The Court of Appeal for Bermuda

CRIMINAL APPEAL No 8 of 2014

Between:

JULIAN WASHINGTON

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Marc Daniels and Mr. Charles Richardson, Marc Geoffrey, for the Appellant
Mr. Carrington Mahoney and Ms. Victoria Greening, Department of Public Prosecutions, for the Respondent

Date of Hearing: **3 & 4 March 2016**

Date of Decision on Grounds 2, 3, & 4: **18 March 2016**

Date of Judgment on Ground 1 and Reasons for the Decision of 18 March 2016: **17 May 2016**

JUDGMENT and REASONS

Appeal against conviction for Premeditated Murder, Attempted Murder and use of a Firearm – juror, allegation of bias – gang evidence – DNA - GSR

Kay, JA

1. On 6 May 2014, Julian Marcus Washington (the Appellant) was convicted of (1) the premeditated murder of Stefan Burgess; (2) the attempted murder of Davano Jahkai Brimmer; (3) using a firearm to commit an indictable offence; and (4) handling ammunition. In relation to (1), (2) and (3), the jury returned verdicts by a majority of 9 – 2. The verdict in relation to (4) the verdict was

unanimous. The trial judge was before the Honourable Justice Carlisle Greaves. The Appellant now appeals against his convictions.

2. The Appellant was friendly with Anthony Smith. On 5 January 2012 there was an incident outside 60 Glebe Road, Pembroke, in the course of which Stefan Burgess assaulted Anthony Smith, knocking him off his bike and causing him minor injuries, including the loss of a tooth. It seems that the assault was prompted by an earlier altercation. Later the same day, at Dublin's yard, Smith told the Appellant about the assault.

3. The following night, Stefan Burgess, Davano Brimmer and others were at 60 Glebe Road. At about 21.00, Burgess went to leave the premises, saying that he was going home to change but that he would be back. When he opened the door, he was shot twice. He died as a result of a bullet penetrating his heart. One of those who had been with him in the house was Andre Blackstock. He gave evidence of seeing a male dressed all in black, including black gloves and a black full visor helmet. The man was at the door, holding a gun. He began to enter the premises and fired another shot. That hit and seriously injured Brimmer.

4. The Appellant was arrested on 9 January 2012. His cell phone was seized and various samples were taken from him and from clothing found at his home. Forensic evidence obtained from these samples and from shells and casings recovered from the scene of the shootings formed a large part of the case against the Appellant at his trial.

5. On behalf of the Appellant, Mr Daniels and Mr Richardson (neither of whom appeared at the trial) advanced four grounds of appeal against the convictions. Three of them relate to the evidence relied upon by the Crown, one of which asserts that the judge ought to have upheld a submission of no case to answer. However, the first ground of appeal asserts that there was an irregularity in the constitution of the jury. We shall deal with that first.

The Jury issue

6. There were considerable difficulties in empanelling the jury in this case. It must often happen in a small jurisdiction that a jury panel includes people who ought not to serve because of a connection with, or prior knowledge of, someone involved in the trial. In the present case it is clear that problems of this kind were unusually numerous. Indeed, at one point the experienced judge commented that this was his first experience of "running out of the list completely". A point arose at which he said that he would instruct the court staff to draw up a list "from the future list" so as to complete the process. It may be that someone misunderstood the judge's instruction because among the last jurors to be empanelled were two who were not taken from "the future list" but had been called for jury service some three months earlier. We shall refer to them as Juror A and Juror B.

7. In the course of preparation for this appeal, Mr Daniels has investigated the empanelling of the jury in the present case and in an earlier trial of this Appellant and two others which took place in January 2014. At the earlier trial, which involved a similar allegation, the Appellant was acquitted. Mr Daniels' investigations were carried out with great diligence and the results are substantially accepted as accurate by Mr Mahoney on behalf of the Crown. The history is set out in minute detail in Mr Daniels' skeleton argument. The material facts are as follows.

8. At the January trial, both Juror A and Juror B were in the jury pool. The indictment comprised counts of attempted murder and firearms offences. In the normal way, the jury pool, having been called into court, heard the names of the defendants and the charges read out. The trial judge (Simmons J) invited Crown counsel to read out the names of witnesses. They included Aneka Donawa, a police officer. The judge then invited the potential jurors to raise any concerns they had as a result of hearing the names of the witnesses and whether they would be unable to render a fair trial. She said that she would assume that, if a juror had any connection with any of the witnesses, or the defendants, or even the lawyers in the case, there might be a potential bias.

Juror A volunteered "I know Aneka, Aneka Donawa". The judge excused her from service. Juror B was called. She raised no personal difficulty but she was stood down by the Crown in any event. None of the jurors empanelled in the January trial served on the jury in the later, April, trial of the Appellant with which we are concerned. However, Juror A and Juror B had heard the defendants (including the Appellant) identified and the nature of the alleged offences specified and Juror A had been excused by reason of her connection with Aneka Donawa.

9. When Juror A and Juror B came to be added, late in the process, to the jury pool at the April trial, the same procedure (although not verbatim) was followed. The late recruits to the pool, including Juror A and Juror B, were told the names of the witnesses and the victims. Again, one of the named witnesses was Aneka Donawa. The judge invited those in the pool to consider whether they would have any bias that could hamper their ability to render a fair verdict. He referred to knowledge of the Appellant, the victims, their families or any witnesses. Several raised connections and were excused or stood down. However, neither Juror A nor Juror B raised any concerns. Indeed, the audio recording discloses that Juror A expressly said "No concerns" when she was called. Both were duly sworn and served on the jury until the conclusion of the trial.

10. Those are the circumstances which underlie the first ground of appeal which refers to "a significant miscarriage of justice arising from a potential juror", although the submission is concerned with actual rather than potential jurors. Factually, its high watermark is that Juror A, having seen fit to raise her connection with Aneka Donawa at the January trial in the context of a process designed to ensure a fair trial, did not also do so in relation to the same connection at the April trial. However, before we consider the detailed circumstances, we must first address a more technical submission to the effect that Juror A and Juror B were statutorily ineligible to serve on the jury at the Appellant's April trial.

(1) The statutory issue

11. The selection of jurors is governed by the Jurors Act 1971. The basic duty to serve if selected is imposed by section 3(1). A person must serve "unless disqualified by subsection (2)", which sets out disqualifications including illiteracy, deafness, blindness, mental illness, detention and certain criminal convictions. In addition to the section 3(2) "disqualifications", section 4 provides for various "exemptions" of persons "otherwise liable to jury service". Some of the exemptions relate to persons engaged in certain offices, professions, employments or callings. However, we are concerned with section 4(4) and (6), the material parts of which provide :

> "(4).....where a person otherwise liable to jury service has served as a juror any time during a session of the Supreme Court then in such case he shall be exempted from liability to jury service –
> for the period of two years next succeeding the last day on which he served as a juror during that session; or
> if the Supreme Court has made an order under section 14 exempting him from liability to jury service for a longer period, then for that period.
> .....
> (6) Where a person otherwise liable for jury service has attended in court on a jury summons during a session of the Supreme Court but has not served as a juror during that session, then in any such case he shall be exempted from liability to jury service for a period of one year next succeeding the last day on which he attended the Court as a result of such summons during that session."

12. Section 14 exemptions arise where service as a juror has been "of an exceptional character" – for example, in an exceptionally long or harrowing trial.

13. By section 15, the Court is empowered to "excuse" persons from serving for "good reason".

14. Mr Daniels' bold submission is that Juror A and Juror B were not eligible to serve as jurors at the April trial because, by virtue of section 4, they were

exempt. He equates exemption with disqualification. So far as section 4(4) is concerned, he submits that Juror A and Juror B "served" as jurors at the January trial by virtue of being part of the pool assembled in court for the selection process. If that is wrong, he submits that they fall within section 4(6) because they were persons who had attended on summons but had not actually served.

15. We are in no doubt that these submissions are simply wrong. It is plain that "served" in section 4(4) requires selection and empanelling. Nothing less would justify the enhanced benefit over section 4(6), viz exemption for two years rather than one year. Moreover, the purpose of both provisions is to provide those whose lives have been interrupted by the inconvenience of jury service with relief from a repeat of the duty within differential specified periods. If a person who, prima facie, is entitled to the benefit of an exemption provided by section 4, is nevertheless ready, willing and able to respond positively to a further summons within the specified period, there is no reason, without more, why he should not serve on a subsequent jury in response to a further summons. In effect, he is provided with an opt-out, but he does not have to avail himself of it. This seems to us to be the plain and obvious meaning of the statute, consistent with its manifest purpose. For these reasons, we are entirely satisfied that Juror A and Juror B were statutorily eligible to serve on the jury at the Appellant's April trial. In fairness to Mr Daniels, his initial enthusiasm for the contrary submission visibly waned in the course of the hearing of the appeal.

(2) Bias

16. The case for the Appellant on this issue is advanced on the basis of alternative factual hypotheses. First, Juror A and Juror B, having been present in court during part of the jury selection process for the January trial, knew at the time of their selection as jurors for the April trial that the Appellant had been tried for similar offences only three months earlier. Secondly, Juror A had taken steps to raise the issue of her potential unsuitability to serve as a juror at the January trial because of her connection with Aneka Donawa, but had failed to

raise the same issue in the same circumstances when told that the same witness would be giving evidence in the April trial.

17. We find the first factual hypothesis to be insignificant. Even if Juror A or Juror B had a detailed recollection of the name of the Appellant and the nature of the alleged offences from the January trial, we do not consider that that could sustain a submission of apparent bias in relation to the April trial. The January trial no doubt received extensive media coverage at the time and Juror A and Juror B, as well as their colleagues on the April jury, might have had some recollection based on that media coverage. In itself, that would not vitiate the propriety of their serving on the April jury or cause concern about their ability to return true verdicts according to the evidence. Even within a single trial, jurors are routinely trusted to give separate consideration to separate alleged offences occurring on different days. The fact that a jury convicts (or acquits) on an earlier count does not prevent them from giving fair and separate consideration to a later count. We see no force in the submission based on the first factual hypothesis.

18. At the time of the hearing before us in March, the submissions on the second factual hypothesis were advanced on the basis of limited factual information. In particular, neither counsel nor we knew anything specific about the connection between Juror A and Aneka Donawa which had led the juror to raise it at the January trial but to which she did not refer at the April trial. The bare facts before us caused us sufficient concern for us to respond positively to counsel's suggestion that the interests of justice might make it appropriate for us to direct that Juror A should be interviewed in controlled circumstances. On 23 March 2016, the Registrar interviewed Juror A in the presence of PC Hylton (the Jury Officer) and a member of the Court staff. Juror A is a 33-year old woman. She and Aneka Donawa "just went to High School together". She said: "We were school friends. Not like friends-friends. I know, she knows, we know the same people." She has not discussed this or any other case with Ms Donawa. Until Ms Donawa entered the witness box, Juror A had not appreciated that she was to be a witness in this case. Although she had heard

the officer's name read out during jury selection at the January trial, she had not heard it at the same stage at the April trial. Her past knowledge of the witness did not influence her "in any shape or form". "I think she just gave evidence because she was a police officer. I don't remember anything."

19. It is common ground that Aneka Donowa's evidence was uncontroversial at the trial. Although her name was one of those in the list read to the jury pool during the selection process, it was well down the list of over forty names.

20. The test for apparent bias in circumstances such as these is founded on the formulation by Lord Hope in Porter v Magill [2001] UKHL.69 (at paragraph 103):

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

21. Although that was not a jury case, the same test has since been applied consistently in relation to juries: see, for example, Pintori [2007] EWCA Crim 1700, and, in Bermuda, Terrence Smith [2007] Bda LR 80.

22. Although we understand why this ground of appeal was advanced with vigour at the hearing, we consider that its initial attractions have been comprehensively dispelled by the facts which have now emerged from the interview with Juror A. We are entirely satisfied that any fair-minded and informed Bermudian observer, having considered all the facts, would conclude that there was no real possibility that the jury or Juror A in particular, was biased. We therefore reject this ground of appeal.

Gangs, photographs and video clips

23. It is well-known that there is a particular sensitivity in Bermuda in relation to "gang evidence". It is what gave rise to the recent Privy Council case of Myers, Cox and Brangman [2015] UKPC 40. In the present case, although there was

material to show that the Appellant was a member of a gang known as "42nd", the case was not presented on the basis that the offences arose in the context of inter-gang conflict. The victims were not considered to be gang-affiliated. This was the effect of a ruling by the judge. In general terms, he ruled against the admission of gang evidence, but permitted evidence tending to prove friendship or association between the Appellant and others, including Anthony Smith, with whom he was frequenting at the time. Whether or not all or any of them were 42nd gang members, the intention of the judge was that their association could be put in evidence so as to establish motive and state of mind but any affiliation to the 42nd gang could not because that would be more prejudicial than probative. The second ground of appeal is in the form of a complaint that, in the course of the trial, a number of matters arose in evidence which deprived the Appellant of the benefit of the judge's ruling with the result that this evidence was significantly more prejudicial than probative. There are three categories of evidence which call for attention and, in relation to the third, there is an issue as to whether there was also an irregularity arising out of the management of the jury.

(1) Reference to 42nd Gang

24. One of the witnesses called by the Crown was Anthony Smith – a friend of the Appellant and the man whose altercation with Stefan Burgess was said by the Crown to have been the catalyst for the murder of Burgess three days later. When Smith was giving evidence-in-chief about the earlier altercation, counsel for the Crown (not Mr Mahoney) asked what Smith had said to Davano Brimmer, who was later to become the victim of the attempted murder. This passage ensued :

> "Q: So what did you say to Mr Brimmer?
> A: I went on to explain to him that it wasn't – it didn't come across the way how he was takin' it.
> Q: What else did you say to him?

A: ….he asked me why we don't trust him and his friends. And I went on to say because certain people felt they were playin' both sides.

Q: And who did you mean by 'certain people'?

A: I would say people up St Monica's Mission.

Q: Do you mean members of 42 Gang?

A: If that's what you want to call them, yes."

Defence counsel intervened at that point.

25. It seems to us that the witness, appropriately, was trying to avoid expressly referring to the 42nd gang and that counsel ought not to have introduced that nomenclature in the light of the judge's earlier ruling. The judge soon made it clear that that was his view too. However, the question is whether this regrettable development, standing alone or when taken with other matters, undermines the safety of the conviction. In our judgment, it does not. The judge promptly directed the jury to ignore what had been said. The reference to the 42nd gang was not mentioned again in front of the jury during the remainder of the trial, which continued for another two weeks. Mr Daniels criticizes the judge for not directing the jury again in the course of his summation to disregard the reference. However, to have done so would have run the risk of reminding the jury of something which they may well have forgotten. It was far safer simply to ignore it so the jury could see that, even if they remembered it, no one was attaching any significance to it. There is no reason to suppose that the jury did not comply with the judge's prompt direction two weeks earlier.

(2) Photographs

26. The Crown put in evidence a number of still photographs, downloaded from the Appellant's cell phone, which depicted the Appellant and some of his associates shortly before the shootings. Some of the images were edited – albeit rather crudely – to conceal prejudicial details but there still remained depictions of the Appellant making a "gun sign" with his hands and making a "middle finger" gesture, together with graphics referring to guns and bullets. It is submitted on

behalf of the Appellant that the photographs ought to have been excluded, either because they went no further than to show general propensity or because they were more prejudicial than probative. We do not agree. It is important to keep in mind the context. When the Crown was presenting its case, it was doing so in circumstances wherein the Appellant had exercised his right of silence when interviewed by the police. Moreover, the procedural rules which were still applicable at the time of the trial did not require the service of a defence statement. Accordingly, the Crown did not know how much of its case would be disputed at trial. One then turns to the question: For what purpose or purposes was the Crown deploying the photographs? To this, Mr Mahoney has persuasive answers.

27. The images assisted in establishing: (1) the close connection between the Appellant and Anthony Smith; (2) his connection with the premises at Dublin's yard; (3) the clothing worn by the Appellant a few hours before the shootings (and upon which particles of gunshot residue were said to have been found following forensic examination (see below)); and (4) his state of mind shortly before the shootings in relation to firearms and their potential use. It was this latter point that was expressly referred to by the judge in his summation. It is also notable that, when the jury in retirement eventually requested facilities for a further and better viewing of the images, the point to which they referred was "pertaining to the jeans [the Appellant] was wearing". This reflects point (3), above.

28. All this drives us to the conclusion that the photographs were properly admitted for permissible purposes and there was no significant risk of their misuse by the jury. They constituted relevant evidence in which the Crown had a legitimate interest in adducing once the more overt "gang evidence" was removed from the picture. We reject the submission that the evidence merely went to general propensity. Its content and the closeness in time to the shootings took it out of that category. It was significantly probative of important issues in the case.

(3) The video clip

29. In addition to the still photographs, the Crown put in evidence a video clip. It came from a cell phone which did not belong to the Appellant but had been seized in the course of another, unrelated, investigation. Indeed, it had featured in an earlier trial of other defendants for different offences. However, it depicted the Appellant in the company of other young men in a house. Some of them were handling a firearm or an imitation firearm. The Crown contended that the evidence was relevant and admissible because it showed that the Appellant was fascinated by firearms and knew how to use them.

30. On behalf of the Appellant, it is submitted that the video clip ought not to have been admitted because (as the judge was later to direct the jury) the Crown could not prove that the firearm was a real as opposed to an imitation gun (as the Appellant claimed in evidence) and, in any event, the evidence was more prejudicial than probative. In our judgment, this submission is unsustainable for essentially the same reasons which we gave when rejecting the complaint about the still photographs.

31. A second submission about the video clip initially caused us greater concern. The clip had a sound track. When it was adduced before the jury, care was taken to ensure that the sound was muted. This was because some of the words spoken by one or more of those present (but not the Appellant) might be considered to be indicative of a readiness to use firearms in the course of gang violence. When the jury were in retirement, they requested to view the still photographs at their leisure and with enhanced clarity. For this purpose, they were provided with a laptop in the jury room, upon which the photographs were recorded. Mr Daniels and Mr Richardson submit that, having been equipped with the laptop, the jury may also have availed themselves of the opportunity to replay the video clip (which was recorded on a second disc) without the sound track having been muted. At the hearing, this scenario caused us some concern. Plainly, it would have been irregular to create a situation in which the jury might have access in their room to material which had been scrupulously kept away from them during the evidence.. It was

suggested by Mr Richardson that, since the disc containing the video clip was an exhibit, it would routinely have gone into the jury room on retirement and, once the laptop had been supplied to enable the jury to view the still photographs, there would have been nothing to prevent the jury from helping themselves to a viewing of the video clip, unmuted. Mr Mahoney disputed that this type of exhibit would routinely go with the jury on retirement. We remind ourselves that none of the counsel appearing before us was present at the trial.

32. This initially difficult issue is now resolved as a result of a careful review of parts of the transcript which were not before us at the hearing and by the helpful observations of the judge concerning what usually happens with this sort of exhibit and what happened on this occasion. The transcript makes it clear that the judge was alert to the danger of the jury having the video clip disc in their room. On the basis of all the material before us, we are entirely satisfied that at no stage did the jury have the opportunity to view the video clip disc, muted or unmuted, in the jury room. Quite simply, this once alarming scenario did not arise.

DNA evidence

33. This ground of appeal is concerned with DNA evidence adduced by the Crown. Its provenance was the swabbing of spent shell casings found at the scene of the shootings. The expert witness called by the Crown was Candy Zuleger, the head of a forensically accredited DNA laboratory in Florida. It is well known that DNA evidence is not always convincing to the same degree. The quality and size of samples varies and the analysis, both chemical and statistical, can vary in its probative force. Mr Daniels focuses on what he submits were shortcomings in the evidence and deficiencies in the judge's treatment of them in his summation.

34. As regards shortcomings in the evidence, Mr Daniels refers to the smallness of the samples and the fact that, as Ms Zuleger conceded, they yielded only a partial profile. So far, his submission is accurate and fair. However, he is still faced with the difficulty that Ms Zuleger was nevertheless able to give

unchallenged evidence that the Appellant was a possible contributor to the profile and that the frequency of occurrence from an unrelated individual was one in 46 million in the black population of Bermuda and one in 173 million in the white population of Bermuda. It is a fact that the Appellant is black and the total population of Bermuda is about 60,000. Moreover, other individuals involved or said to have been involved in the shootings were specifically excluded as contributors. Accordingly, although Ms Zuleger had conscientiously put the DNA evidence in relation to the shell casings below the highest category of a full profile which provides a "match", her evidence was nevertheless capable of supporting a powerful inference in support of the Crown's case against the Appellant. Mr Daniels then submits that, even if that is so, the evidence does not establish how or when the Appellant's DNA had come to be on the casings. That is true but Ms Zuleger was astute to make that concession. It was for the jury to consider whether there was any reasonable alternative explanation. Their consideration would be informed by the directions given by the judge in his summation and it is to those that we next turn.

35. At an early stage in his summation, the judge gave a standard direction on inferences. He distinguished between inference and speculation and emphasized that "if two or more inferences may be drawn from the same set of facts, you must draw the inference that is most favourable to the accused", explaining this by reference to the burden of proof. At a later stage, dealing specifically with the DNA evidence, he further emphasized that it was for the jury to evaluate the evidence and it was not "for experts to rule the world". When reviewing the evidence, he reminded the jury in detail about the evidence of Ms Zuleger, including references to her concessions about the limitations of her evidence. In our judgment, his treatment of the DNA evidence, both legally and factually, did not contain any material error, nor can it be characterised as unfair. We consider this ground of appeal to be unsustainable. Indeed, we did not require the Crown to respond to it.

The Submission of No Case To Answer

36. This ground of appeal asserts that the judge was wrong in law to reject a submission of no case to answer made by trial counsel at the conclusion of the Crown case. Reliance is sought to be placed on the leading authority of Galbraith [1981] 1 WLR 1039. In his skeleton argument, Mr Daniels sought to diminish the value of the DNA evidence and the evidence about gunshot residue (GSR) which was adduced by the Crown. In our judgment, he has totally failed in this endeavour. We do not need to repeat what we have said about the DNA evidence in relation to the casings. There were points which the defence could and did make about it at trial but it nevertheless amounted to evidence upon which the jury would have been able to place strong reliance if they saw fit.

37. We reach the same conclusion about the GSR evidence. The strongest evidence of GSR is found when particles of the three elements which originate from the discharge of a firearm – lead, antimony and barium – are fused together so as to create one particle containing all three of the elements. There will also be particles containing one or two of those elements, referred to as one-component or two-component particles.. In the present case, there were no findings of all three elements fused into one particle on any one exhibit. However, quantities of all three elements were found, albeit only in one-component or two-component particles on numerous items connected or capable of being connected with the Appellant at the material time – a brown beanie hat, his helmet, his watch, both boots, his black sleeveless hooded jacket, a leather belt, his jeans and other items of clothing. At the conclusion of the case for the Crown, there was no alternative explanation of how or when these various particles had come to be deposited, the Appellant having exercised his right of silence when interviewed following his arrest. Although the very strongest GSR evidence is found when particles of all three components are found on a single exhibit, this does not mean that, in the absence of a single three component find, evidence of one or two component findings cannot be probative. Given the multitude and the variety of the particles found in the present case, the evidence could properly be given substantial weight by the jury. We do not

accept that it was weak or tenuous evidence. In this regard, we have in mind the case of Blakeney and Grant [2010] CA (BDA) 20 and 21. The present case comes nowhere near the factual matrix of Barry George [2007] EWCA Crim 2722, to which Mr Daniels refers.

38. When considering a ground of appeal which seeks to challenge the rejection of a submission of no case to answer, it is necessary to have regard to all the evidence which was adduced by the close of the Crown's case. We remind ourselves that this included not only the DNA and GSR evidence to which we have referred but also the other circumstantial evidence of motive, association, state of mind and so on. We are in no doubt whatsoever that the judge was correct to reject the submission of no case to answer.

Conclusion

39. It follows from what we have said that we are wholly unpersuaded that the grounds of appeal, taken separately or cumulatively, cast any doubt on the safety of the convictions. Following the hearing of the appeal, we dismissed the grounds of appeal other than those relating to the jury issue (which we adjourned). This document expresses our reasoning in relation to the grounds previously dismissed and our judgment dismissing the appeal in relation to the jury issue.

Signed

Kay, JA

Signed

Baker, P

Signed

Bell, JA