relevant to Hewey's (or Dill's) conviction. We shall return to Simons when we deal with background events before the murder.

Mid-Atlantic Boat Club

18. Although this was incorporated in the application to adduce fresh evidence, no witness statements or affidavits of the evidence proposed to be adduced were served and this really turned out to be a complaint against the prosecution for failing to preserve evidence and/or to make adequate enquiries.

19. The Court has wide power to admit fresh evidence where it is necessary or expedient in the interest of justice to do so. The correct approach is well known and is set out in the leading case of *R v Pendleton* [2001] UKHL 66. The Court must have regard to the following:

- Whether the evidence appears to the Court to be capable of belief;
- Whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- Whether the evidence would have been admissible in the proceedings from which the appeal lies;
- Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

All the fresh evidence sought to be adduced by Ms Mulligan failed to meet one or more of those criteria.

Ground One: The Direction on Premeditated Murder

20. This is Hewey's first ground of appeal and it is relied on too by Dill. In short the point is that the judge failed properly to direct the jury on the elements that they had to find proved in order to convict of premeditated murder. The judge said at Vol 12 p 2349:

> "Before you can convict any of the two defendants of the charge of premeditated murder, the prosecution must prove, so that you feel sure, the following."

Then he added: that Robinson was dead, that the defendant in question killed him. Then he said it was the Crown's case that Dill did the shooting and Hewey transported him there on the bike. The judge then went on to say this:

> "The Crown has to prove…the prosecution has to prove that each defendant whose case you are considering, at the time of that killing, did so with intent to cause the death of the person killed or to cause him some grievous bodily harm."

Now the reference to intent to cause grievous bodily harm, whilst relevant to unpremeditated murder, is not relevant to premeditated murder which requires a settled prior intent to kill. If one shoots someone with intent to cause him really serious injury and he in fact dies the shooter takes responsibility for that and commits murder. He does not however, obviously, commit premeditated murder. This passage in the summing up is a clear misdirection as regards premeditated murder. The judge went on to rectify matters at p235 saying: "In this case, the issue of intent is not in dispute. Whoever it was – whomever those two persons were on that bike that shot the gentleman Mr. Robinson, clearly, you can find, intended to kill him." But then he said:

> "If you aim a gun at a man and shoot him, you intended to kill him or cause him grievous bodily harm."

Then he defined grievous bodily harm and added:

> "So if you point a gun at a man and put a shot in him, you must be seriously intending to cause him some discomfort to his health. And he had a lot of discomfort to his health. So that's not a difficulty."

However, he returned to the crucial question at 2352:

> "The real issue in this case is, who killed Mr. Robinson. And if you find that it's the two defendants who did it it's over. You find them guilty. If you are not sure it's the two of those, or any two of those, then you acquit that defendant about whom you are unsure.
>
> And the final ingredient which has to be proved is that the killing was done with premeditation.
>
> And the *Criminal Code* says that premeditation means evidence proven expressly or by implication, an intention to cause death of another, whether such person is the person actually killed or not, deliberately formed before the act causing the death and existing at the time of the commission.
>
> Again I don't think that that is in dispute in this case. In other words, you planned to kill(ed) the man from before. Whether it was him, or somebody else."

21. In truth the sole issue in the case was whether the appellants were the killers of what Mr. Byrne, who appeared before us and at the trial, described as an 'execution-style' killing. It was premeditated murder or nothing and the whole case was run on that basis. Interestingly, no one sought to correct the judge's misdirection and one can see that it would not have been in the interests of the appellants to do so as their case was that it was not them on the bike.
22. In our judgment the judge's unfortunate error in directing the jury about grievous bodily harm cannot have led to any injustice as the case was from start to finish one of premeditated murder in which, as the judge directed the jury at p2352, the real issue was who killed Mr. Robinson. Mr. Daniels for Dill contends that the judge's direction on premeditated murder was inadequate because he just referred to the Criminal Code without further explanation but in my judgment it was adequate for the purposes of this case. Ms Mulligan submits the judge should have left manslaughter to the jury. Mr. Daniels submits he should not. The matter was not raised by counsel with the judge and in our view the judge was correct.

Ground Two: Alibi

23. The complaint here is that the judge did not give the jury a proper alibi direction and made scant reference to the police inquires at the Mid-Atlantic Boat Club during his summation. This ground is relied on by both appellants.
24. The appellants' case was advanced on the basis that at all material times they were together on the night of the murder and that they were at the Mid-Atlantic Boat Club at the time it was committed. Dill gave evidence to that effect; Hewey did not. Neither called any alibi witnesses. Hewey did not challenge Dill's account. The police evidence was that they made attempts to speak to people at the Club but that nobody was prepared to give a statement. They seized the CCTV footage. The appellants could not be identified due to its poor quality but it was disclosed to the defence. There was no request for it to be played during the trial, nor was it suggested either appellant could be identified. It is complained that the Crown never led any evidence to show Dill was not at the Boat Club and nor did the judge remind the jury of this. The appellants were

familiar with the Boat Club and the people present there, particularly on the night of the murder. They were well placed to find witnesses to support their alibi. It is also the case that the proximity of the Boat Club to the scene of the shooting was such that it was perfectly possible for them to have been at the Boat Club and nevertheless been parties to the shooting at around 8:25 – 8:30 p.m.

25. The judge directed the jury that one arm of the defence was alibi: "At the time of the killing I was someplace else. I was not there." He told them they had to be sure the Crown had disproved that defence and that the appellants were under no duty to prove it. He continued at p2356-7:

> "So let me give you a little further direction on the issue of alibi. Because, remember, their case is that they were someplace else, most likely down by the North Atlantic Club when this thing happened.
>
> So, as I said, the defence is that the defendant was not at – the defendant, each defendant is saying he was not at the place of the crime when it was allegedly committed but was instead somewhere else. As it is for the prosecution to prove the guilt of the defendant, it is – it is also for the prosecution to prove beyond reasonable doubt that the defendant was present at the time and place when the offence was committed. That means that he was present at Border Lane North and committed the offence.
>
> The Crown does not have to prove that he was at North Atlantic. They don't even have to prove that he was not at North Atlantic.
>
> What they have to prove to disprove his alibi is that he was at Border Lane. That's how it works.
>
> So even if you reject the alibi alleged by the defendants, you should not jump to an automatic conclusion of guilt. You still have to go back to the Crown's evidence and be satisfied so that you feel sure upon their evidence that it was the defendant who committed the crime."

26. The particular passage alighted on by Ms Mulligan is the statement that the Crown don't have to prove the appellants were not at North Atlantic i.e. Mid-

Atlantic Boat Club and that what they have to prove to disprove his alibi is that he was at Border Lane. This was not a misdirection. It was perfectly possible for the appellants to have been at the Boat Club and yet have committed the murder.

27. Mr. Daniels complained that the judge did not direct the jury that sometimes an alibi is invented to bolster a true defence and that such a direction should routinely be given - see *R v Lesley* [1996] 1 CR APP R 39. But the Court added in *Lesley* that failure to give that direction did not automatically render a conviction unsafe; all depends on the facts of each case. We are satisfied that the alibi direction was perfectly adequate in the present case.

Ground Three: Wellington Oval 11 November 2010

28. Both appellants were members of the 42nd gang that adopted the philosophy "all for one, one for all". The deceased Robinson was not affiliated to any gang but some of his family members were affiliated to Parkside, bitter rivals of the 42nd gang. In November 2010 there was an incident at St. George's Club. Robinson's father, Randy Spence, was in the bar when he noticed Darrion Simons staring at Robinson in an angry manner. When asked why, he replied that he had 'a lot of mouth'. Then he said: "I don't know what I'm going to do but your son has a lot of mouth". Minutes later there were five or so young men around Robinson trying to kick and punch him. Mr. Spence managed to drag him outside. Dill was in the company of other 42nd members at the Club that day and from that moment on Robinson was fearful for his life from the 42nd gang. Robinson's mother was also present and was involved in an altercation with Dill for hitting her son and she struck him.

29. This incident took place four months before the murder and it is argued that it should not have been admitted in evidence. There was no evidence that the incident was related to gang activity and it is contended that the evidence was more prejudicial than probative. In our judgment this incident was of marginal relevance when measured against other and later evidence of animosity from members of the 42nd gang. It did, however, show the start of motive for the later murder.

Ground Four: Gang Evidence

30. This court now has the advantage of the Privy Council's decision on the admissibility of gang evidence in *Myers v R, Brangman v R,* and *Cox, v R* [2015] UKPC 40. In the present case the murderous intention of the gunman was not in dispute. The evidence of a feud between the 42nd gang and Parkside was relevant to identity because it went to prove that the appellants were members of a group who had a grievance against the deceased by reason of his familial relationship and thereby association with the Parkside gang whose cousins were high ranking members of it. It is also the case that the events of November 2010 provided evidence from which the jury was entitled to infer a motive for retaliation.

31. The judge gave a ruling on the admissibility of the gang evidence given, as is customary in these cases, by Sgt. Rollin. That was at Vol 1 pp31 – 46. In summing up at Vol 12 p2528 he explained to the jury that it was relevant to motive and at p2530 that they should not be overwhelmed by it. Ms Mulligan argued that gang evidence should not be admitted where it overwhelmed the other evidence and that there was little else to connect her client to the shooting. She also argued that it went too far, for example, by reference to drug trafficking and witness intimidation. In our view care must be taken with the ambit of the gang evidence admitted and Mr. Byrne accepts these aspects went too far but any excess in the present case was marginal in the context of the evidence as a whole and not such in my view as to threaten the safety of the conviction.

32. Mr. Byrne pointed out that the extent of the gang evidence admitted was in large part because both appellants refused to make formal admissions that they were members of the 42nd gang and that the gang used violence in retaliation attacks.

33. Simons and Washington were members of the 42nd gang and so was Parris, who rose to a high level. This was important in the light of two voice notes on Dill's phone two days before the murder. The first refers to various 42nd gang members holding together. These included Parris, the leader at the time. In the

second the speaker refers to "all these bimbies" willing to do it, meaning shoot or murder and "picking up and pulling a thing" meaning picking up a gun and putting your finger on the trigger. And "anyone can pick up a gun and put his finger on the trigger but you have to have the heart to kill." And that he, the speaker, is the only one who has the heart to do it. There is also a reference to Parkside. In evidence Dill admitted these were his notes. This was important evidence and, as the judge pointed out, relevant to Dill's state of mind at the time he made the notes which was shortly before the murder.

Ground Five: Blood Spatter

34. Despite the objection of counsel, the judge admitted evidence from Janice Johnson about an alleged "blood misting pattern" or blow-back of blood from where a projectile discharged from a gun had entered the victim's body. The objection was on the ground that there was no evidence that the stain was a blood stain and that the evidence was not probative. This ground, in our judgment, leads nowhere because the judge, albeit without any prior notice to counsel, summarised the evidence during his summation and then directed the jury to attach no weight to it. The appellants submit the jury should have been discharged and the case retried. There is no reason to suppose the jury ignored the judge's direction and the evidence was in any event of little significance in the context of the case has a whole. The prosecution did not refer to it in their closing speech.

Ground Six: G.S.R Particles

35. Hewey alleged that the evidence of G.S.R particles found on items connected to him should not have been admitted. The basis of his argument is that no three component particles were found and that one and two component particles do not prove anything in that their presence does not necessarily indicate that they came from a firearm. It was more prejudicial than probative. The judge concluded at the start of the trial that there was some merit in the argument that the prosecution expert's report was short on detail as to what the presence of one and two component particles really meant, but he felt that this could be

cured in the course of the trial, if necessary by the service of additional evidence. He ruled that there was no sufficient reason to exclude it.

36. In our judgment the judge was correct to admit the evidence because it had to be considered in the context of the other evidence in the case, not least the evidence that both appellants were together that night, that both bikes had particles on them and that Dill's jacket and jeans had three, two and one component particles on them. The presence of three component particles was of particular significance in view of scientific evidence that they had come from the discharge of a firearm. Such evidence, in the absence of any evidence from Hewey, could assist the jury in weighing the significance of the one and two component particles found on Hewey's clothing. Further, the two and one component particles comprised between them the three elements necessary to constitute G.S.R namely lead, barium and antimony.

37. The prosecution case, as the judge graphically described it, was that the appellants were in this together. They "planned and operated together and got infested with particles together" (Summation Vol 12 p2475). The judge also describes carefully the limitation of the G.S.R particle evidence, describing what was found and what could and could not be deduced from it. In particular he explained the defence case that the one and two component particles could have come from an innocent source. He dealt with the G.S.R and particle evidence over nearly 50 pages of transcript from p2467.

Ground Seven: Kofi Dill

38. Kofi Dill is the appellant Dill's brother and he was called as a defence witness. He denied that he or his brother belonged to any gang or had any animosity to Parkside. He sought to characterise people as friends who socialised together rather than gangs. He denied that Christopher Parris was a leader of the 42nd Gang or that Sgt. Rollin was an expert in gangs.

39. The complaint is about his cross-examination in that a video was played to the jury. It showed the witness in the company of others singing a song showing hostility towards Parkside and specific members of Parkside, whilst playing with a gun. The judge looked at the video in the absence of the jury and ruled

that the evidence went to an issue in the case and could be put to the witness. It did not just go to credit as the appellants alleged. In my judgment the judge was right. He dealt with it at Vol 13 p2601 in his summing up. He said:

> "I think that the Dill defence is entitled to say, on the basis of this video, that it supports their case as it demonstrates him and his buddies playing with a firearm in a manner that [sic] have caused such contamination that such would later be expected to transfer to the clothing Mr. Dill said he took – and to the Dill household environment, consequentially, transferring to him when he visited.
>
> I must also caution you that nothing in that video was designed to show that Mr. Dill was in possession of any firearm and did any shooting.
>
> That video was merely to establish that Mr. Kofi Dill is a man without credibility who would lie, as he did, when he attempted to pervert the course of justice, a conviction he admitted, and that he would lie again, and is so lying, to assist his brother, the defendant Mr. Dill, to escape justice."

In our judgment there is no substance in this ground. The cross-examination was properly admitted, it went to the hostility between the 42nd gang and Parkside.

Ground Eight: No Case

40. Hewey submits that the judge erred in refusing to accede to the submission of no case to answer. The judge had to apply the test in the well-known case of *R v Galbraith* (1981) 73 Cr App R 124. The case against him can be summarised as follows:

> (1) There was evidence that Hewey was a mid-ranking member or 'soldier' of the 42nd gang and as such was expected to conduct revenge attacks on those who were perceived to have humiliated or insulted a fellow gang member. The gang operated on the basis of 'all for one, one for all'. The deceased, Robinson, was

related to two senior members of Parkside, a rival gang;

(2) The 42nd gang is hostile to Parkside. Hewey lived very close to the deceased;

(3) In November 2010 at Wellington Oval, Dill was humiliated in front of other gang members; and

(4) The gun used to kill the deceased had been used by members of the 42nd gang in other cases.

(5) There was telephone contact between the appellants on the day of the murder and between each appellant and Parris shortly before and shortly after the murder. This was clear from a schedule of calls produced as exhibit 50.

(6) Hewey fitted the general description by Busby as the passenger on the bike. His description of the bike as a black Honda Scoopy (he owned one himself) matched the bike owned by Hewey and the bike was linked to him by DNA and prints.

(7) Hewey's call to his mother shortly after the shooting to put out the dog.

(8) Hewey's arrival with Dill in Palmetto Road coming from the direction of No. 5 where the bikes had been hidden, carrying black helmets matching Busby's description, both helmets having on them one component particles consistent with having come from G.S.R.

(9) The fact that Hewey was in the company, soon after the murder, of Dill whose clothes not only matched Busby's description but also were covered in G.S.R.

All this provides in its totality more than ample evidence on which a jury properly directed could convict Hewey. If there was an innocent explanation for

any of these matters Hewey could have provided it but, as he was entitled to, he chose not to give evidence. The consequence is that this evidence and the inferences the jury could draw from it were left unchallenged by any evidence from him.

41. It was also one of Dill's grounds of appeal (in his case ground 14) that he too had no case to answer. The judge carefully summarized the evidence against him, as indeed he had done in Hewey's case. Dill told the police in interview that he was at all times on the evening of the shooting in the company of Hewey after their initial meeting. He told the police he was not in this gun or gang nonsense but G.S.R particles were found all over his clothing soon after the shooting. It was also found on the bikes and on his helmet. The shooter was left handed as was Dill. Then there was the fact that Dill's Yamaha Nouvo was found hidden with the Honda Scoopy and that Busby's description matched the clothing seized from Dill when he was arrested at Hewey's house later on the night of the murder. All this coupled with the voice notes on Dill's phone from days before the murder and the telephone calls on the night made the case against Dill a very strong one. Given that it was Dill's case that he was in the company of Hewey throughout the evening, and that Hewey too had nothing to do with the murder, the case against each cannot be looked at in isolation. Why should he have been staying at Hewey's house if he had to go home and change to go to work in the morning? The judge was amply justified in finding that each appellant had a case to answer.

Ground Nine: The Admission of Busby's Evidence

42. This ground was advanced by both appellants, it being ground eight in the appeal of Dill. The complaint is that the judge allowed Busby's video recorded statement to be played to the jury without the defence having an opportunity to cross-examine him. No objection was raised on behalf of Hewey, but there was objection on the behalf of Dill. The Crown relied on Section 75(1) of the Police and Criminal Evidence Act 2006 on the ground that the witness was in fear. The judge, in accepting the Crown's submission, said that the statement explaining the fear was one of the strongest and most comprehensive he had

ever seen. Section 75(1) provides that first-hand hearsay is admissible if, inter alia, the requirements of subsection (3) are satisfied. Those requirements are:

> (a) That the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
>
> (b) That the person who made it does not give oral evidence through fear or because he is kept out of the way.

43. Section 77 sets out the principles to be followed by the Court. These are that if the Court, having regard to all the circumstances, is of the opinion that in the interests of justice a statement which is admissible by virtue of section 75 nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

44. Section 77(2) then sets out four specific matters to which the Court must have regard. These are, in summary; whether the document is likely to be authentic, the extent to which the evidence would not otherwise be readily available, the relevance of the evidence to any issue in the proceedings and any risk of unfairness to the accused by inability to controvert the statement.

45. The judge plainly had in mind the relevant provisions and could see no reason why the statement should not be admitted. He concluded there was no risk of unfairness, noting that neither appellant was identified by Busby; he merely stated the facts as he saw them. In our judgment it is relevant that counsel for Hewey (Ms Subair appeared at the trial) raised no objection to the admission of the evidence and indeed she made this clear when the judge explained to the jury why they were not seeing Busby in person and how they should treat his evidence. It was no doubt in Hewey's interest that Busby's evidence should be as it stood in his statement rather than risk an answer disadvantageous to him in cross-examination. Dill's position was slightly different in that he is left-handed and Busby said the shooter shot with his left hand. But, as the judge pointed out, Dill is not the only left-handed person in the world and neither appellant was identified by Busby.

46. The judge had a statutory discretion to exercise and we do not think his exercise of it can be faulted. Further, he gave the jury an appropriate warning how to treat the evidence both before the evidence was played to the jury and later when summing up.

Ground Ten: Appearance of Bias

47. This point is also taken by Dill as ground 12. Hewey's complaint is directed at the conduct of the trial as a whole whereas that of Dill is directed to the summation, which he claims was unbalanced and unfairly adverse to him. Taking first Hewey, Ms. Mulligan in the course of her argument to us said that those instances described in her written submissions were the worst examples. First she said the most glaring example was the judge's repeated misdirection as to the use the jury could make of the Crown expert's G.S.R evidence. I have already dealt with G.S.R evidence as a separate ground of appeal. Mr. Byrne referred the Court to numerous references to the G.S.R evidence in the summing up in volumes 12 and 13 of the transcript. The judge began by referring to each of the experts, making it clear that the jury had to exercise their common sense and experience to decide what evidence they accepted and whether each expert was being fair and impartial or just serving the interest of the side that called him. There is in our judgment nothing unfair about the manner in which the judge directed the jury about the G.S.R evidence.
48. Next it is complained that the judge invited the jury to find, in the absence of any evidence, that Hewey had put his mother up to lying on his behalf about wearing a white t-shirt to distance him from articles of clothing that had G.S.R particles on them. In realty what the judge was doing was referring to the Crown's point that a mother may have split loyalties between the truth and protecting her son.
49. Turning to the summing up, the judge at the start of his summation made it very clear to the jury that they were the sole judges of facts and that any opinion expressed by him was irrelevant unless they agreed with it. Inevitably in a case of this nature the judge will comment on points made by the prosecution and points made by the defence. Particular complaint is made by

Hewey of the judge's treatment of the suggestion that he went out on a cool March night on a bike wearing only a t-shirt and no jacket. All the judge was doing was repeating, albeit with some force, a point that had been made by the Crown. In our judgment he was entitled to do so and did not cross the boundary of what was fair. The summing up was not unbalanced or unfairly adverse to the appellants. There was a strong case against them and the judge was entitled, as he did, to draw attention to various points made by both sides. Hewey chose not to give evidence; nor did he call any witnesses. Inevitably the prosecution's case involved greater material than the defence's response and in our judgment both the trial and the summation were fair and appropriate to the case.

Ground Eleven: Unreasonable Verdict

50. This ground alleges on behalf of Hewey that:

> "The verdict of the jury is unreasonable and unsupported by the evidence. The circumstantial evidence relied upon by the Crown could only have led the jury to engage in wild speculation, compounded by the cumulative effect of the errors made (by) the learned Trial Judge. In all of the circumstances the verdict is unsafe."

A similar ground is relied on by Dill.

51. In our judgment this ground adds nothing to the other grounds of appeal either on its own or cumulatively. For the reasons explained earlier, there was a clear case against Hewey to leave to the jury. He called no evidence, but by the conclusion of the trial there was evidence from his co-defendant and the witnesses called by him. Dill's evidence was that the two of them were together at all material times on the evening in question. The evidence therefore that implicated Dill in the shooting, in particular the G.S.R and the phone messages, was relevant to the case against Hewey. The unanimous verdict was both fully supported by the evidence and safe.

52. In Dill's case, this ground of appeal really adds nothing to his other grounds.

Additional Grounds of Dill

Firearm – Dill's Ground Six

53. The prosecution called evidence that the firearm used to kill Randy Robinson had been used in another murder. This was to show that the weapon was a 'gang' weapon and how the appellants would have access to it. Dill's submission is that this evidence should not have been admitted as its prejudicial effect outweighed it probative value. The judge dealt with this evidence in his summation at p2413. He said:

> "The inference to be drawn from that evidence, together with the other evidence of Sergeant Rollin is that this is a 42nd gun that did both shootings. It is not, however, to suggest that either of the defendants did that other shooting, nor is it to suggest that any of the defendants in that other case did the shooting in this case."

54. In our judgment this ground of appeal cannot be looked at in isolation and has to be considered in the context of the "gang" evidence as a whole. In *Myers* Lord Hughes said:

> "47…the evidence in these two cases (Myers and Cox) rebutted the argument 'why on earth should this defendant, who has no proven connection with, or dispute with, the deceased, have taken in into his head to shoot him?'
>
> 48 For the same reasons, the ballistic evidence of the connection between the gun(s) used in these offences and in other shooting which could be inferred to have been committed in pursuit of gang feuds was admissible evidence in support of the motive attributed by the Crown to the defendants. Further it contributed to the conclusion that the weapons were accessible to gangs of which the defendants were members and thus to them.
>
> 49 In both of these cases it was an important strand in the rope of evidence that there had occurred a trigger event which would have created a grievance in the gang of which the defendant was a member. If that is a

> necessary part of the Crown case it is for the Crown to prove that trigger event…..”

The Crown was entitled to adduce the evidence that the gun had been used in a previous shooting by the 42nd gang and that this fitted with the incident at Wellington Oval, the link with Parris and the voice notes on Dill’s phone shortly before the shooting.

Jury Note – Dill’s Ground Nine

55. Six days into the trial the foreman of the jury sent a note to the judge saying that members of the jury had become concerned for their safety and that of their families. The jury was not comfortable in returning to the courtroom. The thrust of the jury’s concern was that a person in the public gallery had made prolonged eye contact with one of the appellants, and as the jury left the courtroom the same person stared at members of the jury as they filed past. Later it was noticed that one of the people in the public gallery was in possession of a cell phone. There was also a significant presence in the public gallery of individuals wearing gang colours. Possession of a cell phone concerned the jury (a) as to the adequacy of security checks and (b) that photographs might be taken of jurors for the purposes of later identification.
56. The judge took appropriate action. No application was made to discharge the jury at the time but an application was made on the following day and the judge rejected it, having made additional security arrangements, and asked the jury whether they felt able to continue and return verdicts. The judge was well placed to assess the situation and had to exercise his discretion. No further concerns were expressed by the jury and there is no basis for this Court interfering with the judge’s decision.
57. A further point is taken that in response to a question from the jury what would happen if they were unable to reach a verdict by the end of Friday, the judge mentioned being sent to a hotel and the jurors being unable to speak to anyone outside their number. It is argued that this, coupled with the other concerns expressed in the note, added up to a position where the jury was placed under undue pressure. We cannot accept that. It is to be noted that the

jury was eventually sent out at 12:38 p.m on Monday 25 February and returned with unanimous verdicts at 4:16 p.m that afternoon.

"Hired Gun" – Dill's Ground Eleven

58. The complaint here is as to the manner in which the judge handled defence witnesses by making it clear during their evidence that he regarded them as dishonest, and questioning during his summation whether the defence G.S.R expert was "honest or a hired gun for the defence like they say in America".
59. The ground was not pursued on behalf of Dill in any detail and in our judgment is not borne out. The judge's comment about the G.S.R expert has to be seen in context. The judge had warned the jury generally about the care needed when a witness might not be giving evidence for the purpose of justice but might have some personal or special interest. Then he said this applied to experts too, asking first whether the Crown's expert was being fair or just serving the interests of the Crown. Then he went on to make the comment complained of in respect of the defence expert. Whilst other judges might have used a less graphic expression, we cannot see that the judge crossed the boundary of fairness.

Inadequate Summary of the Defence – Dill's Ground Thirteen

60. The judge made it perfectly clear at p2355 of the summation that each appellant's defence was in two parts that they neither killed nor assisted in the killing of Randy Robinson and that they were elsewhere at the time (alibi). Further, that the Crown had in each case, to disprove both parts.
61. When he came to summarize the evidence and the issues he inevitably spent more time on the Crown's evidence. They had called many witnesses. Dill gave evidence himself and called three others. Hewey did not give evidence and called no one. The judge dealt appropriately with all the defence witnesses including Clarence Santucci, Dill's supervisor at the Parks Department, who spoke warmly of him and did not regard him as a gang member.
62. The judge then summarized the Crown's case against each appellant. He then followed with a summary of each appellant's case reciting thirteen points made

by Dill. In our judgment both the judge's summary of the evidence and the case for each side was adequately covered and fair.

Conclusion

63. No one identified either of the appellants as the two on the bike when Randy Robinson was shot. The case depended on circumstantial evidence. In reality the case stood or fell against both together. Hewey chose not to give evidence but Dill did and called three witnesses, his brother, a GSR expert, and Mr. Santucci. That evidence, once called, was of course evidence to be considered in the case of Hewey too. There were many threads to the circumstantial evidence and it was a matter for the jury what they made of them both individually and collectively. When one considers the evidence as a whole there was in our judgment a compelling case against each appellant. The verdict is safe and these are our reasons for dismissing their appeals against conviction.

Signed

Baker, P

Signed

Kay, JA

Signed

Bell, JA