The Court of Appeal for Bermuda

CRIMINAL APPEAL No 12 of 2014

Between:

WOLDA GARDNER

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Kawaley, JA (Acting)

Appearances: Mr. Richard Horseman, Wakefield Quin Limited, for the Appellant
Mr. Carrington Mahoney and Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing: **7 & 8 March 2016**

Date of Judgment: **3 June 2016**

JUDGMENT

Appeal against conviction - Premeditated Murder and Use of a Firearm - Competency of counsel - Gun Shot Residue

Bell, JA

Introduction

1. Wolda Gardner ("the Appellant"), was convicted on 2 July 2014 of (1) premeditated murder, contrary to section 286A of the Criminal Code, and (2) using a firearm to commit an indictable offence, contrary to section 30(1) of the Firearms Act 1973 (pre-amendment). The trial commenced on 19 May 2014

before the Hon. Carlisle Greaves J, and a jury, and continued, with breaks, until 2 July 2014. On 28 May 2014, the trial was adjourned until 9 June 2014. The circumstances giving rise to that adjournment were themselves the subject of complaint on the Appellant's behalf. The trial in fact resumed on 11 June 2014, when it was again adjourned, this time until 23 June 2014, at which point the trial resumed and continued until completion. The judge gave his summing up on 1 and 2 July, and a majority verdict (10 to 2) convicting the Appellant on both charges was given on that date. The Appellant was sentenced to life imprisonment on the first count and 10 years' imprisonment on the second count, to run concurrently. He is not eligible for parole until he has served 25 years.

2. The Appellant was represented at trial by Charles Richardson of counsel, and on this appeal by Richard Horseman. Included in the grounds of appeal are various complaints as to the manner in which Mr. Richardson conducted the trial on the Appellant's behalf.

Grounds of Appeal

3. Before dealing with the question of Mr. Richardson's representation of the Appellant, it is no doubt helpful to consider the grounds of appeal. The first of these was that the Appellant had not received a fair trial, since the Crown had failed to disclose to the Appellant's counsel in advance of the trial the fact that the primary witness against him, Michael Flood, had a history of mental illnesses and disorders. There was a complaint regarding the lack of disclosure of material in relation to Flood's medical treatment. There was also a complaint regarding the fact the trial was adjourned in the middle of Flood's evidence, when the Crown had made an application unrelated to him, in the absence of the jury. Flood had started to give his evidence on 21 May. In the event, when Flood was scheduled to resume his evidence the following day, the Crown advised the judge that following the previous day's proceedings, the witness had been taken to hospital, and was not available to continue. The case proceeded with other witnesses, and on Friday, 23 May, the Crown informed

the judge that Flood had still not recovered, and again further witnesses were interposed. Then on Tuesday, 27 May, the Crown advised the judge that Flood remained unfit to continue his evidence for another week or two, and the case again continued with other witnesses giving their evidence, until the position was addressed the following day. At that time, the judge advised the jury that Flood had been taken ill, such that he was not able to continue his evidence, and further advised that Flood had been granted permission to be removed to another jurisdiction. The judge then advised the jury that there would be a delay of about two weeks, and it was at that point that the trial was adjourned until 9 June 2014. On that date, Flood was still not available, and in fact his evidence resumed on Thursday, 26 June, and was completed that day.

4. The second ground of appeal related to Mr. Richardson's conduct as the Appellant's defence counsel, and the complaint was that the Appellant had been denied due process and a fair trial arising out of the following different matters:

    i) Failure to give consideration to or advise the Appellant of his right to instruct a gunshot residue ("GSR") expert to rebut the evidence of the Crown's GSR expert.
    ii) Failure to advise the Appellant of his right to secure evidence from a psychiatric expert with a view to casting doubt on the evidence given by Flood.
    iii) Failure to provide the Appellant with a complete record of disclosure of material received from the Crown, and in particular the statement of one Meredith Gilbert, which it was said the Appellant had seen only after the trial.
    iv) Failure to consider or apply to read in that statement.
    v) Failure properly to prepare for trial and to give adequate time for the preparation of the Appellant's

defence. In connection with this ground, the complaint was that Mr. Richardson had attended on the Appellant at Westgate only twice, for no longer than a total of an hour and a half.

vi) Failure properly to advise the Appellant in relation to whether he should testify on his own behalf, and advising him that the case against him was sufficiently weak that he should not testify, and

vii) Failure to attend trial and to allow the trial to continue in his absence, without consultation with the Appellant.

5. The third ground of appeal is related to the first ground of complaint against Mr. Richardson, insofar as it related to GSR evidence. But the particular complaint was that the trial judge erred in admitting the evidence of the Crown's GSR expert, because the evidence admitted was in respect of findings of one-component particles and one two-component particle, as opposed to GSR properly so-called. The complaint was that the evidence which was allowed in was inconclusive, and just as likely to have come from some other source. In consequence the complaint was that this evidence was highly prejudicial, and was not probative, given the manner in which the Crown put its case against the Appellant at trial. This was not that the Appellant had himself committed the murder of the victim, but that he had ordered others to do so.

6. The fourth ground was that the judge had erred in allowing the prosecution to call evidence in relation to the Appellant having had possession of and having carried a firearm in October 2011, some eighteen months after the murder of Mr. Lynch on 5 May 2010. The complaint was that this evidence was not relevant to the commission of the offence charged, given the manner in which the Crown's case related to the shooting, and that this was particularly the

case when the gun that had shot the victim had been seized by the police in June 2011.

7. The fifth ground alleged a misdirection in relation to a relatively minor assault said to have been committed by the Appellant against the witness Flood. In particular, complaint was made as to the direction given by the judge in regard to the inference that could properly be drawn from this relatively minor assault, in relation to the commission of violent crimes.

8. The sixth and last ground of appeal was that the judge erred in law by allowing the Crown to elicit evidence from Flood that the Appellant was a crack cocaine dealer, such evidence not being relevant to the commission of the offense charged, and being highly prejudicial.

The Nature of the Crown's Case against the Appellant

9. The case against the Appellant rested on a combination of Flood's evidence, and the GSR evidence, which itself was entirely unrelated to Flood's evidence. The evidence from Flood was given on 21 May, and started with Flood's description of having gone into Hamilton with the Appellant for lunch. On leaving the restaurant, there was an incident when the Appellant became exercised (Flood could not remember what had started it, but he was talking to some friends, and this appears to have been the catalyst). The situation was calmed down and the Appellant proceeded to drive back to the job site. During the course of the journey, Flood said something which offended the Appellant, whereupon the latter punched Flood in the mouth, while driving. It was at this point that the Appellant told Flood the he could "make (him) disappear right now". When Flood replied by saying that everyone knew they were together, the Appellant proceeded to tell Flood that he had had people shot before. When asked for specifics regarding that statement, Flood's evidence was that the Appellant then said that he had been responsible for the Hamilton Parish shooting (a reference to the murder in this case), and that he had ordered that to happen, that he didn't necessarily have to be the one to do it. This evidence

as to what the Appellant had said regarding this murder was repeated more than once in the balance of Flood's evidence in chief.

10. In cross-examination, Mr. Richardson had put to Flood that he had become drunk during the lunch, which Flood denied. When Mr. Richardson put to Flood that the Appellant had never said the words in question, Flood stood by his evidence, saying that he had given his statement, that was what he knew to be true, and that was all he could do. The balance of the cross-examination was extensive, but only at the end of it did Mr. Richardson go back to the admission said to have been made by the Appellant to Flood, with the same answers given by Flood.

Mr. Richardson's Evidence

11. In the usual way when complaints are made of counsel's conduct in a criminal trial, Mr. Richardson was invited to and did file an affidavit. This was relatively short, and in sharp contrast to the affidavit filed by the Appellant, comprising more than twenty pages. Counsel for the Appellant had prepared a list of five questions, and set out below are the questions, coupled with the answers provided in Mr. Richardson's affidavit:

    i) The first question asked how many times Mr. Richardson had met with the Appellant in order to prepare for his trial, and Mr. Richardson's answer was that he could not recall.

    ii) The second question was whether or not he had provided the Appellant with a full set of witness statements and evidence, including the statement of Meredith Gilbert prior to trial, to which Mr. Richardson's answer was "Yes".

    iii) The third question was whether Mr. Richardson had considered obtaining expert psychiatric evidence to challenge Flood's reliability as a witness, when he

received the psychiatric reports on Flood from the Crown. Mr. Richardson's response was that he did not specifically recall being in possession of any such report. He did recall making an application for disclosure of such information, but could not recall if it had been provided. He volunteered that he had asked for a copy of the report, essentially to refresh his recollection, but that no such copy had been given to him.

iv) The fourth question was whether he had considered instructing a defence expert in relation to GSR evidence. Mr. Richardson's response was that he had considered this, that he had discussed the issue with the Appellant, and that such a step had been deemed unnecessary, which was something with which the Appellant had agreed.

v) In relation to Mr. Richardson's advice to the Appellant as whether he should take the stand in his own defence, there was also a request to provide a copy of any written advice signed by the Appellant indicating his acceptance of that advice. Mr. Richardson's response was that he did not advise the Appellant not to give evidence. He said that he advised the Appellant that he would be cross-examined and advised him as to where the problem areas might be. Mr. Richardson said that he had made it clear to the Appellant that if he did not feel that he could properly deal with being cross-examined, then he should think carefully about giving evidence, but he stressed that he had made it clear that that the choice was the Appellant's. He said that choice was not made by the Appellant until very shortly before the case for the defence had

commenced, and he said there was no opportunity to have the Appellant "endorse a brief", that is to say to give written instructions.

12. Mr. Richardson was cross-examined on his affidavit. In relation to the communications between lawyer and client, he said that he believed that he had talked on the phone with the Appellant, but could not recall what they had discussed. As to the Appellant's decision not to give evidence, Mr. Richardson indicated that he had in mind the Practice Direction which had been issued in May 2008, reminding counsel that where it was decided that a defendant would not give evidence, this should be recorded in writing, along with a brief summary of the reasons for that decision, and where possible, that such record should be endorsed by the defendant. The Practice Direction closed by warning of the consequences of disciplinary proceedings in the event of non-compliance.

13. While Mr. Richardson indicated that he had the direction in mind, he explained his failure to comply with it by saying that he had made the decision to go ahead without written instructions. He said that he did not recall advising the Appellant that Flood was unreliable in giving his evidence (the Appellant's version of events), and emphasised that he had made it clear to the Appellant that the choice as to whether or not to give evidence was his.

14. In relation to the issue of the evidence of Meredith Gilbert, Mr. Richardson indicated that he did not consider using that evidence, because he had spoken to Ms. Gilbert, and she had told him in terms that she would not say in court what was in the written statement she had given to the police, and that she would not assist in any way. He said that it was not true that the Appellant had not seen her statement until after the trial, and that he had told the Appellant what Ms. Gilbert had said.

15. In relation to the matter of a GSR expert, Mr. Richardson advised that he did not consider it necessary to call a GSR expert. He said that he had cross-examined the Crown's GSR expert Allison Murtha previously, and had also

used Angela Shaw as a GSR expert, the latter being the expert on whom the Appellant's new counsel had relied in seeking to adduce additional evidence. That at least was the original application, made at the start of the session, in response to which the Court had indicated that it would deal with matters at the time of the argument on the substantive appeal. In the event, Mr. Horseman did not seek to adduce expert evidence as such, but rather sought to rely upon the reports which he had obtained, both in regard to GSR evidence and psychiatric evidence, for the purpose of demonstrating the type of evidence which could have been (and in his submission should have been), put forward by trial counsel, in order properly to defend the Appellant. Mr. Richardson took the view that his duties to his client had to be balanced with his duties to the Legal Aid fund, in terms of incurring unnecessary expense. In cross-examination, Mr. Richardson described the Appellant as a robust client, who had been in constant communication with his office, and particularly with his assistant, Eron Hill.

16. The Appellant gave evidence in reply. He confirmed his affidavit evidence in regard to the statement of Ms. Gilbert, and maintained that she should have been called on his behalf. In relation to the issue of his giving evidence, the Appellant confirmed that Mr. Richardson had advised him that the case against him was weak, as was Flood's evidence. He said that he had had no discussion with Mr. Richardson in relation to a GSR expert, and that he first saw the psychiatric and psychological reports relating to Flood a month after the trial. He said that he had had no conversation with Mr. Richardson regarding those reports. The Appellant was cross-examined, particularly with regard to the statement of Ms. Gilbert, and whether her name had been read out at the start of the trial as a prospective witness, something which the Appellant said he did not recall. He described Ms. Gilbert as important to him as representing his alibi witness, and said that he would have recognised Ms. Gilbert's name if it had been read out, and that while he knew that she had given a statement to the police, he did not have that statement.

17. In relation the issue of himself giving evidence, the Appellant maintained that he had little consultation with Mr. Richardson during the course of the trial, and said that he had experienced difficulty getting through either to Mr. Richardson or to his assistant. He maintained that when the issue arose, he was given relatively little time by the judge to come to a decision. In response to a question from the Court, the Appellant confirmed that he realised that there was a choice in regard to giving evidence, and in relation to his decision not to do so, said that this was what Mr. Richardson had told him.

18. Following the oral evidence on both sides, the Court indicated that it would reserve its decision in relation to this aspect of matters, and our conclusions to the various matters in dispute will be set out hereafter in the course of this judgment.

19. Against that background, I now turn to consider the various grounds of appeal in more detail.

The Issue of Flood's Mental Health

20. This ground of appeal refers to the failure by the Crown to disclose material relating to Flood's medical treatment "once Flood was deemed unfit to continue as a witness in the trial". This statement is inaccurate, insofar as there was never any finding in relation to Flood's fitness or otherwise to continue giving evidence. He stopped giving evidence at approximately at 3:30 p.m. on 21 May 2014, to allow an application to be heard in the absence of the jury. The following day, he was said to be unavailable by reason of his medical condition, and when the judge advised the jury that he had given permission for Flood to leave the jurisdiction for medical assistance, this was in the context of Flood's participation in the Justice Protection programme, established pursuant to the Justice Protection Act 2010, although for obvious reasons this intelligence was not made clear at that time. In the event, the Court was assisted by an affidavit from Cindy Clarke, the Deputy Director of Public Prosecutions, who also serves as the Director of the Justice Protection Administrative Centre, established

under the provision of the Act. Because Flood was a participant in the programme, communications relating to Flood's condition took place between Ms. Clarke and the judge, without those communication being shared with counsel involved in the trial, either for the defence or for the prosecution.

21. The starting point in relation to the various medical reports is to consider the reports prepared in relation to Flood's participation in the Justice Protection programme, as opposed to those generated in relation to his problems at trial. First was a psychological report prepared by Dr. M in the United Kingdom on 12 March 2014. This indicated that Flood experienced a significant range in severity of psychiatric symptoms, and most prominently presented PTSD symptoms and depressive symptoms. He was described as being under considerable stress as the case in which he was scheduled to give evidence approached, and that he had limited coping strategies. Next was a report from Dr. SG dated 7 April 2014, which described Flood as a young man suffering from severe depression, post-traumatic stress disorder and a degree of alcohol dependence. This report also indicated that Flood had informed the medical practitioner that he had been diagnosed with bipolar disorder when he was twenty years old, and that he had been prescribed medication for a brief period. The psychiatric report indicated that while no records were available, the history suggested that Flood did not have any significant manic symptoms or psychotic symptoms at the time, and the likelihood was that the diagnosis could have been that of type two bipolar disorder, in which milder forms of mood swings can be seen. It appears that these records had been given to Ms. Clarke immediately before Flood returned to Bermuda for the purpose of giving evidence. The judge ordered disclosure of these reports on 11 June 2014. Then there were two reports arising from Flood's hospitalisation in Bermuda, which had occurred on 22 May 2014, when he had presented himself at the hospital's emergency department with a complaint of having had a panic attack. Flood was described as "unable to carry on" and the medical recommendation was

that he should stop giving evidence, on the basis that he was unfit to continue as a witness at trial.

22. In the event, these reports were made available to Mr. Richardson approximately three days before his cross-examination of Flood began on 26 June 2014. That cross-examination covered the key matters which had been disclosed in the medical reports three days earlier. First was Flood's use of drugs, and his addiction to cocaine or crack cocaine, which had led to his having entered rehabilitation in 2012. Because Flood's recollection on the point does not seem to have been accurate, he was shown a section of the relevant medical report. It was also pointed out to Flood, and he accepted, that he had been diagnosed with bipolar disorder and attention deficit disorder. So all of the key matters contained in the medical reports which were disclosed at a late stage were the subject of cross-examination.

23. Whilst the Court was referred to various authorities dealing with a failure on the part of the prosecution to provide relevant reports, I do not regard these as being on point. The complaint in the submissions was that had the reports been disclosed in a timely manner, it could or should have led Mr. Richardson to proceed with different lines of enquiry. The reality is that if Mr. Richardson had wanted to proceed with different lines of enquiry, and particularly to secure a report similar in terms to that secured for the purpose of this appeal, he could have done so. I now turn to the report in question.

24. This was a report of Dr. Pogos Voskanian, a consultant psychiatrist. Dr. Voskanian had access to the earlier reports but, in relation to the diagnoses of attention deficit disorder and bipolar disorder, took the view that a review of prior records was necessary in order to make a reliable diagnosis and assessment. In relation to Flood's PTSD symptoms, Dr. Voskanian opined that some of the symptoms of PTSD include dissociative states, where the person is detached from his environment and is in a dream-like state. Dr. Voskanian

concluded that the described diagnoses and symptoms could impact on Flood's ability to appreciate reality and differentiate reality from fantasy.

25. In truth, Dr. Voskanian's report did not contain any really significant findings or recommendations. Mr. Richardson's evidence on the point was inconclusive, but it does follow from the fact that Mr. Richardson was able to cross-examine as he did that he obviously took the view that there was no need for him to adjourn with the view to taking advice as to the content of the medical reports. Similarly, in relation to the need to call evidence from a practitioner such as Dr. Voskanian, such a possibilty must have been something which Mr. Richardson had appreciated when he read the reports.

26. In my view, this case can be distinguished from the authorities to which we were referred by reason of the fact that disclosure of the reports had been made, albeit not on a timely basis. Had Mr. Richardson believed that an adjournment or the provision of psychiatric evidence on the Appellant's behalf was called for, it was open to him to act accordingly.

27. On the last point in relation to this first ground, it was complained that Flood had not been warned not to speak to anybody about his testimony when he left the witness stand late on the afternoon of 21 May. The record is not clear as to whether it was then anticipated that he would resume his evidence later that same day. In the event, the usual warning was not given. There was no evidence before the Court to suggest that anything untoward occurred by reason of this technical failure.

28. It follows that there is nothing to this ground of appeal.

The Conduct of Counsel – The GSR Expert and GSR Evidence Generally

29. This matter was also the subject of an application to adduce fresh evidence, although as with the case of the psychiatric evidence, the question was in fact one as to the type of evidence which might have been adduced had defence counsel considered it appropriate to rebut the evidence of the Crown's GSR

expert. As with the psychiatric evidence, we deferred a decision on the application so that the matter would be dealt with as part of the substantive appeal.

30. In relation to GSR evidence, an application was made before Ms. Murtha gave evidence, with a view to excluding the particle evidence which she was intending to give. That evidence covered both the Appellant and his co-accused, Rickai Dickinson. In Dickinson's case there were a total of 18 one-component particles, with a smaller number of particles in the Appellant's case. The judge, who had considerable experience of GSR evidence, referred to that experience during the course of his ruling. He appreciated the argument that in the United Kingdom one- and two-component particles were generally not admitted. But he pointed out that there was no authority in this jurisdiction to rule out evidence of particles which were not sufficient to constitute GSR. The judge referred to the decision of *Blakeney and Grant v R* [2014] Bda LR 32, in which objection had been taken to the admissibility of one- and two-component particles. In that case, there had been a significant number of particles, comprising GSR particles as properly defined, as well as a number of two-component particles. Yet objection was taken in that case to the admission into evidence of the particles found on the hand of one of the accused, which comprised one two-component particle and some single component particles. Baker JA held that the multitude and composition of the particles demonstrated a very strong case that the particles came from the discharge of a firearm. The judge, having referred to that case, took the view that where none of the particles was a three-component particle, that did not of itself mean that the evidence was not admissible, and one had to look at the evidence in its totality. On that basis, the judge ruled that the evidence was admissible. He dealt with the position in relation to Dickinson first, and in relation to the Appellant said "Mr. Gardner is more difficult. His numbers are much smaller." But in regard to his consideration of "all the circumstances of the case", he did not refer to the different nature of the cases against Dickinson and the Appellant, namely that the former was alleged to have been present at

the scene of the shooting, and thus liable to have come into contact with particles, whereas the case against the Appellant was not so based. And in allowing the evidence to be given, the judge made no reference to the nature of the Crown's case against the Appellant, but simply held that in respect of both defendants, the probative value of the evidence outweighed its prejudicial effect.

31. This is no doubt the appropriate point at which to deal with the more general complaint made in this ground, that one- and two-component particles, which by definition do not constitute GSR properly so called, were necessarily not admissible. To uphold this ground of appeal would be to depart from the principles laid down in *Blakeney and Grant.* In my view there was no good reason put forward to depart from the principles enunciated in that case, namely that all the circumstances of the case need to be addressed, and the evidence looked at in its totality. I would therefore reject that submission, and would not proceed on the basis that particulate evidence less than GSR proper should necessarily be excluded.

32. The evidence of Ms. Murtha was given on 27 & 28 May 2014. She gave the standard evidence in relation to the nature of GSR, namely that in the most basic sense this is a combination of three elements, lead, antimony and barium, which originate from the discharge of a firearm. Following the discharge of a firearm, there is a cloud of smoke, referred to by the experts as a plume, in which those three elements escape from the firearm. As the plume cools, those elements fuse together and create a particle that contains all three elements. In addition, there will be particles that contain only two of those three elements, and there will also be particles that contain just one of the three elements. These particles land on the hands, clothing and the area surrounding the shooter, and are identified as being smooth or rounded. With time, the particles will be lost by simple movements, or by the environment.

33. In this case, samples were taken both from the Appellant and from his co-accused. In the Appellant's case, particles were taken from the palm and back of his left and right hands, and also from his cell phone and motor vehicle. Before going into detail of the particles identified from his hands, it is no doubt helpful to reiterate what constitutes GSR properly so called. This is the case when a particle is found which contains all three of the aforementioned elements, fused together into a single particle. The presence of such a particle would lead the expert to conclude that one of three things had occurred. First, the individual from whom the particles were obtained discharged a firearm; secondly, that individual had been in the proximity of a firearm being discharged, or, thirdly, that individual came into contact with something that had GSR on it. In the case of a two-component or one-component particle, the conclusion to be drawn is that the particle could have come from the discharge of a firearm, but could equally have come from a source other than the discharge of a firearm. Before turning to the particles collected from the Appellant's hands or possessions, there is one other matter of note, which is that the samples were collected some three days after the discharge of the firearm in question. This was recognised by Ms. Murtha as being an unusually long period. Ms. Murtha indicated that after about five or six hours of normal movement and activity, there will be a lot of particulate loss, and further conceded in cross-examination that most State or Federal laboratories in the USA would not accept subjects for sampling which were more than 12 hours old. Ms. Murtha's laboratory was a private one which had no such restriction.

34. As mentioned above, as well as there being samples taken from the Appellant's hands, there were samples taken from the Appellant's motor vehicle and cell phone. It is difficult to follow the source of all of the particles identified by Ms. Murtha since some of these were referred to by reference not to the actual source, but to an identifying code. But it appears that from the Appellant's right palm there was one one-component (lead) particle, and from the back of his left hand there was one one-component (antimony) particle and one one-component (lead) particle. In relation to the samples taken from the Appellant's

car, there was one two-component particle, and six one-component particles. There was one one-component particle taken from the Appellant's cell phone.

35. Ms. Shaw's report was to the effect that one-component particles are more common than two-component particles in the environment, and there are many sources of such particles. Vehicles in particular contain a high proportion of one- and two-component particles, due to the nature of the different materials that they are exposed to through daily use. Ms. Shaw suggested that Ms. Murtha had not been aware that some of the samples had been taken from a vehicle. She further indicated that in the absence of characteristic three-component GSR particles, it could not be stated that one- or two-component particles had originated from a firearm discharge.

36. But as indicated in paragraph 15 above, Mr. Richardson did not regard it necessary to call a GSR expert. Ms. Shaw's report cannot be classified as admissible when considering the criteria for adducing fresh evidence, and in my view it would be wrong to place any reliance upon it. In fact, there is relatively little between the evidence of Ms. Murtha and that of Ms. Shaw. Ms. Murtha did agree that one- and two-component particles could not be classified as GSR. The most that could be said is that some particles could have come from the discharge of a firearm, but equally could have come from a source other than the discharge of a firearm. Ms. Murtha also recognised and accepted that, in relation to one-component particles, there were various sources that such particles could have come from, including from sources that people come into contact with on an everyday basis.

37. The Appellant's submissions indicated that the judge made it appear to the jury that Ms. Murtha's evidence was "highly probative". In fact, the judge went through the particulate analysis with considerable care. He identified the various particles and their sources; he referred to Ms. Murtha's evidence as to the morphology of the particles, which were consistent with their having come from a high temperature reaction, and he referred to the fact that there were no other elemental tags in the configuration with those particles which would

indicate some outside source. However, he did refer to that part of Ms. Murtha's evidence where she had said that that did not mean that these particles could not have come from another source, continuing to say that there was nothing to indicate that they did come from another source. It does not seem to me that the judge's summary of Ms. Murtha's evidence was in any way inappropriate. However, it does have to be recognised that the quantity of particles identified was relatively minimal, and in relation to those taken from the Appellant's person (as opposed to his car), only two elements, lead and antimony, were contained within the identified particles.

38. But, and no doubt more to the point, there does not seem to have been any consideration of the relevance of GSR evidence in the context of the case which the Crown was seeking to establish as against the Appellant. I have referred in paragraph 5 above to the manner in which that case was put in opening, namely that the Appellant was not the person who shot the victim. The shooting had occurred when two people had ridden up on a motor cycle to the victim's residence, and after a shot had been fired, the victim had been found seriously injured, and was pronounced dead on arrival at the hospital. The Crown's case was not that the Appellant was one of those two persons, so there would be no possibility that the particles taken from his person or possessions were there in consequence of the shooting.

39. As indicated previously, the Crown's case against the Appellant was not that he was a participant in the shooting, or present at the scene, but that he had ordered the shooting. For this reason, it is hard to see what would be the probative value of identifying particles from the Appellant's hands, cell phone and motor car which could, but equally may well not, have come from the discharge of a firearm. It is troubling that the jury does not seem to have been reminded of the nature of the Crown's case against the Appellant, when the subject of particles which did not constitute GSR was being addressed. In fact, the judge dealt with GSR at page 188 of the summation by referring to the conclusion that could properly be drawn from the scientific evidence. But in

referring to that evidence, the judge referred in general terms to the particles which had been received by Ms. Murtha, carrying on to refer in general terms to "she sees one-, two- and three-components of GSR, and can then say that one of three things happened." The judge carried on to identify the conclusions that can properly be drawn from the identification of a three-component particle, namely that the individual discharged a firearm, or that he was in the proximity of a discharged firearm, or that he came into contact with someone or something that had GSR on it. But the judge did not here refer to the fact that none of the particles taken from the Appellant's body, his cell phone or his car were three-component particles, or GSR properly so called, from which one of the three possibilities mentioned above could properly be inferred. In fact, the judge carried on to say this:

> "And this is part of the essence of the Crown's case. The Crown does not have to prove who was the shooter. One of the ways in which you can get the particles is if you are in close proximity of the discharged firearm. So if the man in the back shot and you're in the front, you might get (particles) or vice versa".

That could only have been a reference to one or other of the persons on the motor cycle from which Mr. Lynch was shot. It had no relevance to the Appellant, who on the Crown's case was not present when the firearm which shot Mr. Lynch was discharged.

40. Later in his summation, the judge went into more detail on the absence of three-component particles, and also dealt with the length of time which had elapsed before the identified particles had been gathered. But at no point did the judge focus on the nature of the Crown's case against the Appellant, and the fact that it was never part of that case that the Appellant had either discharged a firearm, or had been in the proximity of the firearm which had been discharged to murder Mr. Lynch.

41. In my view, this lack of relevance to the nature of the case against the Appellant is highly prejudicial, without being in any way probative of the Crown's case, and this in itself is sufficient to render the verdict unsafe. The nature of the Crown's case against the Appellant should have been taken into account as part of the overall circumstances, to be considered per *Blakeney and Grant* , and this should have occurred when the application was made not to permit the evidence of Ms. Murtha to be given. And bearing in mind the relatively weak nature on the particulate evidence taken from the Appellant, that evidence should not have been allowed in relation to him. Once that evidence was before the jury, it was not possible to give an effective direction to the effect that the strength of the GSR evidence (whether properly so called, or as in this case in relation to one- or two-component particles) was, in the context of the Crown's case against the Appellant, highly prejudicial and not at all probative.

The Statement of Meredith Gilbert

42. This aspect of matters was covered in the third and fourth grounds of complaint in relation to Mr. Richardson's conduct of the case. First is the question whether Mr. Richardson failed to provide the Appellant with a complete record of disclosure received from the Crown, and in particular the statement of Meredith Gilbert. Mr. Richardson dealt with that evidence in his oral evidence, and gave cogent testimony as to why he did not consider calling Ms. Gilbert to provide evidence. I accept that evidence. It is to be noted that counsel listened to the relevant part of the recording of the trial, which confirmed that, contrary to the Appellant's evidence, Ms. Gilbert's name had been read out as a prospective witness.

43. There were two aspects of Ms. Gilbert's evidence which it was contended were important from the Appellant's perspective. First, it was said that Ms. Gilbert's evidence would have provided the Appellant with an alibi. Secondly, it was said that Ms. Gilbert had identified another member of the relevant East End gang

who was said to have given the order which led to Mr. Lynch's murder. These two points can be taken briefly.

44. Firstly, the alibi evidence is quite irrelevant. It would have had relevance only if the Crown's case depended upon the Appellant being present at the scene of the murder. That was not the Crown's case, and the Appellant's whereabouts at the time of the murder are of no significance in this case. In relation to the second matter, that evidence from Ms. Gilbert was quite inadmissible, and there could have been no question of it being given. All of this is quite apart from Mr. Richardson's evidence that he had been informed by Ms. Gilbert that she would not say in court what was said in her statement, and would not assist in any way. There is nothing to these two grounds of appeal.

Adequate Time for Preparation of the Appellant's Defence

45. Mr. Richardson could not recall the number of times he had visited Westgate to take instructions from the Appellant, but from the documents submitted, it appears to have been only twice, with the second time being very shortly before the start of the trial. However, Mr. Richardson's assistant, Mr. Hill, had visited Westgate innumerable times and had seen the Appellant there, and Mr. Richardson's evidence was that Mr. Hill was 'running notes back and forth'. He described how he would tell Mr. Hill about the issues, the latter would see the Appellant, and Mr. Hill would make notes and report the position back to Mr. Richardson. The material put in by the Crown suggests that Mr. Hill had visited the Appellant on some six occasions. Apparently Mr. Hill had no legal qualification, but that would not affect his ability to take instructions on factual matters. As mentioned in paragraph 15, Mr. Richardson described the Appellant as a robust client who was in constant communication with his office.

46. While the Appellant may not been satisfied with the extent to which he met with Mr. Richardson, and while complaint is made that no proof of evidence was taken, either by Mr. Richardson or by Mr. Hill, the reality is that since the

Appellant's defence was that he did not order the victim's shooting, the only area on which instructions were required was in relation to the relationship which the Appellant had with Flood. And without descending into detail of the matters appearing in the record of Flood's cross-examination by Mr. Richardson, it is abundantly clear that Mr. Richardson had detailed instructions on a variety of matters which were put to Flood during the course of cross-examination.

47. In relation to the authorities to which we were referred, the complaints regarding the competence of counsel were generally made with reference to the advice given by counsel regarding the decision by a defendant to give evidence on his own behalf. In terms of the ground of appeal relating solely to an alleged failure to prepare properly for trial, for my part, I do not find that ground to have been made out.

48. This is no doubt an appropriate time to mention an affidavit which was filed on behalf of the Crown, sworn by Ms. Smith, which purported to speak to the interaction which she had witnessed between lawyer and client during the course of the trial. Counsel who file affidavits dealing with disputed issues of fact necessarily stand in danger of compromising their position as counsel. In this case the issue was a peripheral one, which made it unnecessary to explore, much less resolve the issue. But counsel should be aware that if they do choose to become a witness on disputed factual matters, their standing as counsel is likely to be affected.

Competence of Counsel – Advice re Testifying

49. Mr. Richardson's affidavit evidence on this aspect of matters is set out in paragraph 11(v) above and in relation to his oral evidence in paragraph 13 above. For his part, the Appellant's evidence was to the effect that Mr. Richardson had advised him that the case against him was weak, as was Flood's evidence. He did not mention in his oral evidence the version of events which he had set out in his affidavit, namely that Mr. Richardson had "told me

not to take the stand". Instead, he said in chief that Mr. Richardson had told him that the case against him was weak, as was Flood's evidence. Then in cross-examination, he said that Mr. Richardson did not discuss the issue of his giving evidence with him. Finally, in answer to a question from the Court, the Appellant confirmed that he realised that there was a choice in relation to giving evidence, and only then did he say that in relation to his decision, that Mr. Richardson had told him not to give evidence.

50. From my part, I did not find the Appellant's evidence on this aspect of matters at all convincing, and I prefer the evidence of Mr. Richardson. Whilst it may be that Mr. Richardson should have ensured that he had written instructions on this aspect of matters, I accept that in the course of a trial, events can move quickly, and no doubt this was the reason for Mr. Richardson having failed to secure written instructions as he concedes he should have. But accepting Mr. Richardson's version of events, as I do, it follows that there is nothing to this ground of appeal.

Mr. Richardson's Failure to Attend a Day of the Trial

51. The gravamen of this complaint was that Mr. Richardson did not attend Court on 11 June 2014, on the basis that he was unwell. Mr. Attridge, counsel for Dickinson held on his behalf. The evidence given on that day was from Candy Zuleger, the DNA expert. In broad terms, her evidence related to material taken from the scene of the murder, and in relation to the DNA match which she identified, this related to the Appellant's co-accused, Dickinson. In the written submissions for the Appellant, there was a recognition that the DNA evidence did not link the Appellant either to the weapon seized or to the crime scene. The complaint is then made that "no one bothered to drive home the point that in all the testing conducted by Zuleger, there was no DNA or scientific evidence connecting the Appellant to the gun in question". Given the nature of the Crown's case against the Appellant, this is hardly surprising. In fact, Ms. Zuleger's evidence was consistent with the Crown's case against the Appellant. In circumstances where Mr. Richardson would have known in advance that

Ms. Zuleger's evidence had no relevance to the case against the Appellant, it cannot be maintained that the Appellant suffered any prejudice by reason of Mr. Richardson's absence. Accordingly, there is nothing to this ground of appeal.

Subsequent Firearm Possession - Propensity

52. The complaint in this ground is that the witness Flood was permitted to testify that he had seen the Appellant carrying a gun while working at Tynes Bay in October 2011, and around his (Flood's) home at much the same time. The murder had occurred in May 2010, and the submission on behalf of the Appellant was that the gun that shot the victim had been seized by the police in June 2011. Objection to the admission of this evidence was made by counsel at trial. In allowing the evidence, the judge said that he did not see anything wrong with the line of questioning for one reason, which was that the witness's (Flood's) credibility was on the line. The judge referred to the fact that the relationship between the witness and the Appellant had changed, and regarded that as something which required explanation. The judge also referred to the minor assault, which is the subject of the next ground of appeal. In the judge's view, the evidence of firearm possession went further than the minor assault, and justified the witness's fear of the Appellant. In this regard, the judge commented in terms that it did not matter that the gun in the Appellant's possession in October 2011 was not the gun involved in the offence.

53. The complaint on the Appellant's behalf is that the evidence in question simply went to propensity, and nothing else, and was highly prejudicial. Counsel referred us to the recent Privy Council case of *Myers, Brangman and Cox v R* [2015] UKPC 40, in which the Privy Council had confirmed the continuing validity of the principle laid down in *Makin v The Attorney General for New South Wales* [1894] AC 57. The principle to be derived from that case is that evidence which shows that a defendant has a propensity to offend or behave badly may very well be relevant, but it is normally to be excluded on grounds of fairness, unless there is some reason to admit it beyond mere propensity.

54. In this case, the judge appears to have been influenced by the need to "shore up the credibility of a witness", as it was put for the Appellant. I find it hard to follow the logic that evidence of firearm possession (and not the firearm used in the offence) some 17 months after the commission of the offence could have real probative value. Whether or not Flood was in fear of the Appellant, and whether he was justified in such fear, does not seem to me to be the governing issue in relation to the evidence of this witness. The key part of Flood's evidence is in relation to the admission said to have been made to him by the Appellant, that he had ordered the two perpetrators of the victim's murder to commit that murder. In my view, this evidence of subsequent firearm possession goes no further than being evidence of propensity, and there is no justification which would render the usual rule, that such evidence should be excluded as unfair, inoperative. I would therefore hold that this ruling on the judge's part was highly prejudicial to the Appellant and the underlying evidence should not have been allowed.

The Appellant's Assault on Flood

55. The complaint on this aspect of matters is not in relation to the admission of the evidence itself, but in regard to the manner in which the judge in his summation described its effect to the jury.

56. This assault in question was said to have occurred after Flood and the Appellant had had lunch together in Hamilton during a lunch break from work. As they were driving back to the job site, Flood's evidence was that he had said something which offended the Appellant, and in consequence, the Appellant had punched him in the mouth, while he was driving. The conversation between the two had then continued, according to Flood, with the Appellant saying that he could make things happen to Flood, that he did not necessarily have to be the one to do it, and that he had ordered the victim's murder in this case.

57. The complaint comes from the manner in which the judge addressed the incident in his summation, where he said the following:-

> "And I think what the prosecution is aiming at and showing you, that these pieces of evidence, that this Mr. Gardner is not this peace-maker that the defence for Gardner is seeking to have you believe. He is a man with a temper, he is a man that will do stuff. That's what they're pointing at. Alright? Slam the man, throw the punch in his mouth. Alright? And in determining his demeanour and so on, you can look at his interview and see how he conducted himself in that interview. Right?"

58. Hence the complaint is that the direction from the judge was equivalent to a direction to the jury that they could use the assault to infer propensity to commit violent crimes, such as the murder with which the Appellant was charged.

59. I find the direction troubling. Equating the temper which led the Appellant to assault Flood with the critical part of the case again the Appellant, namely that he ordered the murder, does not seem to me to be probative, and again it is undoubtedly highly prejudicial. It is true that the Appellant's case, put in cross-examination at trial, was that he was not the sort of person to have ordered the shooting. It was clearly open to the jury to be invited to consider any evidence which was capable of rebutting such suggestions, provided that the evidence in question was sufficiently probative of the points upon which the Crown was entitled to rely. A suitable warning would have to be given when dealing with such evidence, that it could not be relied upon as evidence of general propensity to commit the offences with which the Appellant was charged. Flood's evidence of the assault did not directly rebut the Appellant's suggestions about the mentality he was perceived as having amongst his peers in a gang-related context at all. Nor was the direction on how to approach this aspect of the evidence accompanied by any sufficient reminder that it could not be relied upon as evidence of propensity to commit the offences charged.

The Evidence that the Appellant was a Crack Cocaine Dealer

60. This complaint arose from a question put by the Crown when re-examining Flood, in relation to the latter's addiction to crack cocaine. Flood had already given evidence that he had assisted the Appellant in "cutting up and bagging his cocaine", maybe twice a week. So damaging evidence had already been given before Flood indicated that his crack cocaine dealer was the Appellant. And it is important to note that Mr. Richardson had already cross-examined Flood on the subject of his having asked the Appellant to secure crack for him, although it was also put to Flood that the Appellant did not sell or use crack. But the inference could well be drawn from this line of questioning that the Appellant was in the drug business.

61. And while there was clearly time for the judge to have cut off the line of questioning, one can understand why he did not do so given the previous evidence. And ultimately the judge dealt with the matter when he summed up in these terms: "Oh, on that drug issue, you cannot say he's a drug dealer and therefore he's guilty of this offence. Right? That evidence goes nowhere." It is submitted for the Appellant that the short direction given "in passing" was unlikely to have been sufficient to rectify the damage done. While the reference may have been unfortunate, I rather doubt that, in the circumstances of this case, it was particularly prejudicial. In his cross-examination of Flood, Mr. Richardson had referred not only to drug related issues, but also to the fact that Flood could not have met with the Appellant in about Christmas 2009, because the latter was in prison at the time. I would regard the direction in the judge's summation as being sufficient to rectify the situation.

Summary

62. The judge erred in admitting the GSR particle evidence, which in my view was not probative of the Crown's case that the Appellant set up the shooting rather than being directly involved. I have some sympathy with the judge because objection to the evidence being admitted seems to have been based on the quality of the evidence rather than the balance between its prejudicial effect

and any probative value The judge made two other errors, first in admitting evidence of possession of a firearm long after the offence with which the Appellant was charged, and second in relation to the minor assault on Flood. The GSR particle error is in my judgment the most significant. The Crown's case depended on the evidence of Flood, which the jury plainly accepted. The question for the Court is whether, absent these errors, the jury would still have convicted the Appellant. I cannot be confident that they would have done so. In my judgment the errors collectively render the jury's majority verdict unsafe and I would therefore allow the appeal.

Signed

Bell, JA

Signed

Baker, P

Signed

Kawaley, JA (Acting)