The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 20 & 21/21A of 2011

Between:

JAHMEL GLEN BLAKENEY

SANCHEY WINSLOW KAIJUAN GRANT

Appellants

-v-

THE QUEEN

Respondent

Before: **Zacca, P**
Evans, JA
Baker, JA

Appearances: Mr. Charles Richardson, for the 1st Appellant
Mr. C. Craig Attridge, for the 2nd Appellant
Ms. Cindy Clarke and Ms. Larissa Burgess for the Respondent

Date of Hearing: **5, 6, 7 & 10 March 2014**
Date of Judgment: **25 March 2014**

JUDGMENT

Baker, J.A.

Introduction

1. On 22 November 2011 Sanchey Winslow Kaijuan Grant and Jahmel Glen Blakeney were each convicted of two counts of attempted murder. They were sentenced on 15 December 2011 to 30 years imprisonment, being 15 years on each count consecutive, it being ordered that each serve at least 15 years before being considered for parole. They appeal against conviction and sentence.

The Facts

2. On 13 November 2009 Shaki Minors and his girlfriend Renee Kuchler, "the victims" went to the Southside Cinema in St. Davids to see the 9:30 p.m. showing

of the movie "Precious." After the movie ended at about 11:30 p.m. the victims got into their car with Minors in the driving seat and Kuchler in the front passenger seat. A gunman approached the car and fired a number of shots seriously injuring both victims. Kuchler, who was eight weeks pregnant, subsequently lost her baby.

3. The gunman fled on foot in the direction of Pizza House travelling east from the cinema. Eye witnesses described him as wearing a baseball cap and clothing which appeared to be of ganzi like material which made a scratching noise. The victims were taken to King Edward Memorial VII hospital where they were treated for their injuries.

4. At about 2:00 a.m. the police set up a road block at St. David's roundabout, otherwise known as the Double Dip roundabout. A Kia motorcar 44333 travelled from the direction of St. David's towards the roundabout but ignored police efforts to stop the vehicle, accelerating onto Kindley Field Road and out of sight. However, officers pursued it and it was stopped near the BAS kitchen, some distance further on. The appellant Blakeney was the driver and Grant the passenger. They were arrested.

5. Among the articles found in the Kia were:

    - A jacket with gunshot residue (GSR)
    - Gloves from the floor of the car at Grant's feet with GSR
    - A baseball cap with a DNA profile matching Grant
    - A blue windbreaker with a mixed profile, the major contributor being Blakeney

6. At the police station a black hooded sweatshirt taken from Grant was found to have GSR particles as were his blue jeans. GSR particles were also found on the back of Grant's left hand.

7. The police searched the area of Kindley Field Road between the roundabout and where the vehicle had been stopped but nothing significant was found. However, in the early hours of the same morning a walker found a gun on the side of the road closest to the airport. It was common ground that this was the gun that had been used in the shooting outside the cinema.

8. Grant's home was searched with the aid of a police dog trained in detecting explosives. It alerted the police to a green bag in a drawer in his bedroom. GSR particles were later found on this bag.

9. When the pistol grip of the gun was analysed four DNA markers were obtained identifying Grant as a possible contributor but the occurrence ratio was one in two of the black Bermuda population. Blakeney was also a possible contributor at five markers, in his case the random occurrence ration being one in thirteen of the black Bermuda population. There were at least three other individuals who were also possible contributors. They included Kinte Smith and Skyah Furbert, of whom more later.

10. Two cell phones were seized one from the Kia, the blue phone (441) 517-3960 registered to Furbert and the other from Blakeney, the green phone (441) 599-0155. Prior to the shooting these two phones had been in communication with each other but this ceased after the shooting.

11. Blakeney and his girlfriend Jalicia Crockwell had gone to the Southside Cinema with the view to seeing the same movie, Precious, but they never saw it because Blakeney suddenly departed without explanation although Ms Crockwell, who was a prosecution witness, followed him. They drove to Hamilton in silence where Blakeney dropped Ms Crockwell at her home. It was the Crown's case that Blakeney had spotted Minors at the cinema and went to alert Grant who subsequently carried out the shooting. Ms Crockwell was far from pleased about being deprived of seeing the movie. She said that Blakeney was making calls on his cell phone during the journey to her house.

12. Sometime after Ms Crockwell was dropped off at her house Grant arrived. This was said to be soon after 10:21 p.m. and he left while Ms Crockwell was in the shower or soon after.

13. Both appellants cases were that they were not in the area at the time of the shooting but in Pembroke parish at separate locations. Blakeney gave evidence but Grant did not although he called an alibi witness, Ms Crockwell's mother, Mrs Walker. During his evidence Blakeney claimed his reason for leaving the cinema was that he learned that the feature movie was Precious because he saw the name printed on the ticket and he did not want to see it. The Crown called

rebutting evidence that at no time in six or seven years was the name of the feature movie ever printed on the ticket.

14. Unsurprisingly, Minors was asked if he knew of any reason why someone would wish to shoot him. His answer was that he lived in the St. Monica's area and is considered a member of the 42nd Street Gang. In fact he wears a tattoo in confirmation of this. He knew Blakeney, with whom he played football and Grant, both of whom are members of the Parkside gang. There is a bitter of rivalry between the gangs which he described as "like a war."

15. The Crown called Sgt. Rollin who is the supervisor of the Gang Targeting Unit which is responsible for investigating and coordinating gang intelligence from Bermuda gangs and interacting with them. He has trained locally and overseas with the FBI in the identification, behaviour and so forth of gangs. He keeps close ties with the local gangs and observes their evolvement from closely organised groups into the known gangs of today. He is familiar with their respective territories. He identified both appellants as connected to the Parkside Gang, Grant as a member and Blakeney as an associate. He confirmed Minors as a member of the opposing gang the 42nd or 4-2. It was not disputed that there was a feud between the two gangs that included shootings and killings.

16. The thrust of Blakeney's evidence was that he never saw Minors at the cinema, never procured Grant or anyone to shoot Minors. He was neither a member nor an associate of the Parkside gang. He left the cinema because he didn't want to see the movie, dropped Ms Crockwell at her home and was sleeping at his home until awakened by her call at 11:59 p.m. i.e. after the shooting. He picked up Grant late in the night and ended up in St. David's long after the shooting.

17. Grant did not give evidence but sought through Mrs Walker, his alibi witness, to establish that he was still at her house at the time of the shooting.

18. Each appellant has argued a number of grounds of appeal and there is a more general attack on the summing up claiming that it was unbalanced, contained adverse comments against the appellants and made points that had not been relied upon by the prosecution.

19. The appellants' arguments were wide ranging and discursive. Mr Attridge who appeared for Grant, presented the Court with written submissions running to

108 pages. I have endeavoured to compartmentalise the various grounds although often one ground was argued as relating to another.

The DNA Evidence - Ground 6 Grant, Ground 7 Blakeney

20. It was argued that the judge should not have admitted the DNA evidence in respect of the hand grip of the gun which it was common ground had been used in the shooting. It had low or minimum probative value and high prejudicial effect. Having heard detailed argument, the judge gave a careful written ruling. He pointed out that no authority had been cited either in law or science that tended to show that when the statistical evidence is in low figures, as in the present case, the evidence was valueless. The judge also noted that the significance of the DNA evidence depended to a large extent on the other evidence in the case. The DNA evidence showed a possible connection between the gun and each of the appellants and also two others, Kinte Smith and Furbert, who although not defendants figured in the evidence in the case. The gun was found close to the car in which the appellants were arrested just two and a half hours after the shooting and in which were found items linked on the evidence to the shooting. Furthermore, a baseball cap seized from the vehicle was found to have a full DNA profile matching all 15 markers to Grant. In my Judgment the judge was right in the exercise of his discretion to admit this DNA evidence. The evidence was relevant because neither appellant had admitted any involvement in the shooting.

21. An expert, Ms Zulegar, gave the DNA evidence. It was put to her that the evidence was meaningless or worthless but she would not go that far, albeit accepting it was very weak. The ultimate value of the evidence was not, of course in isolation, but in the context of the evidence in the case as a whole.

22. When summing-up, the Judge gave careful directions to the jury noting that in both cases there were partial profiles only, that the random occurrence for Grant was one in two of the Bermudian black population and for Blakeney one in thirteen. Further, the accuracy of the findings could be increased or decreased by a factor of ten. He said:

> "If you hold the view that this piece of evidence should be rejected it is up to you to do so. If it leaves you in any doubt, you should reject it. If you find that some weight

should be attached to it, either by itself or together with the other evidence in this case, it is up to you to attach such weight as you consider fit.

You must consider all that has been said about this piece of evidence and weigh it. And you must remember that the burden of proof is upon the prosecution to make you feel sure of its weight and value, and that no burden rests upon the defence to prove anything about it.

I think that this piece of evidence is such that you need not place any value upon it at all. You ought not to elevate to a level to justify the other evidence which is available in this case, nor do you need to rely upon the other evidence in this case to justify this particular piece of evidence, that is to raise this piece of evidence."

23. The judge went on make two other points relating to this DNA evidence. Both relate to others in particular Kinte Smith and Skyah Furbert. The prosecution was contending that others in the Parkside gang may have played a part and the defence were contending that any one of the others could have handled the gun, done the shooting and left the gun where it was found.

24. In my judgment the judge's direction to the jury on the DNA evidence was fair and appropriate to the case.

The GSR evidence - Ground 5 Grant

25. It was argued that the judge erred in admitting evidence which was not shown to be gunshot residue (GSR) but merely component particles. When a firearm is discharged three elements, lead, anatomy and barium are going to expel from that firearm. The different elements can fuse together or an element can stay on its own prior to settling on surrounding surfaces. There may therefore be one, two or three component particles. Three fused component particles are known as GSR.

26. The evidence was that the following was found:

- On Grant's jacket and jeans four GSR particles and two component particles not characterised as GSR.
- On the back of the right glove three GSR particles, one two-component particle and eight or more one component particles.

- On the palm of the right glove four two-component particles and 11 or more one-component particles.
- On the palm of the left glove one two-component particle and 11 one-component particles.
- On the back of Blakeney's navy blue jacket found in the back of the Kia two GSR three-component particles and five single particles.
- On the back of the left glove one two-component particle and seven one-component particles.
- On the green bag found by the dog in Grant's house one two-component particle and at least 21 one-component particles.
- On the sweatshirt taken from Grant GSR and one two-component particle.

So, in summary, actual GSR was found on Grant's jacket and jeans, his sweatshirt and one of the gloves and there were numerous two and one-component particles found on their own that did not establish GSR but presented a picture of likely proximity to a discharged firearm.

27. Objection was taken by Grant's counsel to the admissibility of GSR particles found on Grant's hands, one two-component particle and some single component particles, the Crown's argument being that all three elements were present separately albeit not in fused form to establish GSR. Objection was also taken to the admissibility of the particles found on the green bag found in Grant's house. No objection was taken to the other GSR or particle evidence.

28. The judge ruled the evidence admissible in both instances. As to the particles on Grant's hand, he said that if they had stood alone he would have ruled they had no probative value but that in the circumstances the evidence should be admitted on a totality approach because of the other GSR evidence, not least on the gloves. As to the green bag, he said it was possible that Grant had left with the firearm and carried out the shooting. Given the number and composition of the single

component particles it was for the jury to consider what weight to attach to this evidence.

29. This seems to me to be consistent with the approach of the Court of Appeal (Criminal Division) in *Joseph v R* [2010] EWCA Crim 2580, see paragraph 28. It will be recalled that the appeal of *Barry George* [2007] EWCA Crim 2722 had been allowed following a change of approach by the forensic science service to its guidelines on "The Assessment, Interpretation and Reporting of Firearms Chemistry Cases" following the conclusion that the jury had been left with the mistaken impression that the murder weapon was the likely source of a particle found in Mr George's coat pocket. In *Joseph* the court concluded that the jury had not been misled; the recorder had fairly presented the case to the jury for their decision. The same is in my view true in the present case.

30. When the judge came to sum up he dealt appropriately with all the GSR and particle evidence including the particles found on the bag discovered by the dog in Grant's bedroom. He reminded them of the evidence of Ms Zitkovitch, the GSR expert, and that the defence case was that the various particles could have come from a source or sources other than the gun, such as paint, solders, and the like. In truth, however, given the multitude and composition of the particles found on Grant and on items in the car, there was a very strong case that they came from the firing of the gun. I am unpersuaded that there is anything in this ground of appeal.

Direction on Eyewitness Evidence – Ground 2 Grant

31. This ground of appeal alleges that the judge failed to give the jury a proper direction in respect of the evidence of eyewitnesses to the shooting in so far as they gave evidence of description which the prosecution relied on to render Grant the shooter. Mr Attridge complains that the judge overstated the weight to be attached to these witnesses' evidence. None identified the shooter; each provided a description. Their evidence was uncontentious and their statements were read to the jury. No *Turnbull* or *Turnbull-like* direction was either required or appropriate. The judge did not say that the descriptive evidence alone could properly form a basis to conclude that Grant was the shooter. What he did do was to point out the discrepancies and draw attention to the extent to which this

evidence matched what was found in the Kia. This ground of appeal, which was adopted by Blakeney has, in my judgment, no merit.

Admissibility of Ms Crockwell's text messages - Ground 2 Blakeney

32. Mr Richardson, on behalf of Blakeney, contends that the judge wrongly admitted evidence of the context of text messages sent by Ms. Crockwell after she had left the cinema giving the impression or assumption that Blakeney had left to go and get someone from up the road. Ms Crockwell's evidence was that Blakeney did not do or say anything to indicate why he had left. What she texted was: "He saw some guy and just ran out. I was, like, WTF (what the fuck)." Then she was asked about the next text message. She did not know who the guy was and just assumed he was with his girlfriend. Asked why she assumed that, she said: "Guys don't go to the movies by their self."

33. No objection was taken to the admissibility of this evidence at the time. Indeed Mr Lynch, who appeared at the trial on behalf of Grant, asked in cross-examination: "You were texting, yeah, you were telling her that your boyfriend was going to be meeting somebody or was going to collect somebody, that was the impression you got." To which the answer was "Right". And then: "You came to the conclusion that he was going to get someone." Again the answer was: "Right". There was no cross-examination of behalf of Blakeney.

34. Mr Richardson's submission is that Ms Crockwell was giving evidence of opinion that was not based on established facts. We were referred to the *Modern Law of Evidence (5th Ed)* P 519 where the author says that a non-expert witness may give opinion evidence on matters in relation to which it is impossible or virtually impossible to separate his inferences from the perceived facts on which those inferences are based. In these circumstances the witness is permitted to express his or her opinion as a compendious means of conveying to the court the facts he perceived. I accept this as a correct statement of the law. If the compendious opinion is challenged as to its basis this can be done in cross-examination. In the present case not only was no objection taken to the admissibility of the evidence, Grant sought to affirm what Ms. Crockwell had said and Blakeney chose not to cross-examine at all. There is nothing in this point.

Erroneous Treatment of Alibi Evidence – Ground 4 Grant

35. This ground of appeal is advanced by Mr. Attridge in the following terms:

> "The learned judge erred (a) in characterising the alibi witnesses (Ms. Crockwell and Mrs Walker) as witnesses who had an interest to serve thereby wrongly undermined their evidence; (b) by giving confusing directions in respect of the alibi; and (c) in failing to give a special direction in a case where the issues of alibi and identification arose for consideration by the jury."

The judge directed the jury about alibi telling them that Grant's case was that he was at the residence of Ms Crockwell and Mrs Walker and Blakeney's case was that he was at home and not awoken until his girlfriend called at 11:59. The judge correctly directed the jury that the burden of proof was on the prosecution and they had to prove beyond reasonable doubt that Grant was present at the time and place where the offence was committed.

36. Mr Attridge complains that the judge wrongly treated Ms Crockwell who was called by the prosecution, and Mrs. Walker who was called by Grant, as witnesses with special interests to serve whose evidence should be treated with caution. The judge said of Mrs. Walker that her special interest was the protection of Grant whom she had known since he was five years old and whose house was always open to him. He made the same point, but to a lesser extent, about Ms Crockwell who lives in the same house. In reality, the judge did no more than remind the jury of a point made by the prosecution that Mrs Walker in particular might be considered to have an axe to grind and that the jury should be cautious in considering the evidence of these two witnesses. He went on, however, to make it absolutely plain that was entirely a matter for the jury whether they accepted or rejected the evidence of these witnesses. The judge was fully entitled to make the comments that he did.

37. It is true that the judge did not specifically go on to direct the jury that if they rejected the defendant's alibi they still had to go on to consider whether the Crown's case was made out, but it seems to me that this was perfectly plain from the summing up as a whole. As to the third aspect of Mr Attridge's complaint, this was not a case that called for any special direction because of the inter-relationship of identification and alibi. In short, this was not an identification that warranted such a direction. In *London (Junior) v The State* (1999) 57 WIR

424, 430, Warner JA pointed out that is only where circumstances exist which create a risk that the jury may use the rejection of an alibi in an unwarranted way as confirmatory of guilt that an express warning must be given. I am unpersuaded that there is anything in this ground of appeal.

The Judge's Direction that both Defendants or Neither should be Convicted - Ground 1 Grant adopted by Blakeney

38. The Crown's case was that Blakeney had spotted Minors at the cinema, had gone to find Grant, and possibly others, to set up the shooting that had been carried out by Grant. It was, submitted Mr Attridge for Grant, possible for the jury to convict Blakeney and acquit Grant and the judge should have left this option to the jury. He drew attention to the further particulars of the indictment provided on 5 October 2011 which alleged in Count 1 that Grant discharged the firearm and Blakeney "participated in a joint criminal enterprise by intentionally assisting another to commit that crime pursuant to the provisions of section 27 of the Criminal Code." Count 2 was in similar terms. Mr Attridge emphasised that Blakeney was charged with assisting "another" rather than Grant. Ms Clarke's response was that the reference to "another" simply followed the drafting of the Act. It was always the Crown's case that the shooter was Grant.

39. The judge directed the jury that each count had to be considered separately but that if a defendant was guilty of one attempted murder he was realistically guilty of the other. Then he said that although the two defendants were charged jointly their cases had to be considered separately, adding:

> "So, if, for example, you are considering count 1 where both defendants are charged for shooting Mr Minors, for example the attempted murder of Mr Minors, the general rule is that you would consider, let's say Mr Blakeney, first, he's named first on the indictment, and if you find that he is guilty you return a verdict of guilty. If you find that he is not guilty you return a verdict of not guilty as you record it.
>
> And then you consider the case against Mr Grant and do likewise. If he is not guilty you say that. If he is guilty, you say that.
>
> So you don't automatically throw them into one pot and say just because A is guilty B is also guilty, or because A is not guilty. That's the general rule."

40. There then follows a passage in the summing up to which the appellants take exception:

> "Having regard to the particular facts in this case, the way this case is, you remember the Crown's case is that Mr Grant is the shooter and their case is that Mr Blakeney is the assister, the aider, the procurer. Right.? And that he did so intentionally and knowingly. Right.
>
> I am not able to see in this case if you convict Mr Grant why you would not be convicting Mr Blakeney. And vice versa, if you acquit, why you would not the other.
>
> But I may return to that later. And I may give you further reasons for my conclusions. It seems to me, on the evidence of this case if you convict one you should be convicting the other. And I'm going to give you the reasons for that later."

41. The judge returned to the subject at the end of his summation repeating the need to consider the case against each separately. He said:

> "But the manner in which this case is, as I have said earlier, that I did not see how the conviction of one could result in the acquittal of the other, or there could be a conviction of one and an acquittal of the other. I could see where there may be an argument among you that, for example, Mr Blakeney might have gone out and committed the offence, and Mr Grant didn't know anything about it, and was later picked up, for example, and was taken to St. David's, I don't know, maybe to recover the gun that might be hidden out there or something like that, as the clean-up man, for example.
>
> And you may say, okay, in those circumstances I think it is proved that Mr Blakeney is guilty, but Mr Grant is not, especially in light of the evidence of Ms. Blakeney and Miss Crockwell – Ms Walker and Miss Crockwell.
>
> But I would say that I see no evidence of that. I'm not able to see why one – or how you could draw an inference like that. Because there is no evidence that Mr Grant – Mr Blakeney went to St. David's more than twice that night.
>
> To draw that inference you have to find that he went to St. David's three times. First when he went to the theatre, secondly when he shot, and thirdly when he was going back with Mr Grant. So Blakeney's evidence is very clear, that he

went twice. The police – the Crown's evidence has always been that he just went twice. All right.?

So I think an inference like that would be based on speculation. On the other hand, I can see where some may say Okay, it might have been Mr Grant who did the shooting, but that Mr Blakeney did no assistance, and therefore may convict Mr Grant and acquit Mr Blakeney.

It is difficult for me to see how you could draw an inference like that in this case. I think if you find that Mr Grant is the shooter, I think on this evidence you will have to find that Mr Blakeney is the assister, and he would have to be convicted likewise.

I think that is as far as I can go with – when it comes to the issues of treating the two defendants' cases separately."

42. Mr Attridge's submission on behalf of Grant is that this direction unfairly prejudices his client. It was possible for the jury to convict Mr. Blakeney and acquit Grant. Mr. Richardson argued that it was possible for the jury to convict Grant but acquit Blakeney. There was reference in the trial to other members of the Parkside gang, in particular Kinte Smith and Furbert and Ayinde Eve, whom the Crown alleged may have been involved with setting up the shooting, but without suggesting the particular circumstances.

43. What the judge said in the paragraphs I have cited was expressed more as a comment than a direction. There was no evidence on which the jury could have come to the conclusion that one appellant was guilty and the other not guilty and it would have been better if the judge had given the jury a direction that they stood or fell together. Had the jury convicted one and acquitted the other it seems to me that there would have been an appeal on the basis of inconsistent verdicts. It was never suggested, nor was there any evidence, that Blakeney assisted anyone other than Grant and if the jury was sure about Blakeney's involvement it must have followed that Grant was guilty also. Likewise, if they were sure Grant was the shooter it emanated from Blakeney's sighting of Minors at the cinema. In my judgment there is no substance in this ground of appeal.

Gang Evidence – Ground 3 Grant Ground 3 Blakeney

44. There have unfortunately been many gang related killings and shootings in Bermuda in recent years. This is well documented in the media and jurors are unlikely to be unaware of inter-gang warfare. It has become the practice of the Crown to call evidence in these cases of Sgt. Rollin, a police officer who is put forward as an expert in "gang membership and warfare." His evidence has caused differing views from members of this court. See *Cox v R* [2012] BD LR 72 and *Myers v R* [2012] BD LR 74. The decision in the present case to admit the evidence of Sgt. Rollin predated the decisions of this court in those cases.

45. As Auld JA observed in *Cox*, jurisprudence on admissibility of so-called "expert" evidence of gang membership in a local context of retaliatory gang warfare has emerged in a number of common law jurisdictions in recent years. It is done so in a piecemeal way and by recourse to different formulae. It is less developed in England and Wales then in other common law jurisdictions such as Canada where there is legislation specifically directed to the circumstances in which it may be admitted.

46. Both appellants objected to the admission of Sgt. Rollin's evidence in the present case. The thrust of the objection was (1) that Sgt. Rollin's should not have been declared an expert in gangs and (2) that his evidence was not admissible and should not have been admitted. Sgt. Rollin was not called until towards the end of the Crown's case whereas Mr Minors was the first witness. The admissibility of Sgt. Rollin's evidence has to be considered in the light of Mr. Minors' evidence. He was asked if knew of any reason as to why he had been shot and he replied that he was "affiliated" with certain people up 42nd street and that 42nd and Parkside were in a feud, "like a war really, with people getting chased and shot." It had, he said, not always been like that and he had numerous friends from Parkside with some of whom he had grown up. He knew Blakeney, went to school with him and had played football with him. He knew Grant too, he was part of the Parkside crew and in 2009 Blakeney was affiliated with Parkside. Mr Minors admitted to having a 42 tattoo on his back. His evidence was not challenged.

47. Before Sgt. Rollin gave evidence there was an objection to his giving evidence that Grant was a member of the Parkside gang. This was rejected by the judge. Sgt. Rollin then gave evidence which can be summarised as follows. He was in the

Gang Targeting Unit which collected gang intelligence on an island wide basis. He interacted with gang members and did proactive enforcement maintaining close ties with the criminal fraternity. He had seen the development of closely organised groups evolve into what are now referred to as gangs. He was aware of their geographical division. Counsel for the Crown at this point asked for Sgt. Rollin to be tendered and accepted as an expert in gang rivalry, gang association and geographical locations. The judge agreed.

48. Sgt. Rollin then gave evidence that he had known Grant for over four years by the nickname of Bully B and described areas of Parkside gang territory. He had seen him with other known Parkside gang members and monitored public websites for gang members associating with other gang members. He produced a photograph of Grant identifying himself as a member of the Parkside gang by "throwing up" a letter P with his hands. He described other features relating to the Parkside gang.

49. He said he had known Blakeney for over five years and he was normally in the company of known Parkside gang members. He considered him to be "associated to the Parkside gang."

50. He considered Shaki Minors to be a member of the 42nd gang and had seen the tattoo on his back. Parkside and 4.2 are rivals. An ongoing feud between the two factions had lead to violence back and forth between each group, firearms, murder, attempted murder and other crimes. It was put to Sgt. Rollin in cross-examination on behalf of Grant that Parkside and 4.2 are rivals and that tit for tat shootings and killings took place between them and that everyone living in Bermuda could not fail to be aware of this. He agreed. Rollin was not cross-examined on behalf of Blakeney.

51. The judge in his summation referred to the evidence of Mr. Minors and Sgt. Rollin saying the prosecution relied on it to show that each of the appellants had a motive and that if there is motive what might otherwise be inexplicable becomes explicable but that motive without more was not sufficient to found a finding of guilt. Later in his summation the judge in summarising the crown's case reminded the jury of the undisputed evidence that Minors was a member of the 42nd gang which was in a feud or war with the Parkside gang of which Blakeney was an associate, albeit Blakeney denied this, and that Grant was a member.

52. When he made his ruling about Sgt. Rollin's evidence and summed up in the present case, the judge did not have the advantage of the observations in this court in *Cox* or *Myers*.

53. The appellants submit that the admission of the gang affiliation evidence amounts to evidence of bad character; its prejudicial effect is great and outweighs its probative value. Further, motive for members of the Parkside gang in general is not the same as motive for Grant or Blakeney in particular and in any event Blakeney is no more, on the evidence, then an associate of the Parkside gang. In my judgment the starting point in the present case was the answer of Minors to the question of whether he knew of any reason why he had been shot. It was the answer to this question, to which there was no objection that introduced the gang evidence. I have given careful scrutiny to Sgt. Rollin's evidence. Although leave was given to treat him as an "expert" it seems to be that the whole of his evidence was factual and based on his experience and observations over a period of years. In my view the jury was entitled to consider this evidence in the context of the whole of the rest of the evidence which connected both Grant and Blakeney to the shooting and asked themselves whether what would otherwise be an inexplicable shooting had a gang related motive.

54. The fact that leave was given to treat Sgt. Rollin as an expert entitled him to give opinion evidence on the subject of his expertise albeit the primary facts to which such opinion was based had to be proved, if not by Sgt. Rollin by other evidence. I do not regard Sgt. Rollin as an expert in gang warfare in the manner in which the courts classically understand expert evidence. Nor do I think he gave any evidence that can truly be classified as expert evidence in the ordinarily sense of the expression. His evidence was from his own experience as a police officer deployed over a period of time to deal with gangs.

55. The members of this court in both *Cox* and *Myers* made a number of obiter observations about the admissibility of gang evidence in cases of the present kind. There are differences in the opinions of the members of the court about whether admission of gang evidence in those cases met the principles and rules set out by Zacca P and Evans JA in paragraph 17 of their judgment in *Cox*.

56. My starting point is that it wrong for a judge routinely and without more to admit the evidence of Sgt. Rollin or someone similar as expert in gang membership, warfare or behaviour. There may indeed be cases in which it is necessary for the judge to direct the jury that although they have heard or read about feuds between gangs they should put such thoughts out of their minds in the case they are trying. As Evans JA pointed out in paragraph 13 of his judgment in *Cox* "gang expert" is not a particularly helpful term because it fails to identify the kind of expertise that the witness has acquired which permits him to give opinion evidence on issues in the case. Auld JA at paragraph 76 in the same case drew attention to the difficulty for a judge to determine whether the evidence sought to be admitted was truly of an expert nature whether by knowledge or experience, and as to whether and where it moves from direct to hearsay factual evidence to opinion. He said, and I respectfully agree, that the admissibility is both case and issue specific. The bottom line is to first assess its probative value, if any and then weigh that against any unfairly prejudicial effect.

57. In my judgment the label of expert these cases is something of a misnomer and liable to be misleading. Care needs to be taken to ensure that the appellation "expert" does not without more lead to the admission of evidence that is both prejudicial to the defence and has little or no probative value to an issue in the case. The subject was touched on by Rix LJ in R v O [2010] EWCA Crim 2985. At paragraph 29 he said this:

> "We consider that much of the evidence that (the police officer) gave about the situation of gangs in the locality and so forth was factual evidence, it might have been challenged evidence but it was factual evidence, which was entirely admissible as coming from a police officer with local experience. It may even have been, if the ground had been properly laid that that local experience would have been sufficient for her to give evidence as a local expert. The word expert is slightly strange in the circumstances because it is, of course, very far removed from medical expertise or scientific or commercial expertise, but nevertheless there is no reason why a local person may not have expertise in local dialect, and, as we have said, if the ground had been properly laid it may have well be that WPC Haynes was capable of being regarded as an expert in that limited sense about the language patiois of South London."

In my judgment what is critical in gang cases is for the judge to be clear as to the matters on which Sgt. Rollin or his equivalent is an expert and the issue or issues to which the evidence relates. Much of the evidence relating to gangs will be of a factual nature and such that evidence could be given with direct as opposed to hearsay evidence of those facts. Indeed it is apparent in the present case that Sgt. Rollin has over the years built up a wealth of experience about gangs in Bermuda from which he can give direct evidence of his own knowledge. Where he may be able to give expert evidence is as to the manner in which, in his experience, gangs or specific gangs operate see e.g *R v Hodges and Walker* [2003] Cr App R 15 where evidence was admitted from a police officer as to the method of supply of heroin, the local purchase price and an amount that was consistent with intent to supply rather than personal use.

58. The second matter to which I would draw attention is the introduction of gang evidence as purporting to be necessary explanatory evidence under the approach in *R v Pettman* [1985] CA 5048/C/82. Auld JA in *Cox* at paragraph 77 referred to this as a slippery concept unless (1) it is approached on a case by case basis and is tightly related to the issue(s) before the jury (2) it is necessary to advance or support the prosecution on such issue(s) and (3) its probative value is tested vigorously against any unfair prejudice to the defence. I agree. It is not enough to introduce gang evidence simply so that the jury can understand the background to the case. There is in Bermuda no comparable provision to gateway (c) of section 101(1) of the Criminal Justice Act 2003 which admits, subject to safeguards, such evidence as important explanatory material. Again, the temptation is to be avoided of introducing such evidence just because it is background evidence without testing its admissibility against the criteria identified by Auld JA. However, in the present case, there was a wealth of evidence connecting the appellants to the crime and the evidence of Sgt. Rollin was properly admitted to show that they had, in addition a motive to commit the crime. True it is that other members of the Parkside gang and associates would likewise have had a motive, but they were not connected to the shooting by many different strands of evidence as were the appellants.

General Attack on the Summing Up – Ground 8 Grant, Ground 4 Blakeney

59. Mr. Attridge referred the court to numerous instances which, he argued, illustrated the unfairness of the judge. Each member of the court has read the whole of the summation. The judge correctly directed the jury at the start of his summation that he was entitled to express opinions but he was not entitled to persuade the jury one way or the other and that they were the sole judge of the facts and the truthfulness and reliability of witnesses. Further, that they should disregard any comment of his if they found it unhelpful or disagreed with it. He mentioned this again later in his summation.

60. The judge made numerous points in his summation both in favour of the prosecution and in favour of the defence that were in accordance with the submissions with both sides. He also said (see B 170):

> "Now, the prosecution, I think would be suggesting and sometimes I may say things that you didn't actually hear the prosecution say, but it is my view to understand the prosecution's case and where issues (arise), I am entitled to put them as I see them. I am bound in duty to do the same for the defence."

The appellants complain that the judge made points on the evidence not advanced by the prosecution but in my view he was entitled to do so, although it is usually wiser first to raise such points with counsel to make sure that there is not an answer to them. This was a case based on a multitude of circumstantial evidence in which there were various possibilities as to precisely what may have transpired at particular stages in the story, not least because it was the Crown's case that other members of the Parkside gang may have played a part in the events other than as the shooter.

61. In the forefront of the appellants' submission on this ground of appeal is a complaint about the judge's direction in respect of cell phone 3960 and its relationship to cell phone 0155. Phone 3960 was referred to as the blue phone and 0155 as the green phone. 3960 was found on the front console of Blakeney's car subsequent to his arrest. Blakeney was the subscriber for 0155 and admitted possession of it during the relevant period. 3960 was shown by forensic examination to have been in the possession of Kinte Smith until shortly before the shooting but it was registered to Skyah Furbert.

62. There was a lot of activity between the two phones between 21:35 hours and 23:21 hours on the night in question. Complaint is made about the following passage in the summation:

> "No wonder, I think you may consider, the prosecution, you may think, even if she didn't say it, would be entitled to ask or to suggest, well, if this phone is so busy amongst so many, why could it not be that after having passed through some hands early in the night when business was being rallied or arranged, could it not have been in the hands of Mr. Grant at 11:20, when Mr. Blakeney called him, perhaps to ascertain that he, Grant, was in position to carry out the shooting, when the target was seen, or and to further accommodate him if necessary for perhaps a later pickup. Thus explaining why it was found in that Kia later that night, with both defendants with there being no further contact between the two phones after the time of the shooting, about 11:20, 11:30."

63. Mr. Attridge relied on admissions by the prosecution (1) that the green phone 0155 did not belong to Grant and that Blakeney admitted possession of it during the relevant period and (2) that calls between the green phone and the blue phone were between Blakeney and Kinte Smith. The judge mentioned in passing that the jury may have begun to think that because of the amount of its use the blue phone was some kind of community phone. The complaint is that the judge should not have suggested the inference that the blue phone could have been in the hands of Grant at 11:20 when Blakeney called him to see if he was in the position to carry out the shootings. It could not, submitted Mr. Attridge, be inferred that Grant had any use of the blue phone at a relevant time or of Ms Crockwell's phone, the later being, as he put it, pure speculation and never put to Ms. Blakeney.

64. This is not a case in which the prosecution was able through direct evidence to identify the detail of how Grant came to be involved in the shooting or which other members of the Parkside gang may have played a part in the arrangements. In my view the judge was entitled to make the comments that he did and no unfairness resulted.

65. As to the other grounds of complaint, the court was taken laboriously through in excess of 30 passages of the summing up. Suffice to say that I am satisfied that neither individually nor collectively were these passages unjustified or unfair.

Conclusion

66. Although there was no direct evidence identifying Grant as the shooter and Blakeney as the procurer there was a very strong circumstantial case constructed from a number of different threads. Five are identified: opportunity; proximity to the events; communications between the participants; scientific evidence; and motive. Both appellants were stopped in a car driven by Blakeney that had sped through a road block manned by the police 2 ½ hours after the shooting. The gun that was undisputedly the one used in the shooting was found a few hours later in a place that was consistent with it having been thrown out of the passenger window after the car passed the road block and before it was stopped by the police. Items were found in the car that matched descriptions of the witnesses of the shooting. GSR and GSR particles were found on various items in the car and on Grant's clothing. DNA from the gun showed a possible connection with both appellants as well as other members of the Parkside gang. Grant's DNA was on the baseball cap. Evidence of communication between the alleged participants began with Blakeney hurriedly leaving the cinema in the circumstances described by Ms. Crockwell and continued with the numerous phone calls referred to in the evidence which ceased just before the shooting and Blakeney called no one thereafter.

67. As to motive, while the gang evidence would not, without more, be admissible to show motive, in the context of this case it was probative in the light of the other evidence that connected each appellant to the shooting to explain why Grant and Blakeney should have been parties to the shooting. Its probative value substantially outweighs prejudicial effect.

68. Blakeney gave evidence but Grant chose not to, as was his right. However, the consequence was that the jury did not have the advantage of hearing his account of relevant events from the witness box, in particular as to his alibi.

69. Having examined all the grounds of appeal at length over a hearing lasting four days I am satisfied that there is no substance in them either individually or

collectively and that the convictions are safe. I would therefore dismiss the appeals against conviction.

Baker, JA

I agree

Zacca, P

I agree

Evans, JA