The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 11 of 2017

B E T W E E N:

ROMANO MILLS

Appellants

- v -

THE QUEEN

Respondent

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

Appearances: Elizabeth Christopher, Christopher's, for the Appellant; Carrington Mahoney and Maria Sofianos, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **12th, 13th & 14th June 2018**
Date of Judgment: **27 July 2018**

JUDGMENT

Witness in fear – criteria for admission of hearsay evidence – s.75 PACE – Accomplice evidence – admissibility and Crown's entitlement to call – Judge's power to discharge juror – S.525A criminal Code – Consequence of Co-defendant's guilty plea during trial – previous consistent statement – whether admissible.

BAKER P.

Introduction

1. On 23 January 2013 Rico Furbert and Haile Outerbridge were brutally shot and killed at Belvin's Supermarket in Happy Valley Road, Hamilton. The Crown's case was that Le-Veck Roberts was the shooter and that Gariko Benjamin and

the Appellant, Romano Mills, were present at the scene as aiders and abettors. A fourth man, Christoph Duerr, was the armourer who provided the gun. Roberts and Duerr were tried in 2015 and both convicted of their pre-meditated murder. Duerr's conviction for murder was subsequently set aside on appeal and a conviction for being an accessory after the fact substituted.

2. Mills and Benjamin were tried in May 2017 before Greaves J and a jury. Near to the close of the prosecution's case Benjamin pleaded guilty to murder, rather than pre-meditated murder and this plea was accepted by the Crown. The trial continued against the Appellant alone, and on 9 June 2017 he was convicted unanimously of two counts of pre-meditated murder, one count of taking a motorcycle without authority and two counts of using a firearm to commit an indictable offence. The Appellant was sentenced to life imprisonment with a minimum period to serve of 25 years before eligibility for consideration for parole, but with 10 years' imprisonment for each of the firearms offences to be concurrent with each other but consecutive to the 25 year period.

3. The killings were gang related. On 9 November 2012 Roberts complained to the police that shots had been fired at his house, just under his bedroom window. He was a member of M.O.B and told the police he believed that members of Parkside were trying to kill him. The Crown's case was that it was decided to retaliate and kill someone from the Parkside area. That was the motive for the killing of Furbert and Outerbridge. The case against the Appellant was that he was an associate of M.O.B. and the manager of the guns. He obtained them from Duerr, who was their keeper, and provided them to Roberts. He was present when the shootings took place and was one of the riders of the three bikes seen on CCTV footage at the scene. Although not physically identified, cell site evidence showed his phone to be in the area at close to the material time and members of M.O.B. would not ordinarily be expected to be in Parkside territory around 9.00pm, absent an ulterior motive.

4. The primary evidence against the Appellant was that of Duerr, who was, of course, an accomplice. Following his successful appeal with the substitution of a conviction for a lesser offence, he elected to give evidence for the Crown. The substance of his evidence was that he lived at Boaz Island Village and the Appellant, whom he knew as 'Mano' lived close by. They were close friends and had known each other for years. He also knew Benjamin, who lived in the neighbourhood. He knew that the Appellant and Benjamin were members of M.O.B. On either the evening of 23 January 2013 or the following evening the Appellant arrived at his house with a paper bag containing three guns, which he asked him to look after. This was not the first time he had held guns for the Appellant. Later the Appellant phoned saying he wanted the black 9mm gun back. Duerr believed this gun belonged to the Appellant as the Appellant had given it to him before. Some days later the Appellant returned and collected it leaving the other two guns, a black revolver and a silver 9mm which Duerr put back under the bed. On 28 January, following information from Duerr's girlfriend, Ritica Belboda, the police executed a search warrant. When they arrived Duerr grabbed the guns and went to the attic and called the Appellant to come and get his guns. Duerr then ran away and hid the guns in an abandoned building before making his way to the Appellant's house where he met the Appellant and another M.O.B. member, Cordova Marshall. Later they moved next door to Marshall's house in case the police searched the Appellant's house. The following day Duerr surrendered to the police.

5. Duerr's evidence was corroborated by Ms Belboda. Her evidence was in the form of an interview that was read to the jury, although she had given oral evidence at the trial of Roberts and Duerr. The decision to admit her evidence forms one of the main grounds of appeal. About two or three weeks before the murders she was in Duerr's bedroom when he showed her two guns from under his mattress. One was black and one was silver. He showed her how to open the barrel and where the bullets go. She saw the bullets in the gun that day. After showing her the guns he put them back under the mattress. On 28 January she was again

in the bedroom with Duerr, and because of her concerns she telephoned a friend in the police whilst Duerr was in the bathroom, and then took a picture of two guns that were hidden under the mattress. She then sent the picture to the friend in the police.

6. Ms Belboda also gave evidence that a man referred to as Mono (sometimes referred to as Mano) had come to the house the previous week and that Duerr had gone outside to meet him and returned with a plastic bag and went upstairs to his room but would not show Ms Belboda what was in the bag. She knew 'Mono' as someone who lived in the general area and had heard his name before.

Admission of Ms Belboda's Evidence

7. Ms Christopher, who appeared for the Appellant both before us and at the trial, submits that the judge erred in allowing Ms Belboda's evidence to be read to the jury. Ms Belboda had given oral evidence at the trial of Roberts and Duerr in March 2015. The Crown's application for her evidence to be read was supported by a witness statement from Ms Belboda dated 22 May 2017 and an affidavit from D.C. Beach sworn on 23 May 2017. The application was made under section 75(3) of the Police and Criminal Evidence Act 2006 ("PACE"). The material parts of section 75 provide:

> *"75 (1) Subject to subsection (4), a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if –*
>
> *(a) the requirements of one of the paragraphs of subsection (2) are satisfied; or*
>
> *(b) the requirements of subsection (3) are satisfied.*
>
> *……..*
>
> *(3) The requirements mentioned in subsection (1)(b) are –*
>
> *(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and*

(b) that the person who made it does not give oral evidence through fear or because he is being kept out of the way.

……"

8. The Crown's case was that Ms Belboda was in fear. After giving evidence in the earlier trial she was too afraid to leave her house for several months and eventually left Somerset and moved away from her family with her son, because people were saying threatening and nasty things to her. On one occasion her car tyres were slashed. Indeed she enrolled in school overseas for a fresh start with her son. When informed by the police that she was required to give evidence again she said: "There is no way that I can put myself through this again. It is just very hard for me to relive this situation again. It's not good for my son or me to have to go through this a second time." She had previously been counselled by the Womens' Resource Centre.

9. The affidavit from D.C. Beach recorded that around February 2017 she had a chance meeting with Ms Belboda who told the officer that she had a new job. When told that she would be required to give evidence at the forthcoming trial she "did not seem pleased." When visited by D.C. Beach and D.S.Martin in April 2017 she queried whether she had to give evidence, saying she had been through a lot and saying she was planning to go away to school and did not want her name mixed up with the trial. On 28 April, when served with a subpoena she was reluctant to sign it and "appeared sad." Thereafter she did not respond to messages and phone calls or appear for a meeting. On 15 May D.C. Beach visited Ms Belboda at her place of work and she then described what she had been through since giving evidence, describing her family's concern about her safety and the rift that this had caused. She said that her tyres had been slashed and that she had been approached and threatened because of her involvement in the case. She was being counselled for stress and was scared to give evidence. She appeared anxious and near to tears. The officer believed she was in fear of giving evidence.

10. The judge ruled on the application on 23 May. He noted that the defence objected on the ground that it was not established that the witness was genuinely in fear. He observed that the Court had to take into account that Bermuda was a small society; that Ms Belboda was young and would be regarded by others as a "snitch" for having betrayed her boyfriend. He ruled that she had very good reason to be in fear and was satisfied that she was in fear, having read the affidavit of D.C. Beach. He went on to consider the balance of fairness. On the one hand she was an important witness whilst on the other she could not be cross-examined. He concluded that the probative value of admitting her hearsay evidence outweighed its prejudicial effect. Certain passages in the interview were to be edited out by agreement.

11. An unusual feature of the application relating to Ms Belboda's evidence was that she had already given evidence at the previous trial and so there had been some opportunity to test her evidence in cross-examination, although not of course by the Appellant, who was not a Defendant in that trial.

12. Ms Christopher submitted that because the English provision in section 116 of the Criminal Justice Act 2003 is similar to section 75 of PACE, the English authorities are relevant. I agree. The starting point is that a defendant has a fundamental right to challenge the evidence brought against him. This is enshrined in the Bermuda Constitution (see paragraph 6(2)(e) to Schedule 2 to the Bermuda Constitution Order 1968). That the test is not absolute is apparent from the decision of the Supreme Court of the United Kingdom in *R v Horncastle* [2010] 2 AC 373. Lord Phillips of Worth Matravers, having discussed the position of a witness who was dead, abroad, missing or unable to attend for medical reasons, went on to say at paragraph 34 that the same conditions apply to a witness who does not give evidence through fear. But, he added, an important additional condition must be satisfied:

> *"The court must be persuaded to admit the evidence and it must do so only when satisfied that it ought to be admitted in the interests of justice. In deciding whether or not this is so, the court must have regard to all relevant circumstances, but in particular to: (a) the contents of the statement; (b) any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement in the absence of the maker); (c) the possibility of alternative special measures for the protection of the witness, such as screens or video-transmitted evidence."*

13. *Horncastle* was followed in *R v Riat* [2013] 1 WLR 2592. Hughes LJ, as he then was, said at para 16 that the court should take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension. He added that the general principle applicable to all hearsay cases is that second-hand evidence is only to be admitted if the trial will none the less be fair and any conviction resulting from it safe.

14. Ms Christopher submitted that the judge should have held a voir dire when Ms Belboda could have been cross-examined to establish whether this was a true case of fear or just reluctance to come to court and give evidence. She relied on *R v Z* [2009] 1 Cr. App. R. 34, *R v Fagan* [2012] EWCA Crim. 2248 and *R v Shabir* [2012] EWCA Crim. 2564, submitting that special measures could, if necessary, be used, noting that a reluctant witness can often be reassured once he gets to court.

15. Ms Christopher also relied on *R v H* [2001] Crim. L.R. 815 pointing out that it is the witness's fear at the date of trial that is relevant and that the Court should be informed what steps had been taken to persuade the witness to attend and to alleviate her fears. Ideally, she submitted, this should come from Ms Belboda herself. In summary her argument was that that there was sketchy and untested evidence about Ms Belboda's fear and the basis for it.

16. In response Mr Mahoney for the prosecution relied on *R v Fairfax* [1995] Crim. L.R. 949 to show that proof that a witness is in fear can be proved by hearsay evidence. Thus the statements of witnesses could be sufficient for this purpose. Further, as was apparent from *R v Davies* {2007] 2 All ER 1070, there was a danger in bringing a witness to court to test his claim of fear as that could create the very situation that the Act was designed to avoid. Much depends on the facts of each case and the judge could not be faulted for taking the course that he did.

17. Bermuda is a small jurisdiction in which gang related and gun violence is notorious and regrettably common. This was such a case with clear evidence that these were "tit for tat" killings. It was therefore not at all surprising to learn that Ms Belboda was in fear and what had led to this since she gave evidence in the earlier trial.

18. In my judgment it was not a realistic option to force Ms Belboda to come to Court to hold a voir dire. Assuming her fear was real and justified, as prima facie it was, that would seem to me to be just as potentially damaging to her as giving evidence itself before the jury. Ms Belboda's evidence was important in that it corroborated that of Duerr that the Appellant returned the weapons after the murders but it was far from being the sole and decisive evidence in the case. She was not the key witness for the prosecution.

19. Whilst Ms Christopher's main line of attack was that she should have been allowed to cross-examine Ms Belboda as to her fear, she also complained of the lack of detail in D.C. Beach's affidavit. A course that the judge could have followed was to allow the defence to cross-examine D.C. Beach. She could then have been asked what, if any, further information or details she had about the basis for Ms Belboda's fear and the events, such as the tyre slashing incident, giving rise to it. However, no such application was made and I do not think that in the circumstances the judge can be criticised for making the decision that he did. It was justified for the reasons that he gave. The Appellant's inability to

cross-examine Ms Belboda at the trial did not mean that her evidence was necessarily unchallenged. He was able to rely on portions of her evidence at the earlier trial, of which there was a transcript, and draw attention to inconsistencies with her recorded interview. Furthermore he could himself have given evidence but, in accordance with his rights, chose not to. The judge gave an appropriate direction to the jury about the absence of Ms Belboda as a witness in person and the disadvantages to the defence in being unable to cross-examine her. No complaint is made about this.

20. One further point is made in relation to Ms Belboda's evidence. It is that the jury was given exhibits in the form of transcripts of her interview (exhibit 34A) and portions of the transcript of the earlier trial (exhibits 35A, 35B and 36). Ms Christopher referred to *R v R* [2017] EWCA Crim. 1487 in which Simon LJ pointed out at para 48 that transcripts should only be made available to the jury if there is good reason for it and after discussion between the judge and counsel in the absence of the jury. Otherwise there is a danger that the jury will give the written word undue weight. These are salutary words that should be observed. Ms Christopher took no objection in the present case and rightly so. The defence were interested in showing inconsistencies between Ms Belboda's interview and her evidence at the earlier trial, and it was much easier to follow this from reference to the transcripts. Despite Ms Christopher's careful analysis I am not persuaded that it was contrary to the interests of justice to allow Ms Belboda's evidence to be read or that there is any substance in this ground of appeal.

Duerr's Evidence

21. The substance of this ground is that the judge should have prevented the prosecution from calling Duerr. It was not in the interests of justice for him to give evidence and, in the result, the Appellant's trial was unfair and his convictions unsafe. The judge ruled before the start of the trial that so long as Duerr's retrial remained outstanding he could not be called by the prosecution as a witness. The Crown subsequently decided not to proceed with a retrial and

he duly gave evidence. His evidence was critical to the prosecution's case. Without it there was insufficient evidence to be left to the jury.

22. The prosecution has a discretion whether to call or tender any witness. The root authority is *R v Oliva* (1965) 49 Cr. App. R.298. Lord Parker C.J. said at page 310:

> *"The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and, if they refuse, there is the ultimate sanction in the judge himself calling that witness."*

23. Ms Christopher also referred us to *R v Russell-Jones* [1995] 1 Cr. App. R. 538 in which Kennedy L.J. set out the principles underpinning the prosecution's obligation to call witnesses, and we were also referred to the judgments of Fullager J in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 272 at para 9 and Lord Thankerton in *Adel Muhammed EL Dabbah v Attorney General for Palestine* [1944] A.C. 156. These cases were, however, all concerned with the prosecution *not* calling a witness. The issue in the present case relates to the other side of the coin because the contention is that the prosecution called a witness that they should not have called. What these authorities show is that it is the prosecution's long established right to decide who the material witnesses are and that the court will only interfere with a decision not to call a witness in limited circumstances.

24. Greater assistance is to be found in Keene L.J.'s judgment in *R v Cairns* [2002] EWCA Crim. 283. In that case the second and third defendants were charged with conspiracy to supply heroin. The allegation was that they supplied the drug to C who passed it on to a network of suppliers to distribute. The first defendant was C's wife who was alleged to have played an active role in the conspiracy. C pleaded guilty and gave evidence for the Crown implicating the second and third defendants but exculpating the first defendant. The third defendant sought to exclude C's evidence on the ground that the Crown only relied on it in relation to the second and third defendants and not in relation to the first defendant and that it was unworthy of belief. The judge refused to accede to the application and his decision was upheld by the Court of Appeal. There was no principle of law or justice which required the prosecution to regard the whole of a witness's evidence as reliable before he could be called as a prosecution witness; that it was open to a prosecutor to form the view that part of a witness's evidence was capable of belief, even though another part of his evidence was not relied on, and to exercise his discretion to call that witness if his evidence could be of assistance to the jury in performing their task. Accordingly the prosecution was not acting perversely or unreasonably in exercising their discretion to call C as a witness and the judge had been right not to interfere with the exercise of that discretion where the prosecution had decided not to call a witness.

25. Keene L.J. said at paragraph 29:

> *"Such authorities as there are on the prosecution's duty and its discretion as to the witnesses it calls all seem to be ones where the prosecution had decided not to call a witness. In other words, they deal with the circumstances in which the prosecution is or is not obliged to call a witness. They do not deal with the present issues, where it is being contended that the prosecution should not have called a witness."*

He went on to say that the authorities nevertheless provided a valuable starting point. He summarised the principles set out by Kennedy L.J. in *Russell-Jones*:

> *"The prosecution has a discretion as to the witnesses it actually calls at trial. But the discretion is to be exercised in the interests of justice and therefore is subject to the overall control of the court on the usual principles applicable to the exercise of discretion. If a witness can give evidence of primary facts and his evidence is capable of belief, then a proper exercise of the discretion will normally require him to be called by the prosecution."*

26. However the prosecution is not required to call a witness whose evidence it regards as unworthy of belief. As Kennedy L.J. put it at p 245: "his evidence cannot help the jury assess the overall picture of the crucial events; hence it is not unfair that he should not be called.""

27. Keene L.J. continued at para 34:

> *"If one moves away from the question of whether the prosecution is obliged to call a witness to that of whether it is entitled to do so, the same overriding criterion of the interests of justice must apply to the exercise of its discretion. If the prosecution took the view that a particular witness could give no evidence on which reliance could be placed, then it would normally not be in the interests of justice for that witness to be called by the prosecution. In Kennedy L.J.'s words, "his evidence cannot help the jury," because in the prosecution's view it is not capable of belief."*

28. He then went on to point out that it is not uncommon for there to be witnesses whom the prosecution regard as largely or in part worthy of belief but not wholly reliable, and there may be good reason for the prosecution arriving at such a judgment. There is no reason why a jury should not regard part only of a witness's evidence as true and the remainder unreliable. There is no principle of law that requires the prosecution to regard the whole of a witness's evidence to be reliable before he can be called as a prosecution witness. He added:

> *"It is open to the prosecutor to form the view that part of a witness's evidence is capable of belief, even though the prosecutor does not rely on another part of his evidence, then the prosecutor is entitled to exercise his discretion so as to call that witness. That must be so, since part of the witness's evidence could be of assistance to the jury in performing their task, and it would therefore be contrary to the interests of justice to deprive them of that assistance. The prosecution in such circumstances is not to be prevented from calling such a witness."*

29. Finally he said at para 39:

> *"So it is clear, in our view, that the prosecution may properly call a witness when they rely on one part of his evidence but not on another part. Whether they choose to call such a witness is a matter for their discretion, to be exercised on the principles which we have already set out."*

30. 29A similar issue arose in *R v Daniels and Ors* [2010] EWCA Crim. 2740. A witness, S, entered into an agreement under the Serious Organised Crime and Police Act 2005 ("SOCPA") under which he agreed to give assistance to the authorities and plead guilty to manslaughter and conspiracy to rob, which he did, and then gave evidence for the prosecution at the trial of the appellants. It was argued on appeal that it was an abuse of process for the case to have proceeded, on the basis that the evidence should have been excluded. Richards L.J, giving the judgment of the Court of Appeal said at para 58:

> *"If the prosecution considered the core features of (S's) evidence against his co-defendants to be capable of belief, it was entitled to put (S) forward as a witness even if he was not considered to be telling the whole truth about his own involvement. The judge rightly relied on R v Cairns [2003] 1 Cr. App. R. 38 to that effect. The position is not altered by the fact that (S's) SOCPA agreement required him fully to admit his involvement and to give truthful evidence but there was reason to believe that he was not making a full admission or giving truthful evidence as to the extent of his own involvement. Any such failure to fulfil the terms of*

his agreement exposed him to the risk that he would lose the benefit of the agreement and to proper attack upon his credibility in cross-examination by the defence. It did not, however, make it an abuse or unfair for the prosecution to put him forward as a witness."

31. Ms Christopher submitted that the admission of Duerr's evidence was contrary to the interests of justice and that the judge should have excluded it. The prosecution should not have been permitted to rely on him as a witness of truth. The basis of her submission is that the prosecution had previously carried out a direct and sustained attack on his credibility. The case against him in the earlier trial was that he was the armourer and kept the firearms for members of M.O.B. He supplied the firearms when needed. His assertion in evidence that he had never seen the firearm and ammunition before the murders was a lie and his evidence at his trial was false. He was convicted by the jury, who did not believe him or his alibi and the prosecution resisted his appeal. The fact that his appeal was allowed and a retrial ordered, which in the event was not pursued by the Crown, is nothing to the point. When he was called at the Appellant's trial the prosecution was aware that he had previously given false evidence both in his own trial and for the prosecution at the trial of Cordova Marshall, who was acquitted.

32. The prosecution should, submitted Ms Christopher, explain the reason why they called Duerr so that the exercise of its discretion could be examined because, on the face of it, he should not have been put forward as a witness. It seems to me obvious why the prosecution called Duerr. Without his evidence the prosecution of the Appellant was not sustainable. With his implication of the Appellant, supported by the corroboration of Ms Belboda there was, along with the other evidence in the case, a case to answer based on circumstantial evidence. Notwithstanding doubts about his credibility in other respects, the prosecution was entitled to conclude that his implication of the Appellant was worthy of belief. It was a matter for the jury to decide whether they accepted or rejected

his evidence. They had, of course, to be given an appropriate warning about the dangers of accepting his evidence as he was an accomplice, but there is no complaint about the judge's direction to the jury on this.

33. Ms Christopher has two subsidiary complaints about the evidence of Duerr. These are that the prosecution should have served a statement from Duerr setting out the final version of his evidence and that there were inconsistencies in his accounts. Mr Mahoney's response on behalf of the prosecution is that the Appellant was provided with full disclosure in relation to Duerr in respect of all the trials in which he had been involved. There was no obligation to serve a further statement which would merely repeat what had already been disclosed.

34. As to the second complaint, it is helpful to look at the chronology. During the earlier trial Duerr did not name Mills but referred to him as man 'A', although it became apparent during cross-examination this was Romano Mills. It was man 'A' who brought the guns in a bag to his house on, he thought, the day after the murder and he stashed them under his mattress. In his witness statement made on 21 April 2016 he named the Appellant, described the weapons and said they were handed to him on the day of the murders or the following day. In his evidence in chief at the Appellant's trial he said that the Appellant came just inside the door to his house on the night of 23 January when it was dark. In cross-examination it was put to him that at the earlier trial he had said nothing about the Appellant coming to his house on the night of the murders and he agreed, but said that nevertheless that is what had happened. In re-examination he said he could not recall the exact date; it was either the day of the murders or the day after. In my judgment too much should not be read into these inconsistencies. The defence no doubt relied upon them in their submissions to the jury, but I cannot regard them as amounting to a fresh account on the part of Duerr or creating any unfairness to the Appellant. Rather they were the kind of discrepancy that one comes to expect in a criminal trial.

Discharging a Juror

35. This ground of appeal alleges that the judge improperly discharged a juror on 30 May 2017. The background is this. The trial began on Thursday 18 May 2017 and continued the following day. Juror number 4 did not return after the lunch adjournment. One of the other jurors volunteered that she had previously spoken to juror number 4 about timing. The court clerk ascertained that she was not answering her phone. At 3.00pm the jury was released until Monday morning. On the Monday morning the judge asked her why she had been absent on the Friday afternoon. She replied that she had gone to her home in Devonshire and was unable to obtain a taxi to return. She did not realise the court was trying to contact her and had called the police and asked them to take her to court but they had refused. She had called the court but it went through to voicemail. She apologised and denied that she was finding jury service overwhelming. The judge warned her about lateness. The trial continued over the following week but on the morning of 30 May juror number 4 called in twice, the first time to say that she was not coming and the second to say that she was sick. The judge said there were two options, waiting for her or discharging her. The foreperson indicated the jury's desire for the latter. The Crown took the same view, pointing out that an adjournment would disrupt the travel arrangements of a witness coming from abroad. Ms Christopher expressed concern about losing a juror as juror number 12 had indicated she would have to leave if the trial overran.

36. The judge discharged juror number 4 and replaced her with an alternate juror who had been present since the start of the trial. This is now permissible under section 522A of the Criminal Code Act 1907 ("the Code") He noted that she had been disruptive since the start of the trial, was unimpressed with her excuses and observed that the longer a trial went on the greater the chance of losing a juror. He did not wish to lose more time.

37. Under section 525(d) of the Code, where at any stage of the trial a juror fails to appear and is discharged the trial can proceed and the jury remains properly constituted provided its number is not reduced below nine.

38. Ms Christopher relied on *R v Hambery* [1977] 1Q.B. 924. Lawton L.J. said the court could see no reason in principle why the exercise of judicial discretion to discharge one or more jurors should not be reviewed if it is alleged that an injustice might have resulted. The judge undoubtedly has a discretion to discharge a juror but no doubt one that he will not lightly exercise. The judge has responsibility for the management of the trial and an obligation to avoid unnecessary delays. In this case there was evidence that juror number 4 was not committed to participating fully in the trial process and the judge was rightly concerned at the consequences if she continued as a juror. Fortunately he had the option of replacing her with an alternate. We did not feel it necessary to hear Mr Mahoney on this ground and discharging the juror falls far short of an irregularity. It was an entirely appropriate exercise of the judge's discretion and I would have taken the same course.

The Consequence of Benjamin's Guilty Plea

39. Towards the close of the prosecution case the Appellant's co-defendant Benjamin changed his plea to guilty of 'simple' as opposed to premeditated murder and this was acceptable to the Crown. Ms Christopher's submission is that the judge should have declared a mistrial and discharged the jury from further consideration of the case against the Appellant. The judge declined to do so and instead took Benjamin's change of plea in the absence of the jury and, following the practice approved in *R v McCarthy* [1998] 2 Archbold News 1, did not inform the jury of it and directed them not to speculate upon the reason for his absence, adding that they must draw no inferences, adverse or otherwise in respect of the Appellant. The media were directed not to report the change of plea during the course of the trial.

40. Where one defendant changes his plea during the course of a trial and the case continues against another it is almost inevitable that the jury will have heard evidence that is not probative against the remaining defendant. Sometimes it will be obvious that the evidence is not admissible and probative. For example there was evidence in the present case linking Benjamin to the attempted murder of Zico Majors on 16 January 2013, but no evidence that the Appellant had anything to do with that offence. Perhaps the most common example is that what one defendant says in interview to the police is not evidence against another. A standard warning is given to the jury about this, whether or not there is a change of plea during the trial. The interview of Benjamin did not implicate the Appellant in the murders. Nor was there any other evidence admissible against Benjamin only that implicated the Appellant. I do not accept the contention that there was a real danger the jury concluded Benjamin had pleaded guilty and that, together with the evidence they had heard about the involvement of Roberts and Duerr, the jury would decide that the case against Mills was made out without the need to consider the evidence against him. The judge had a discretion to exercise. There are many disadvantages in declaring a mistrial when the trial has been running for over two weeks and they do not need enumerating here. The critical question for the judge was whether it could continue without injustice to the Appellant. The judge decided that it could with appropriate directions to the jury. In my judgment he reached the correct decision.

41. When the judge summed up he referred to Benjamin's interview and the transcript of it that the jury had. He said:

> *"Now, you heard that interview and followed with the transcripts. You also have the Instagrams. But that was at the time when Mr Benjamin was still with us. However, in Mr Benjamin's absence, all of that evidence is no longer relevant and ought not to be considered by you. That is what Mr Benjamin is saying in interview, of which you have transcripts."*

42. That direction was correct and indeed the judge went on a little later to emphasise that nothing said in the interview was evidence against the Appellant and that the jury should put it out of their minds. It is not clear why in those circumstances the judge found it necessary nevertheless to remind the jury of part of it:

> *"You remember in that he was talking about some of the things he said had to do with his own motivation, might be construed to be part of his own motivation for participating. He was talking about how Maybury got killed at, I guess at Woody's, and all of that, and how he feels about Parkside and all of that, and so on. But none of that in this context is relevant to the case of Mr Mills for some of these reasons."*

43. What the judge should have done is to have removed copies of the transcript of Benjamin's interview from the jury after he had pleaded guilty and made no further reference to its contents other than to remind the jury that nothing said by Benjamin implicated the Appellant or was evidence against him. However, I do not think his failure to do so caused the Appellant any prejudice because there was nothing in the interview that was detrimental to the Appellant.

Post Mortem Reports and Photographs

44. This ground of appeal alleges that the judge wrongly admitted into evidence photographs of the two deceased and allowed the post mortem reports to be read out in evidence. This evidence, it was claimed, did not prove any fact in issue and was highly prejudicial to the Appellant. This ground was not pursued with any vigour by Ms Christopher. The photographs were produced by D.S. Thompson on 19 May and the post mortem reports read to the jury on 5 June. On neither occasion was there any objection. The probative value of this evidence was that it supported Duerr's evidence that the Appellant told him how the murders were committed with one of the bullets going through one man and into another. I am not persuaded that there is any merit in this ground.

Wrongly Equating the Defence Witness Borges with Duerr

45. This complaint is that the judge equated the Appellant's witness Claudia Borges with the accomplice Duerr on the basis that as they both had interests to serve, the jury should treat their evidence with caution. In order to appreciate the significance of this point it is necessary to explain some background. The Crown's case was that there were three men present at Belvin's at the time of the shootings, on three bikes with three guns. The case against the Appellant was that he was the rider of the third bike and was based on inference from circumstantial evidence. Cell site evidence relating to the whereabouts of his phone showed that it was possible for him to have been at Belvin's Supermarket at the time of the murders, which occurred around 9.03pm, the police receiving the emergency call at 9.06pm. At 20.36.32 the Appellant's phone was registering at the Bank of Bermuda cell tower in Hamilton and at 21.19.57 it was registering at the Somerset mast. At that time of the evening a bike could have travelled speedily from the scene of the murders to Somerset.

46. The Appellant himself did not give evidence but he called Ms Borges with a view to establishing an alibi. Her evidence was that at the time she was employed as an accountant by KPMG at 12 Par-La-Ville Road in Hamilton. She had a seven year relationship with the Appellant that ended in May 2013. Afterwards they remained friends. If she worked late the Appellant usually picked her up. On the night of the murders she asked him to pick her up between 8.30 and 9.00pm, which he did in his mother's car. He drove her to her house in Somerset. She remembered police cars and sirens as they drove out of town. January to April was the busy season and she worked late on that night as she did on other nights. She called or messaged him between 8.30 and 9.00 to pick her up. Later she said that was the time he was to pick her up; she wasn't sure what time she'd called him but put it between 7.45 and 8.00pm. He arrived closer to 9.00pm. He would message her and tell her when he was close by.

47. There were serious difficulties with Ms Borges' evidence. She was skilfully cross-examined by Mr Mahoney. The two major problems with her credibility were (1) her time sheets did not show her working overtime on 23 January and (2) the phone records did not support contact with the Appellant at the material time. The prosecution called rebutting evidence from Zina Hayward, an administrator at KPMG who produced Ms Borges' time sheet. On 23 January she worked 7.25 hours and would have finished at 5.00pm. If an employee does extra work, whether billable or unbillable it is always noted.

48. The Appellant's complaint relates to two passages in the summing up. The first begins at p.31:

> *"Now, in this case, the defence is saying that Mr Duerr is a witness with special interests. In Ms Christopher's address to you she says he might have some interests that we don't know about. Hasn't really come out. Some interests to say.*
>
> *The defence - - - the prosecution, on the other hand, is saying that Ms Borges is a witness with special interests too, or not too, that she is a witness with special interests, because she is here to serve the interests of Mr Mills and herself, the love of her life.*
> *So in each case, both sides are saying you should reject each other's witness.*
>
> *I am going to give you a further direction about Mr Duerr later, but at this point you should be cautious about witnesses who are said to be testifying out of special interests.*
>
> *It is entirely up to you to accept or reject their evidence, but it has been shown that some witnesses can indeed testify for improper reasons, improper motives, and may be more interested in protecting that interest, that special interest, than in telling the truth in the interests of justice. So, in the approach of the evidence of Ms Borges, and in the case of Mr Duerr, you should take those matters, (that) direction into account."*

49. The second is at p 195, after summarising the evidence of Ms Borges:

> *"You may think the prosecution are entitled to rely on this evidence to ask you to find that this witness is not a witness to be believed. That she is a witness with a special interest, to save her old love and not to serve justice, that she is in this with a made-up story about him picking up her between 8.30, 9.00, closer to 9.00, from Bermudiana Road, to Scott's Hill. By the Royal Gazette, KPMG, to Scott's Hill, in order to explain away the implication from the cell site evidence which shows him, or his cell, to have travelled from Boaz Island to Hamilton and back at the material time.*
>
> *You may think the prosecution entitled to say that even if he is correct, even if - - - - you may think the prosecution entitled to say that even if it is correct that he did pick her up that night, she was not accurate about the time. It was likely . . . . I don't think he actually said that, so I did leave that out.*
>
> *In any event the prosecution, you might think, is entitled to say her evidence does not weaken the implication of his handling the firearms, as Duerr testified, and knowingly aiding, assisting and enabling the shooter to carry out the murders."*

50. Mr Mahoney, on the other hand, draws attention to page 58 of the summing up, where the judge gave a strong and clear accomplice warning in respect of Duerr's evidence and the reasons why it could be unreliable and untrustworthy, making no comparison with or reference to Ms Borges.

51. In my judgment it was unwise for the judge to equate the witnesses Duerr and Ms Borges, in the two passages that he did, as both having special interests in the outcome of the case. The root authority is *R v Beck* 74 Cr App. R. 221 in which Ackner L.J. giving the judgment of the Court of Appeal referred to a passage in the then current edition of *Archbold* which read: "A general rule seems to be developing that when a witness in a criminal case, whether he be a fellow accused or called for the Crown, may reasonably be regarded as having some purpose of his own to serve which may lead him to give false evidence against an accused, the judge should warn the jury of the danger of convicting that accused on that witness's evidence unless it is corroborated." He then said (p.228):

> *"While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."*

52. He added that they had set out the general ground of their decision in order to assist trial judges by dispelling belief in the "general rule" referred to above.

53. It seems to me clear that Ackner L.J. was referring to those giving evidence *against* an accused and he was not suggesting that a similar warning should be given in respect of defence witnesses where different considerations apply. The Crown brings the case and has to prove it to a high standard. It is obviously right that where it calls a witness who may have an interest to serve by giving false evidence, such as an accomplice, the jury should be given a specific warning, particularly where, as here, he is a key witness in the case. I do not think there is the same obligation to warn the jury in respect of a defence witness's evidence although the judge is perfectly entitled to comment on the evidence if there are reasons to believe it may not be true. In the present case there were reasons to question the veracity of Ms Borges' evidence, although the judge would have been better advised to comment on it other than in the same context as that of Duerr. Her supposed or possible interest to serve was very different from that of Duerr. She was not an accomplice in the crime with which the Appellant was charged. This does not, however, in my judgment affect the safety of the conviction because there were compelling reasons why the jury should not accept the evidence of Ms Borges which was shown to be untrue in key respects.

Unfair Summing Up

54. Ms Christopher expanded on this ground over some eight pages of written submission, taking numerous points of detail such as that the judge used the expression "you may think the prosecution is entitled to say" in respect of various aspects of the evidence and on some occasions saying: "I think they are entitled to say". However, he did so with regard to both defence and prosecution points and at the start of his summation he gave the jury the standard direction that the facts were for them. He also directed the jury more than once that they were not bound by any opinion he might appear to express. Ms Christopher reminded us of *Mears v R* (1993) 97 Cr. App. R. 239 in which the judge's comments went beyond the bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting. The Privy Council rejected the Crown's submission that although the judge perhaps went to the limit of legitimate comment, any defect was put right by the warning given by the judge that any views expressed by him were not binding on the jury.

55. Whilst in the present case the judge referred trenchantly to features of the evidence that favoured both the prosecution and the defence, in my judgment he did not usurp the jury's function. Mr Mahoney referred us to *Warner v R* [2012] Bda L.R. 73 in which this Court rejected a similar submission by Ms Christopher. Zacca P cited the judgment of Watkins L.J. in *R v Hillier and Farrar* (1992) 97 Cr. App. R.349:

> *"It is in our experience often, too often, we think, argued unavailingly almost always, in this court that a judge has not presented properly in summing-up a defendant's defence, after that person has not given evidence. We must make this clear yet again, namely that it is no part of the judge's duty to build up a defence for someone who has not chosen to give the jury the benefit of his version of material circumstances and events. The judge's obligation is limited to reminding the jury in summary form, of what the*

defendant is said to have stated as to those matters at some time or another pre-trial and what assistance, if any, the crown's witnesses have provided."

56. The Appellant in the present case, as he was entitled to, exercised his right to silence, although he did call Ms Borges. However her credibility was effectively destroyed in cross-examination. In consequence there was no evidence to refute the inferences that could properly be drawn from the prosecution's evidence.

Evidence of Previous Consistent Statement of Ms Borges

57. This ground of appeal contends that a previous statement made by Ms Borges was admissible to refute the suggestion that her evidence in support of the Appellant's alibi was a recent invention. The purport of her evidence was that the Appellant could not have been at the scene of the murders because he was giving her a lift home from work at the time. She said in cross-examination that she learned of the murders when the Appellant was charged in May 2016 and stepped forward immediately to provide alibi evidence but did not go to the police. It was put to her that her evidence was a lie. In re-examination Ms Christopher sought to adduce evidence that she had given a statement of her evidence to the Appellant's previous lawyer and that her evidence to the jury was not a recent invention but the judge was not prepared to entertain it.

58. Ms Christopher submitted that that the previous statement was admissible as an exception to the hearsay rule. Mr Mahoney's position was that Ms Borges' evidence was a fabrication from the outset. He referred us to helpful observations of Maurice Kay L.J. in *R v Athwal* [2009] 2 Cr. App. R. 204 at p.224:

"The mere fact that the witness has said substantially the same thing on a previous occasion will not generally be a sufficient basis to adduce the previous statement when the truthfulness of his evidence is put in issue. There must be something more—for example, the absence on the earlier occasion of a factor, say personal dislike, which is being advanced as a possible explanation for the falsity of his

> *evidence in court. However, when circumstances have changed in such a way, it may not matter that they changed last week, last month or last year, provided that there is a qualitative difference in circumstances, but substantial similarity, between the two accounts. There is no margin in the length of time. The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence."*

I am entirely satisfied that Ms Borges' previous statement should not have been admitted.

The Appellant's Motive

59. The final ground of appeal relates to the evidence of D.S. Martin. He gave evidence that on 9 November 2012 he was in contact with Roberts, who complained to the police of a shooting at the bedroom window of the property at which he was then staying. The officer saw the damage below the window. The Crown's case was that M.O.B, of which Roberts was a member or associate, had been disrespected and that this was the motive for the murders of Furbert and Outerbridge.

60. Ms Christoper submitted that the shooting at Roberts' house was a trigger event and that as such it could not be proved by hearsay evidence, see *Myers v R, Cox v R, Brangman v R* [2015] UKPC 40, para 67. There are a number of answers to this. First, there was no objection to the evidence of D.S. Martin and it was not challenged in cross-examination. Second, the evidence was not hearsay in that he saw the bullet marks and was the investigating officer in the Roberts shooting and third, motive was already established by the gang evidence of P.S. Rollins. Accordingly there is no substance in this ground of appeal.

Conclusion

61. The only point at which in my judgment the learned judge fell into error was at pages 31 and 195 of the summation when he equated the special interests of Ms Borges with those of Duerr. It seems to me doubtful whether this error amounted to an error of law and I would not regard it as amounting to a miscarriage of justice because, for the reasons I have explained, Ms Borges' evidence was not credible. Accordingly, application of the proviso in section 21(1)(a) of the Criminal Appeal Act 1964 does not fall for consideration. If I am wrong about that, any miscarriage of justice was not substantial, the conviction is safe and I would apply the proviso. The case against the Appellant was based on circumstantial evidence. He did not seek to refute the inferences that could properly be drawn from this evidence with his own evidence and the jury was left to draw inferences from the evidence that they had. The key witness was Duerr, whose evidence the prosecution accepted was essential to their case. The judge gave an appropriate warning about the evidence of an accomplice and the jury clearly accepted his evidence. I would dismiss the appeal.

Baker P

Bell JA

Smellie JA