Criminal Appeal No. 6 of 2025

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. JUSTICE RICHARDS
CASE No. 12 of 2023

Dame Lois Browne-Evans Building
58 Court Street
Hamilton HM 12
Bermuda

Date: 20 November 2026

Before:

THE HON IAN KAWALEY, PRESIDENT
THE HON NARINDER HARGUN, JUSTICE OF APPEAL
and
THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

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Between:

SHELTON BAKER

Appellant

-and-

THE KING

Respondent

Appearances: **Mr. Jonathan White of Marshall Diel & Myers for the Appellant**
Mr. Adley G. Duncan of Department of Public Prosecutions for the Respondent

Hearing date(s): **9 November 2026**
Date of Judgment: **20 November 2026**

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Failure to excuse two jurors- impact upon safety of the conviction- amending the indictment after closing speeches- whether injustice caused to the Appellant

JUDGMENT

HARGUN JA:

Background

1. On 3 February 2025, Mr Shelton Baker, the Appellant, was found guilty by a jury of Aggravated Burglary, contrary to section 340(1) of the Criminal Code.

2. The Appellant now appeals to the Court of Appeal against his conviction on the following two grounds:

    (1) the Learned Judge erred in law by failing to excuse two jurors, namely juror number 3 and juror number 10, both of whom advised the Court that they knew Crown witness A/DC Jewel Alex Hayward ("**DC Hayward**").

    (2) That the Learned Judge erred in law by allowing the Crown's application to amend the indictment as laid by substituting the words "*and at the time had with you an offensive weapon*" in place of the words "*and at the time had with you an article with a blade*" after the close of evidence.

3. The background to this matter is set out in the prosecution's summary of evidence. Briefly, around 9:30 PM on 26 October 2022 the complainant was sitting in a folding chair on the front porch of her residence on Princess Street, Pembroke. As the complainant sat outside playing a game on her phone, she felt a hand aggressively grab her mouth and felt the jagged edge of a knife blade pressing against her neck. She tried to turn around to see who was behind her, but she could not move as her chair was against a wall. A male with a Bermudian accent spoke in an aggressive tone and said, "*If you don't get up I'll split your throat*". She followed his instructions and stood up from the chair. The Appellant kicked the chair from behind her, and it landed in front of her near the open front door of the residence. The Appellant pushed her through the front door of

her residence into her living room. As they entered the living room, the complainant saw her roommate sitting on the couch looking towards them. At this stage, the Appellant let go of the complainant and walked out of the front door and towards the end of Princess Street.

Failure to excuse the two jurors

4. The factual background to this ground of appeal is that is that Juror number 3 advised the Hon. Justice Richards ("**the Judge**") that DC Hayward was his neighbour and that he had known DC Hayward most of his life. Whenever he saw DC Hayward, they would exchange polite greetings but could not recall having any substantive discussions with him. When asked by the Judge whether his connection with DC Hayward had any bearing on his ability to be impartial, Juror number 3 advised the Judge that it had no bearing on his ability to try the case fairly.

5. Juror number 10 advised the Judge that more than 25 years ago he and DC Hayward had known each other as police cadets but that he had not spoken to DC Hayward during the last 25 years. He also confirmed to the Judge that his former association with DC Hayward did not affect his ability to try the case fairly on the evidence.

6. Having regard to this evidence from Jurors number 3 and 10, the Judge decided that there was no sufficient reason why these two jurors should be excused.

7. The statutory power for a court to discharge jurors after they are sworn due to possible bias or lack of indifference between the parties, is set out in section 524 of the Criminal Code which states:

> "*Where after a juror has been sworn, and during the trial of an accused person, it appears to the Supreme Court that the juror is not indifferent as between the Crown and the accused person, the Court, without prejudice to the power of the Court to discharge the whole jury, may discharge that juror from further service in connection with the trial.*"

8. It is also common ground that the test for apparent bias is set out in the judgment of Lord Hope in **Porter v Magill [2001] 1 UKHL 67** 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*."

9. In his written submissions Mr. White advised the Court that the extent to which the Appellant relies upon the first ground of appeal is limited to its impact upon the overall safety of the conviction.

10. I am satisfied that having regard to the tenuous and historical relationship of Jurors

number 3 and 10 with DC Hayward the Judge was fully entitled to accept the Jurors' evidence that their connection with the DC Hayward did not affect their ability to try the case fairly based upon the evidence. Having regard to all the facts bearing upon this issue, I am satisfied that the facts do not disclose any real concern of apparent bias on the part of Juror number 3 and 10.

11. Further, it is to be noted and needs to be taken into account that the evidence of her DC Hayward was entirely uncontroversial. DC Hayward was part of the Bermuda Police Service's forensic support unit, and he was called to produce 6 photographs of the crime scene at Princess Street taken by crime scene investigator Victoria Holden. DC Hayward's evidence was entirely of a formal nature.

12. In the circumstances I entertain no doubt that the Judge was fully entitled to take the view that there was no sufficient basis for excusing Jurors number 3 and 10 on the grounds of inability to try the case fairly on the evidence presented to them. Further, I am satisfied that the decision not to excuse Jurors number 3 and the 10 had no effect upon the overall safety of the conviction. Accordingly, I would dismiss this ground of appeal.

Amendment to the Indictment

13. Under this ground the Appellant complains that the Judge erred in law by allowing the Crown to amend the indictment as laid by substituting the words "*and at the time had with you an offensive weapon*" in place of the words "*and at the time had with you an article with a blade*" after the close of the evidence.

14. The court's jurisdiction to allow an amendment to the indictment is set out in section 489A (1) of the Criminal Code which provides that:

> "..*where before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without causing injustice*".

15. In relation to this ground Mr. White relied upon a passage in the judgment of Watkins LJ in **R v Newington 6 BMLR 99** at page 102:

> "*Unquestionably the judge had the power to amend the indictment as and when he did but we question whether it is ever wise to exercise that power during a summing-up, especially of a long and complex case. When such a course is pursued it must inevitably deprive defence counsel - no matter that he does not object strenuously, or at all, to what the judge proposes to do - of the opportunity to address the jury on the implications of the amendment. Furthermore, there is a risk*

> *of the Judge being unequal to the task of properly adjusting his summing-up to accommodate the change brought about by the amendment.*"

16. There is no question in this case of the Crown in any way acting improperly in seeking the amendment that it did. The issue for the Court to consider, therefore, is whether an amendment to the indictment can be made at a given stage of the trial without prejudice to the accused (See: (i) the judgment of Hickinbottom LJ in **R v Mumtaz (Kamran) [2017] EWCA Crim 1843** at [17]: "*The real issue is whether, in the particular case, the amendment can be made without prejudice, i.e., for the purposes of this case, without prejudice to the defendant*"; and (ii) the judgment of Thomson J in **R v William Henry Collison [1980] 71 Cr. App. R. 249** at 254: "*Was there in this case any injustice to the defendant from allowing the amendment to be made? In our judgment there was not. The amendment which was allowed did not involve the inclusion of a fresh or new charge. Unlawful wounding was a charge already before the jury as the unstated alternative lesser charge comprehended in the one count in the indictment of the wounding with intent*".

17. In the Respondent's written submissions counsel correctly submits that the original wording. "*article with a blade*", and the amended wording, "*offensive weapon*", are both aggravating circumstances contained within section 340(1) of the Criminal Code. Section 315(4) of the Criminal Code defines "offensive weapon" as: "*any article made or adopted for use for causing injury to or incapacitating a person or intended by the person having it with him for such use by him or by some other person*." Section 315C (2) of the Criminal Code defines "article with a blade or a point" as: *"subject to subsection (3), this section applies to any article which has a blade or is sharply pointed accept a folding pocketknife*".

18. It was the prosecution's case that the Appellant had with him a metal object, specifically a metal blade or knife-like object, that was placed at the throat of the complainant when he grabbed her from behind on her porch. The evidence at trial was that the complainant described the object as a knife and perceived the knife to be made of metal when it touched the throat. The Respondent submits that, irrespective of whether the article fell within the legal definition "an article with a blade", this description of the article was capable of bringing it within the definition of an offensive weapon. The article was placed against the complainant's throat, and the evidence was capable of supporting the conclusion that it was intended to cause injury if the complainant did not comply with the attacker.

19. In a careful Ruling the Judge, applying the correct test, was anxious to ensure that the Appellant was not prejudiced by the amendment:

> "*I will allow the amendment but, as I indicated during the course of argument, I do propose to somewhat artificially restrict the direction that I will give to the jury on*

> *the meaning of an offensive weapon so that the Crown will not be able to benefit from any intention that any knife that the jury may find that the intruder possessed may have been had with him for the purposes of causing incapacitation rather than injury, so I will not mention the concept of incapacitation at all. As long as I do that, it does not seem to me that since the definition of "bodily harm" is an injury which interferes with health or comfort, the residual definition of the intention with which the weapon must be carried in order to make it offensive is wholly subsumed within the definition of the pleaded ulterior intent in the indictment and, for that reason, I do not see that Mr. Baker is prejudiced by the amendment*."

20. During argument, Mr. White candidly accepted that the factual basis of the prosecution case did not change as a result of the amendment to the indictment as the jury was always being asked to determine whether Mr. Baker went equipped with an article with a blade. Mr White was unable to say how he would have approached the defence case differently and what other questions he might have asked in cross examination if the indictment had been in the amended form from the beginning of the trial.

21. In all the circumstances, like the Judge, I am satisfied that the amendment to the indictment in this uncomplicated case by substituting the words "*and at the time had with you an offensive weapon*" in place of the words "*and at the time had with you an article with a blade*" after the close of the evidence did not cause prejudice to the Appellant. Accordingly, I would dismiss this ground of appeal.

Conclusion

22. For the reasons set out in this judgment I would dismiss this appeal.

Hickinbottom JA

23. I agree.

President Kawaley

24. I also agree.