Neutral Citation Number: [2022] CA (Bda) 14 Crim

Case No: Crim/2021/5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR JUSTICE ATTRIDGE (AG)
CASE NUMBER 2019: No. 27

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 15/08/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL CHARLES-ETTA SIMMONS

- -

Between:

JAHMICO TROTT

Appellant

- and -

THE QUEEN

Respondent

Mr. Richard Horseman of Wakefield Quin Limited for the Appellant
Mr. Carrington Mahoney and Mrs. Karen King-Deane of the DPPs Office for the Respondent

Hearing date: 8 June 2022

- -

APPROVED JUDGMENT

KAY JA:

1. On 30 March 2021, following a retrial, Jahmico Trott ("the Appellant") was convicted by a majority verdict (11-1) of a jury for the offences of: attempted murder; using a firearm to commit an indictable offence; carrying a firearm with criminal intent; and intimidating a witness. The retrial had been consequential upon a successful appeal against conviction following an earlier trial on the attempted murder and firearms charges which had concluded on 7 March 2018.

The Successful Appeal

2. The only ground of appeal which succeeded related to the failure of defence counsel at the first trial to call Lakeisha Darrell as an alibi witness The intimidation charge related to events subsequent to the first trial.

The case for the Crown

3. I take the following summary of the case for the Crown from the judgment of Sir Christopher Clarke P on the first appeal, adapted to reflect some differences in the evidence.

4. On Sunday 14th May 2017, which was Mother's Day, the complainant, Daniel Adams was at the residence of his cousin, Marekco Ratteray, in Elliot Street, Hamilton in the upper level above the Bulldogs Sports Bar, which is at the corner of Elliott Street and Court Street. At around 6.00 pm Troy Burgess, Jr and other associates of the appellant were seen1 walking south along Court Street from the direction of the Elliot Street car park on the side of the road opposite to the building in which the apartment was. This group eventually congregated just across the road from the entrance door of the building and looked towards it.

5. Shortly afterwards, the Appellant emerged from the Elliot Street parking lot, just to the right of where Burgess was standing. He was armed with a black firearm. He ran across the street and entered the building where Ratteray's residence was. He was dressed in dark clothes – a hooded sweatshirt with the hood pulled over a baseball cap on his head, black gloves on his hands, dark distressed jeans, and dark sneakers with a distinctive grey pattern. The lower part of his face was concealed with a red scarf. The Appellant knocked on the door of Ratteray's apartment. Ratteray went outside onto his porch to see who it was and immediately recognised the Appellant although he had the red scarf across his face from his nose down. The Appellant was about 10 feet away from him and he could see his eyelashes which he described as distinctly bushy/girlie. The Appellant kept asking him to open the door saying words to the effect "Ro, just open the door, this isn't for you". Ratteray recognised the Appellant's voice as he was someone whom he saw and spoke to daily and whom he had known for around ten years. (The Appellant had been overseas for some time before returning to Bermuda in February 2017). He had seen him the same day shortly before the incident. He would see the Appellant and Tony Burgess daily in the vicinity of his residence, by Bulldogs.

6. Ratteray saw a revolver in the Appellant's hand which the Appellant was holding downwards behind and between his legs. Ratteray ran back inside after slamming the door to the porch and

alerted Adams as to what was happening. Ratteray accepted in his evidence that it was likely to be a matter of some 5-6 seconds during which he spoke to the man at the door. Unable to get Ratteray to let him into the apartment, the Appellant climbed along the wall of the balcony and crossed onto the porch in order to try and gain entry into the apartment from the door to the porch.

7. Ratteray and Adams fled the apartment. Adams fled down the steps towards Court Street. Ratteray jumped over the wall of the balcony, then scaled a fence and ran across the adjoining empty car park of the Jamaican Grill. The Appellant ran through the apartment and down the steps to Court Street in pursuit of Adams.

8. Once on Court Street Adams tried to flee the area on his motorcycle which was parked on the sidewalk on the west side of Court Street just outside the building. But he could not get it started. The Appellant managed to catch up with Adams, who was much bigger than the Appellant, and there was a vicious struggle for the firearm (which Ratteray witnessed) during which the Appellant fired 3 shots at Adams' head. In the course of this the Appellant fell to the ground and Adams got on top of him. Adams said that he immediately recognised the Appellant, notwithstanding the red scarf, which slipped during the struggle enabling Adams to see his face. At this point Adams and the Appellant were face to face and Adams was actually breathing on him. Adams had known the Appellant from when he (Adams) was about 14 years old and saw him from time to time since the Appellant's return to the island.

9. As Adams was getting the better of the Appellant, Troy Burgess Jr ran across the road to help the Appellant by pulling Adams off him and attempting to hold on to him. This allowed the Appellant to get back onto his feet and fire the gun again at Adams. As Adams tried to disarm the Appellant again Troy Burgess Jr tried to hold on to Adams as the Appellant discharged the gun. After he got up Adams, now no longer close enough to restrain the Appellant, took cover behind a parked vehicle and the firearm was discharged again. He sustained a graze wound on the top of his head. He had various abrasions on his hands and knees.

10. Adams then ran to the Hamilton Police station, shouting the Appellant's name, arriving there by 6.08 pm. He made a report identifying the Appellant as the gunman who had tried to kill him. All this happened on a sunny afternoon and was captured by CCTV cameras erected in the area.

11. The Appellant attempted to make good his escape on a motorbike through the Elliot Street parking lot which led onto Union Street. As he exited the lot at speed, he collided with a car, driven by Larenzo Ratteray, which was travelling south along Union Street. Larenzo Ratteray had been driving south down Court Street and had heard the sound of the gunfire. He reversed, turned left along Angle Street and then went south down Union Street when the collision occurred. The front bumper of the car was damaged on its right side. Larenzo Ratteray noticed the black gun in the Appellant's hand and backed up his car and drove off. He described the Appellant as 5'6" to 5' 8" tall and of light complexion.

12. The Appellant had fallen to the ground. But he hastily jumped up and ran off, abandoning his motorbike in the vicinity of the collision. He rode off on another motorbike which was parked outside a nearby house toward King Street and then onto Curving Avenue.

13. The collision was not captured on CCTV but the Appellant was captured on CCTV when riding away from the collision scene and making his way along Curving Avenue.

14. An investigation was launched and on Monday 15 May 2017 the Appellant was arrested at 38 King Street, the residence of his girlfriend, Lakeisha Darrell, and taken to Hamilton Police Station. A search warrant was executed at her residence and a bullet proof vest was found.

15. The Police reviewed CCTV cameras from the area. They noted a man, wearing shorts, riding a motorbike on the day of the incident at about 5.50 pm from Curving Avenue onto King Street in the direction of the place where the Appellant was arrested. The timing on the CCTV was 5.50 but that was probably about 5.45 in real time. At about 7 minutes later the same man was observed, now a passenger but still in shorts, on the back of a motorbike coming from King Street and continuing onto Curving Avenue wearing a blue cap which appeared to be similar to the one that the Appellant appeared to be wearing. Further CCTV footage showed a man on Kirby Avenue, now fully clothed. He went into a house on Curving Avenue and came out of it soon afterwards. His left hand appeared to swing in a normal fashion as he walked; but his right hand was kept to his side, rather as if he had some form of deformity. The case for the Crown was that that was because he was carrying a gun in that hand. At about 6.00 pm in real time the same day a man was seen walking from Curving Avenue into King Street. This was recorded on Camera 6, The prosecution case was that the man concerned in each of these videos was the Appellant and that, in the last of them, he was heading briskly towards the Elliot Street parking lot across from Ratteray's residence at the Bulldog's building.

16. A video was lifted from the Appellant's phone, which had been seized on 15th May. The video recorded footage of the Appellant a few days before the incident, which showed him wearing dark sneakers with, the Crown contended, the same distinctive grey pattern as he had worn at the time of the shooting and which, it was said, could be seen in photographs of him which were on his phone.

17. The motorbike that the Appellant was riding out of the Elliott Street parking lot, and which he abandoned after the collision, was found to have a significant number of three component gunshot residue particles with all three chemical components of lead, antimony and barium present, as well as a large number of two component particles. The Appellant's right palm had 2 two-component particles which, between them, included all three chemical components present. His left palm had 1 two-component particle consisting of lead-barium.

18. The case for the Crown in relation to the charge of witness intimidation related to events on 22 July 2018, that is after the first trial but before the hearing of the first appeal. Accordingly, it did not feature in the first trial. Moreover, the Appellant's conviction of it in the retrial, following amendment of the indictment, is not challenged in this appeal. The facts of it (which are relevant to this appeal) are that on 22 July 2018, when the Appellant was in disciplinary segregation in the Westgate Correctional Facility and Ratteray was close by in protective segregation following his conviction and sentence for unrelated offences of violence, the Appellant spoke to Ratteray through a door for about 15 minutes. The Appellant asked Ratteray why he had testified against him at the first trial; told him that Adams was a rapist and deserved what he got; that something had happened between Adams and the Appellant's sister many years earlier and the Appellant had

been trying to get at Adams; that he wanted Ratteray to help him with his pending appeal by signing an affidavit to say that his evidence had been untrue and had resulted from police pressure; that Ratteray would not be protected once he was released from prison and, if he refused to help, someone would get him; that people see Ratteray's girlfriend all the time and know which school his son attends; and that Ratteray should do the right thing and sign the paper because, if he did not, things would happen. The Crown intimated that this amounted to, or was the evidence of, an admission of involvement in the indicted offences.

The case for the defence

19. The case for the Appellant was that he had nothing whatsoever to do with the attempted murder of Adams; that at the material time he was with Lakeisha Darrell at 38 King St; that he had been wrongly identified by Adams and Ratteray, who were unreliable witnesses; that he was not the man identified as the shooter on CCTV footage; and that the two- component particles found on his hands were not sufficient to be probative and, in any event, might have resulted from innocent secondary transfer, for example from the arresting officer or in the police car.

The grounds of appeal

20. On behalf of the appellant, Mr Richard Horseman advanced grounds of appeal under four headings, having abandoned two additional grounds prior to the hearing. He made it clear that his main ground of appeal related to the treatment of the GSR evidence which ground, he submitted, had been greatly assisted by the recent decision of the Judicial Committee of the Privy Council in *Devon Hewey v The Queen* [2022] UKPC 12. The other grounds of appeal are that the Judge erred by not excluding evidence of the finding of the bullet-proof vest at 38 King St; that the Judge erred when he refused to allow the Appellant to put to Ratteray in cross examination a document said to contradict Ratteray's evidence that he was not a cocaine or crack user; and that the Judge erred by failing to give an appropriate direction on voice recognition and further erred by suggesting to the jury that the Appellant's voice could be easily recognisable.

21. In the course of his submissions, Mr Horseman repeatedly emphasised that at the retrial, the Appellant was without legal representation

The GSR evidence

22. As with several other firearms cases in Bermuda in recent years, the Crown relied on GSR evidence. GSR comprises three components: lead, barium, and antimony. Particles may be found which consist of only one of the three components; or two of the three components; or all three components fused together. One component particles may have emanated from the use of a firearm or some other source; two component particles are considered to be consistent with GSR but can also be found from other sources, albeit from fewer sources than one component particles. Forensic scientists analyse the morphology and chemistry of the particles when considering other possible sources. Three-component particles are considered to be characteristic GSR, because they are highly specific to the discharge of a firearm, and because there are very few other sources from which they can emanate.

23. In the present case a substantial number of two and three- component particles were found on the motorcycle, which crashed into Larenzo Ratteray's car, but the Appellant disputed that he was the rider. The particles found on the Appellant were as follows: right palm, two two-components – one barium/antimony the other lead/barium; left palm, one two-component – lead/barium.

24. On his first appeal following his conviction at the original trial, the Appellant advanced grounds of appeal which objected to the admissibility of the GSR evidence on the basis that it was more prejudicial than probative and he also complained about the way in which the trial judge's summation dealt with the evidence. Although the appeal succeeded on the unrelated ground to which I have referred, this Court rejected the GSR grounds. Clarke P said:

> *"[88] In our view the judge was not in error in allowing the Crown to adduce evidence of what was on the appellant's palms, and his summing up was appropriate and fair. We do not accept that because a possible explanation for the particles on the appellant's palms was that the two-component particles came from the arresting officer the jury should have been denied the evidence of what was found on those palms. That evidence was part of the whole picture and it was for them to determine what significance, if any, they attached to it. As this court said in Deven Hewey and another v R [2016] CA Bda Crim at [35] this type of evidence has to be considered in the context of the other evidence in the case.*
>
> *[89] Mr Horseman submitted, as he had to this court in Pearman-Desilva v R [2017] CA Bda Crim at [20] that where two inferences can be drawn from the presence of two-component particles on an individual, the one most favourable to the defence must be adopted, with the result that this evidence should not have been allowed to be before the jury. We disagree, as did the court in Pearman -DeSilva, and for the same reason. Evidence of this kind falls to be considered in combination with the rest of the evidence. There are often items of evidence in which a jury could draw one of two or more inferences. That is not, however, a circumstance which means that the evidence ought not to be before the jury at all."*

25. In the current appeal, following his conviction, on the retrial, the Appellant again complains about the way in which the judge dealt with the evidence in the summation but does not repeat the challenge to its admissibility. The evidence was not exactly the same as it had been in the original trial, nor was the approach of the Judge identical to that of his predecessor. Since the retrial the Judicial Committee of the Privy Council has considered the case of *Hewey v R* [2022] UKPC 12. The Judicial Committee was concerned solely with the issues surrounding the GSR evidence in that case. On the question of the admissibility of the evidence of one and two -component particles it approved the approach of the trial judge. The judgment of Lord Hughes and Lord Lloyd Jones stated at paragraph 32:

> *"As the Court of Appeal observed in the present case, the judge was correct in admitting the evidence of particles because it had to be considered in the context of all the evidence in the case. The judge correctly exercised his discretion to admit it and the Court of Appeal correctly declined to interfere with the exercise of his discretion."*

26. However, the Judicial Committee allowed the appeal on the grounds that in his summation, the trial judge had, "effectively reversed the burden of proof" (paragraph 29), and that his approach to one component particles was not consistent with the expert evidence. On the present appeal, Mr. Horseman seeks to derive significant support from *Hewey*. In order to examine whether the decision of the Judicial Committee supports the Appellant's case, it is necessary to examine the Judge's summation.

27. The transcript of the summation in relation to the evidence of the forensic scientist Ms. Tyra Helsel covers some 13 pages. It begins with a helpful account of her methodology and the phenomena of one, two and three particle components. That methodology included the elimination of two-component particles which were unlikely to have come from a discharged firearm, It then accurately recounts Ms Helsel's evidence and findings. It continues with these passages:

> *"Ultimately, Ms. Helsel indicated, by way of qualifiers, that when GSR is found on an individual it can be said that either the individual discharged a firearm, was in proximity of a discharging firearm, or has come into contact with a surface or object that has GSR on it through transfer.*
>
> *...*
>
> *Ultimately, in this case, it's for you to decide, on the evidence you've heard, whether one or more of those possibilities can be inferred as flowing logically and reasonably from the facts as you find them to be. But, again, the GSR evidence is not an element to the offences charged and there's no burden on the Prosecution to satisfy you beyond a reasonable doubt so that you feel sure that the two-component particles on his hands must have come from the Defendant discharging a firearm, before you can return "Guilty" verdicts against the Defendant in respect of Counts One, Two and Three in the Indictment. This is simply evidence which, if you accept it, is capable of supporting the Prosecution case that it was the Defendant, as recognised by Mr. Adams and Marekco Ratteray, who discharged the firearm in an attempt to kill Mr. Adams.*
>
> *...*
>
> *Ms. Helsel did not agree that GSR evidence has very little probative value. She stated that the question is not whether it was there but why it was there. And in this case the Prosecution ask you to infer it was there because Mr. Adams and Marekco Ratteray correctly recognised the Defendant who shot Mr. Adams the day before."*

And later with this:

> *"Ms. Helsel then confirmed that the population of two and three-component particulate she found on the samples from the Yamaha were, in her opinion, GSR particles from the discharge of a firearm. She also confirmed that there were no three-component particles found on the Defendant's hands, just 3 two-component particles. Ms. Helsel agreed that she could not say, in the same way that she can with the Yamaha, that the two-component particles on the Defendant's hands definitely came*

from the discharge of a firearm, but if they were GSR from the discharge of a firearm, then they are there because the subject, Mr. Trott, either discharged a firearm, was in the proximity of a discharged firearm, or they were transferred there."

28. We do not have the benefit of an official transcript of Ms. Helsel's evidence. However, Mr. Horseman has provided a copy of his transcription from the recording. It attributes the following to Ms Helsel:

> *"I can never say how it got there. I can just say it is there…All of those scenarios are equally possible."*

And later:

> *"I can't say any of those particles [presumably the two component particles] are GSR. Even if they are' I cannot say how they got there. If they are in fact GSR, they are there from either discharging a firearm, being in the proximation of a firearm being discharged…or through transfer, all of which are equally possible".*

29. In the final pages of his lengthy summation, the Judge, when summarising the case for the defence, said :

> *"The Defence case is that the GSR -– let me say that again -– evidence is equally unreliable and you could never be satisfied that the only inference that you could logically and reasonably draw from that evidence is that Mr. Trott discharged a firearm, because it is equally, if not more logical and reasonable on the evidence to infer that the particles consistent with GSR on his hands got there by transfer from the Police and the Police car."*

30. Mr. Horseman made forceful submissions about the summation. He first contended that, as in *Hewey*, the Judge reversed the burden of proof. Secondly, he failed to direct the jury that for the GSR evidence to have any probative significance, they had to be sure that the Crown had disproved innocent explanations for the presence of the two component particles on the Appellant's palms. Thirdly, the summation was unfair because it did not mention the passages in Ms Helsel's evidence, where she had stated that probative and non-probative explanations were 'equally possible'.

Discussion

31. It does not seem to me that the decision of the Judicial Committee in *Hewey* has changed the law. The appeal was allowed because the trial judge had misdirected the jury on the burden of proof and had misrepresented the evidence. As to the reversal of the burden of proof, what concerned the Judicial Committee was the trial judge's observation that there was no credible evidence that the one and two component particles were from an innocent source, whereas it was for the Crown to disprove innocent sources. That is what had "effectively reversed the burden of proof". Can it be said that the summation in the present case effectively reversed the burden of proof? in my judgment, it cannot. The passage relied upon most heavily by Mr. Houseman was,

> *"But, again, the GSR evidence is not an element to the offences charged and there's no burden on the Prosecution to satisfy you beyond a reasonable doubt so that you feel sure that the two-component particles on his hands must have come from the Defendant discharging a firearm, before you can return "Guilty" verdicts against the Defendant in respect of Counts One, Two and Three in the Indictment."*

32. What the Judge was contemplating in that passage was the possibility that the jury might find that the Crown had failed to prove that the two component particles on the Appellant's hands must have come from his discharging a firearm. His point was that that alone would not compel verdicts of Not Guilty. The primary issue in the case was identification or recognition. As the Judge immediately pointed out, the GSR evidence was simply evidence which, "*If you accept it*", was capable of supporting the Crown case that it was the Appellant, "*as recognised by Adams and Marekco Ratteray*", who had shot at Adams. The words *"If you accept it"* plainly carried the meaning, "*If the Crown has discharged the burden of proof in relation to it*". There is nothing in the passage or elsewhere to suggest that it was for the Appellant to establish an innocent explanation for the presence of the two component particles on his hands. Whilst it is true that, when dealing with this part of the case, the Judge did not expressly state that it was for the Crown to disprove innocent explanations, and not for the defence to establish them. I do not construe his words as being anything other than consistent with that proposition. He had, of course, given trenchant directions on the burden and standard of proof earlier in the summation, stating that there was no burden on the Appellant "*whatsoever*" to prove his innocence, and that the burden of proof remained on the Crown "*throughout*". Again, it seems to me that, as a matter of direction, this case falls on the other side of the line from *Hewey*

33. Nor do I consider that the summation was unfair because the Judge did not expressly refer to Ms. Helsel's evidence about "equal possibilities" at this point of the summation. She had made it clear in her evidence that "*I can never say how it got there. I can just say it is there*". I understand her to have been referring to objective scientific possibilities, expertly assessed within her limited remit. Whilst it was for the jury to consider her scientific "findings" in the context of all the evidence in the case" (*Hewey*, paragraph 32), that was not a matter within the purview or competence of an expert witness. It was not for her to factor in, for example, the recognition evidence, the alleged motive, the proven witness intimidation, or any aspect of the CCTV evidence. When assessing the possibilities, such matters remained within the exclusive province of the jury. When the Judge came to summarise the case for the Crown and for the defence near the end of his long summation, he made a fleeting reference to the Crown's reliance on the GSR evidence in a list of matters which the Crown had submitted were supportive of the recognition evidence. When he turned to the defence case on the GSR evidence, he said (as I have already indicated):

> *"The Defence case is that the GSR -– let me say that again -– evidence is equally unreliable and you could never be satisfied that the only inference that you could logically and reasonably draw from that evidence is that Mr. Trott discharged a firearm, because it is equally, if not more logical and reasonable on the evidence to infer that the particles consistent with GSR on his hands got there by transfer from the Police and the Police car."*

34. It seems to me that that was a fair way of leaving the evidence. It remained evidence in the case in the sense that it cannot be suggested that the Judge ought to have directed the jury to ignore it. As Mr. Houseman conceded, it was for the jury to consider it in the context of all the evidence in the case. In my judgement, nothing the Judge said or omitted to say on this issue, calls into question the safety of the convictions. As the Judge had made clear early in his summation, the primary issue in the case was that of recognition and the reliability of the testimony of Adams and Marekco Ratteray. That was addressed scrupulously by the judge. There were several categories of potentially supportive evidence, including reciprocal support as between Adams and Ratteray: Motive, the intimidation of Ratteray, the CCTV evidence and the GSR evidence. I do not consider that there was a serious risk that the summation may have caused the jury to overvalue the GSR evidence.

The bullet-proof vest

35. About 24 hours after the shooting incident, Detective Constable DeSilva went to 38 King Street, where the Appellant had recently been arrested. In the presence of Ms Darrel, he found a bullet-proof vest in the bedroom. Ms Darrel denied previous knowledge of it and in evidence the Appellant did not dispute that it was his. At the first trial, the Crown did not adduce this evidence but we are cold that there was no ruling as to its admissibility. There does not seem to have been a formal objection to, or ruling on, its admissibility at the retrial at which the Appellant was unrepresented. Nevertheless, it is now submitted that the Judge ought to have excluded the evidence as being more prejudicial than probative pursuant to section 93 (1) of the Police and Criminal Evidence Act 2006. Indeed, Mr Horseman submits that it was highly prejudicial but not probative of any fact in issue in the case, not least because it is not suggested that the attempted murder was gang -related. The alleged motive was more of a personal vendetta. After the evidence had been given by Detective Constable DeSilva, it seems to have played very little part in the trial. In examination in chief, Miss Darrel denied all knowledge of it before it was spotted by Detective Constable DeSilva behind the bed. It does not seem to have been referred to in the Appellant's evidence-at least so as to be referred to in the Judge's summary of it. Nor did the judge refer to iit n his final summary of the Crown's case.

36. Mr Horseman refers to the fact that, in the judgement of my Lord, the President, when addressing the Appellant's previous appeal against conviction, my Lord said (at paragraph 73) that "such evidence could have been very damaging to the Appellant". However, after the evidence had been adduced at the trial, it seems to have receded into the background. Mr Mahoney has suggested to us that the hooded top worn by the shooter "*appeared to be*" padded but there is no evidence asserting that it was a, let alone the bullet-proof vest.

37. It seems to me that the admission of the evidence about the bullet-proof vest does not begin to undermine the safety of the conviction. I do not consider that. if objection had been taken, the Judge would necessarily have excluded the evidence. As Mr Mahoney points out, at the point when the evidence was adduced, the Crown did not know how the Appellant was going to put his case. He had exercised his right of silence when interviewed by the police. He had not filed a defence statement, nor had he given evidence at the first trial. At the retrial, the Crown had to anticipate all foreseeable defences, including, for example, any suggestion that nothing relating to firearms

was found at 38 King St; or that the Appellant had no familiarity with firearms; or that, as actually happened at the retrial, the Appellant would assert that it was Marekco Ratteray who had orchestrated the shooting.

38. If, contrary to my view, the Judge would have been bound to exclude the evidence if an objection to it had been taken, I would still be unpersuaded that its admission undermines the safety of the conviction. It was part of the Appellant's case that he and his friends were in the habit of selling drugs, including cocaine, in and around Court Street and has previous convictions for other offences were properly before the jury. In these circumstances, and having regard to the extremely limited references to the bullet-proof vest at the retrial, I cannot conceive that the admission of the evidence was, in the event, as damaging to the Appellant as Mr Horseman submits. Indeed, he later formally conceded that this ground of appeal was advanced more as support for his main ground of appeal relating to the GSR evidence than as a freestanding ground.

Cross-examination on collateral issue

39. Soon after the Appellant commenced cross-examination of Marekco Ratteray, he asked a number of questions the purpose of which was to establish that Ratteray was "a crackhead" who had bought cocaine from him and his friends on numerous occasions. Ratteray's answers were unequivocal denials. The Appellant then sought to confront him with a document which was said to be a telephone record which showed that on 4 November 2017, several months after the shooting incident, Ratteray had texted Tucker, a friend of the Appellant, with the following message:

> *"Yo Fam. Its Row. Need you today. Had a rough week scraping up rent. Back work Monday. Same deal. 100 Monday AM. 100 Tuesday next. Text me on my phone if you got me."*

40. Mr Mahoney immediately objected. There was some discussion in the absence of the jury. Mr Mahoney submitted that, among other things, this was a collateral issue going only to credit which ought not to be before the jury. The Judge agreed. The Appellant then said that he was seeking to establish that Ratteray was a crackhead who was now giving false evidence about the shooting because he had been cleaned up by the police and given a "get out of jail free card" in return for incriminating the Appellant. The Judge ruled that the Appellant could put that allegation to the witness (which he later did).

41. This ground of appeal relates solely to the Judge's refusal to permit the Appellant to put the document containing the text message to Ratteray. Strictly speaking, I consider that the Judge's decision was justifiable and in accordance with the rule restricting cross-examination as to credit, although I think that a trained advocate could have prepared the ground in a way in which the Judge might have been led to reach a different conclusion. Moreover, judges often permit cross-examination in this area, as they are encouraged to do by *Funderburk* [1990] 2 All ER 582, on the basis that a general rule designed to serve the interest of justice (viz discouraging evidence of irrelevant side issues) should not be used to defeat justice by an over-pedantic approach. As Henry J said (at page 598):

"The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecution's and the court's sense of fair play rather than any philosophic or analytic process."

42. All this leads me to the conclusion that the judge committed no legal error, although it is arguable that he could have been a little more generous. However, this is a grey area and it is well established that it is one that is primarily for the trial judge and that an appellate court will only interfere if his decision was wrong in principle or plainly wrong as being outside the wide ambit of discretion. See *R v Somers* [1999] Crim LR 744. In the event, the Appellant was able to explore his "*get out of jail free card*" point with the witnesses in cross-examination. In fact, Ratteray's recent sentence had been for two offences of violence, not drugs offences. Moreover, when the Judge summarised the defence case towards the end of his summation, he said:

"The defence case is that Daniel Adams and Marekco Ratteray are unreliable crackheads that the police have cleaned up just to get a conviction against Mr Trott… Ratteray just did as the corrupted and lying police told him to do, because they wanted to get the defendant."

43. This passage was a generous passage, not least because, by then, it was also the Appellant's case that Ratteray was complicit in the attempted murder of Adams. I do not consider this ground of appeal to be sustainable.

Voice recognition

44. The fourth and final ground of appeal relates to the issue of voice recognition in relation to Marekco Ratteray. Mr Horseman candidly described it as "*not a huge point*". His submission was in two parts, namely (i) inadequate direction on the issue; and (ii) inappropriate suggestion to the jury that the Appellant's voice would be easily recognisable.

45. It is common ground that identification or recognition by voice attracts the need for the same kind of approach as is required in relation to visual identification or recognition: *Phipps* [2012] UKPC 24, paragraph 27, per Lord Carnwath. There is no doubt that the Judge gave a very full *Turnbull* direction in the approach to visual identification. It has attracted no criticism whatsoever. When he turned to Ratteray's evidence that he had also recognised Ratteray's voice, the judge said:

"It's also important to note that Marekco Ratteray, in identifying the Defendant, purports to rely not only on his visual observations of the person at his door, but also the person's voice, and so you should again carefully consider, not only, for example, the scarf around the assailant's nose, but also how often the Defendant and Mr. Ratteray spoke. Again, I don't think it's disputed that they spoke regularly when they would see each other, in passing, on Court Street. And you should, perhaps, consider also, having had some considerable opportunity, as he represented himself and gave evidence, to hear the Defendant's voice yourself. Consider whether, for example, that his voice is in any way distinctive. For myself, and whilst it's entirely a matter for you, I find the Defendant's voice to be distinctly effeminate; but, as I say, these are all

matters for you to consider in your cautious approach to this evidence of recognition, to avoid the potential risk of any miscarriage of justice."

46. Clearly by saying "*you should again carefully consider*" and *"your cautious approach…to avoid the potential risk of any miscarriage of justice"*, the Judge was referring to the *Turnbull* direction he had given in relation to visual recognition. I have no doubt that the jury would have understood that. There was no need to reiterate it *in extenso*. There was no misdirection.

47. I turn to the "*easily recognisable*" point. In the passage that I have just set out, the Judge did not use the words "*easily recognisable*". He told the jury to consider whether the Appellant's voice "i*s in any way distinctive*". There was nothing wrong with that, particularly in a lengthy trial in which the jury had heard the self-representing Appellant's voice day after day. The Judge added that he filed the appellant's voice to be "*distinctly…*" However, in the same sentence he told the jury that it was entirely a matter for them. I find nothing of substance in this point.

Conclusion

48. It follows from what I have said that I am unpersuaded by the grounds of appeal, individually and cumulatively. Therefore, I would dismiss the appeal.

SIMMONS JA:

49. I have read the judgment of my Lord in draft, and I agree.

CLARKE P:

50. I also agree. The appeal is therefore dismissed.