The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2019

B E T W E E N:

ALEX WOLFFE

Appellant

- v -

THE QUEEN

Respondent

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

Appearances: Susan Mulligan, Christopher's Barristers & Attorneys Ltd., for the Appellant;
Alan Richards, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **15th November 2019**
Date of Judgment: **9th January 2020**

JUDGMENT

Appeal against convictions for wounding with intent, attempted robbery and intimidation by threats – prosecution's case based on circumstantial evidence and confession to fellow prisoner - allegations by defence of abuse of process as basis for stay of the prosecution- whether such allegations are better resolved as part of the trial – defence of alibi – late disclosure of alibi – suggestion that alibi a recent fabrication – subpoenas to prison officers to elicit evidence to rebut recent fabrication – prosecution's claim for public interest immunity ("PII") in respect of prison records upheld – whether proper procedure applied and claim for PII properly upheld- – further evidence adduced on defence case ex improviso – whether prosecution entitled to adduce evidence in rebuttal.

SMELLIE JA:

1. In the early hours of the morning of 23 October 2018, two assailants on a motorcycle embarked upon the attempted ambush and robbery of other motorcyclists who happened along Harbour Road, Paget Parish.

2. The Appellant was tried and convicted by judge and jury on an indictment with four counts which alleged his involvement as one of the two assailants. He was found to have been involved in separate attacks upon two motorcyclists, Mr Jahvon Mallory and Mr Borislov Angelov. He now appeals against his conviction.

3. As the indictment stated, the offence against Mr Mallory involved intimidation and threats of injury by the spoken word with the intent to stop and rob him, which threats, as will be explained below, fortunately did not succeed. The offences against Mr Angelov proved far more serious. When similar attempts to stop and rob him did not succeed, he was chased by the two assailants to his home where he was set upon by both. One of the assailants, armed with a knife, inflicted several stab wounds to his body, while the other brandished what appeared to Mr Angelov to be a firearm. Mercifully, although critically injured, Mr Angelov survived.

4. The Appellant was convicted as being one of the two assailants, by dint of circumstantial evidence and a confession made to a fellow prisoner while in custody.

5. The Appellant's grounds of appeal question whether his conviction, in all the circumstances of the case on the evidence presented, was safe. These grounds of appeal will be examined in turn below.

The circumstances of the case.

6. The circumstances are best described from the narrative of the evidence of the witnesses, first from Mr Mallory, and then from Mr Angelov. The narrative of other important witnesses will also be summarized.

7. Mr Mallory testified that on 23rd October 2018, at approximately 2:40 a.m. to 2:45 a.m., he was riding his Nuovo 135 cc motorcycle in a westerly direction on Harbour Road, and as he passed the junction of Keith Hall Road he saw another dark coloured Taurus-like motorcycle travelling in an easterly direction. This motorcycle slowed down, turned off the lights, turned around and then slowly came up behind him. He could see in his rearview mirror that two people were on the motorcycle. After a series of corners, the motorcycle came right beside him and he asked them what was their problem. At that moment his and their speed was about 40-50 kph. He could not hear a response so he asked again, "*what happened?*", again without hearing a response. As he approached the intersection at Longford Hill he thought to make a turn in order to get away, but as he slowed down, so did the other motorcycle. His and the other bike overtook each other and as they exchanged places he again asked "*what's your problem*"? On this occasion one of the two replied in a Bermudian accent "*get off your bike*". He could not say whether the speaker was the rider or the pillion passenger. He then sped off reaching a speed of 80 kph. They tried to catch up with him but after a while he lost sight of them and made good his escape.

8. He described the rider of the bike as not having a helmet on but that he had on a reddish-coloured wool-like hoodie which was over his head with the drawstrings tightly pulled. During cross-examination by Ms Mulligan, the witness demonstrated this to the jury by reference to generic photographs presented to him and which showed that the head and mouth/nose areas of the wearer would have been covered but the area of the eyes would have been visible [defence exhibit 1]. He described the pillion passenger as wearing dark clothing, a dark-coloured helmet with a full-face dark visor.

9. While he could not say what the height of either man was, it appeared to him that the rider was the taller of the two.

10. The attire and relative height of the two men became of significance in the light of Mr Angelov's evidence about the description of his assailants.

11. Mr Angelov testified that he lived at #90 Harbour Road in Paget Parish and that on 23rd October 2018 he left his work place in Dockyard at around 1:30 a.m. He and his co-workers rode together in an easterly direction until they reached Harbour Road. Just before he reached Belmont Ferry terminal, two motorcycles travelling in the opposite direction caught his attention. The first bike had only the rider on it but the second had a rider and pillion passenger. On this second bike the pillion passenger had on a red scarf on his head but no helmet. After a minute or so had passed, this bike (which must have turned around), rode up next to him and he felt the person in the red scarf trying to "*snatch him around the neck*" and the rider, who had a helmet on with a dark visor, tried to push him down with his leg. One of the men said to him, "*give me what you have*."

12. He did not fall but zigzagged. The men he said were screaming at him to stop but he sped up and tried to get home as fast as he could. In doing so he took dangerous curve corners and went on the other side of the road as the men were trying to overtake him. He said it was as if they were in a rally, at times reaching 80 kph. He said that he "*put the pedal to the metal*". But just before reaching his house, he slowed down because of a dangerous turn and the bike with the two men went in front of him. They applied their brakes which caused their bike to slide out in front of him. His bike then hit their bike near its licence plate and muffler and he then saw the licence plate number to be CE875.

13. This evidence of the licence plate number and of contact between the two bikes, became of significance in the trial, for reasons which will become clear.

14. Mr Angelov managed to drive his bike into his yard but there his two assailants followed him, got off their bike and attacked him. Any doubts before that his two assailants were both male were then removed.

15. The man wearing the helmet (observed to have been the rider) tried to get control of his bike with the engine still running but Mr Angelov pushed him off. The man wearing the red scarf started hitting Mr Angelov to his back and so Mr Angelov engaged him. He could see his eyes but later, in cross-examination by Ms Mulligan, said that he could not say whether he was wearing glasses. This was raised as being relevant to the Appellant's defence because, while the Appellant was convicted as being this assailant, there was uncontested medical evidence to the effect that he wore prescription glasses for near-sightedness.

16. Mr Angelov was at pains to emphasize that his ability to observe and recall what was then going on was hampered. He was fighting for his life and that of his wife, who was in the house recovering from a bad leg injury. Everything happened very quickly.

17. He and the man in the red scarf ended up in the patio area outside his house just near to the hedge (shown to the jury in photographs). He then saw the man with the helmet come into the patio area with a green-handled knife in his hand- some 10- 23 centimeters long. He said that that was when he "*started to feel hot all over my body*" and blood was coming out of everywhere of his body. He noticed that blood was then also oozing from his shoes, collected there as it flowed from his body. He got a patio chair and tried to keep the guy with the knife off of him and started screaming for his wife who was in the bedroom, to call 911.

18. He became fearful as the heat from his body was incredible. It was hard for him to explain the feeling, he said. His wife switched the inside lights on and that was when the guy with the helmet looked at her and the guy with the red scarf moved away towards a car parked in the drive way. He said that the guy in the

scarf then pointed at him in a "gun gesture", with something he described as a gun.

19. The two assailants then left, riding on their bike in a westerly direction. Mr Angelov said that when they left he managed to get to the patio door to his house, still bleeding profusely.

20. As his wife opened the door to come to his aid, he screamed out the licence plate number of the assailants' bike "CE875", ten times over, as he said "*to make sure she got it.*"

21. The police and ambulance then arrived and he was taken to the hospital. He awoke in the hospital when he discovered that he had suffered 13 stab wounds. He spent 11 days in the hospital, 6 or 7 of which were in intensive care.

22. Mr Angelov, although not able to identify them, gave further descriptions of his assailants. He said that the man with the helmet was "*just about my height, which I think is 5' 7" to 5' 8"*" tall and the same build as himself, his weight being 215 to 220 pounds. Later in cross-examination, being Bulgarian, he gave his own height in the more familiar metric terms as 175 cm, which he calculated to be 5' 7" approximately but which when converted is actually more like 5' 9". This discrepancy, while not of fundamental importance, goes to the issue of the accuracy of his descriptions of his assailants, descriptions which, as he himself pointed out in his testimony, were gleaned during the highly fraught circumstances of his struggle against them for his life.

23. He described the man with the red scarf as shorter and as a thin or tiny person, smaller than his own build which he described as "*normal*". He said that during his momentary engagement with this man at the back of the patio, he was able to see his eyes. He made no mention of the man wearing glasses, a factor to

which Ms Mulligan sought to attach much significance in her arguments on behalf of the Appellant.

24. Mrs Deborah Angelov, Mr Angelov's wife, testified and described so much as she saw of the struggle between her husband and his assailants from her perspective. It was shortly before 3 a.m. when she heard a scraping sound on the patio outside. She thought the wind had picked up and was blowing the chairs across the patio when she heard her husband say, "*Debbie, call the police, call the police*". Recovering from a broken leg, she hobbled out of bed to the phone and called 911. She could see her husband's back through the patio door and that he was fighting someone. Someone else with dark clothing was also behind him and she could see that this person was of medium build. She said that she was not good at estimating weights and heights and it was difficult to say how tall that person was from her position above the patio in her bedroom. When in cross-examination she was reminded of her written statement to the police, she accepted that she had estimated that both assailants were about her height, which is 5' 8". She said that at the time she gave the description of the men to the police she was trembling and in shock.

25. Upon their arrival, she reported to the police the licence plate number of the bike –"CE875" – that which her husband had screamed out to her many times.

26. As will be shown below, the fact that the Appellant was in possession of CE875 during the night of the attempted ambush of Mr Mallory and the attack upon Mr Angelov, was established on the prosecution's case and was not in dispute. His account given in his defence, was that he had been robbed of the bike by two men who must have used it to commit the offences. His account will be examined in more detail below but here the further narrative of the prosecution's case must be completed.

27. CE875 was the property of D'Zia Coddington and registered in her name. She was intercepted by the police on the bike along with her boyfriend Geneiko Green on the morning of 24th October. In her interview by the police also on 24th October 2018, she stated that she had lent the bike to Geneiko Green. Her evidence by way of record of interview, was read to the jury at the trial by consent of the defence. She stated that she had loaned the bike to Geneiko Green and had seen him on 23rd October but that when the bike was returned by him, the black plastic guard over the muffler had been cracked. It had not been in that condition when loaned to Green.

28. Geneiko Green next testified. He said that he lived in Warwick Parish and had known the Appellant for just over a year having met him through mutual friends and his, Geneiko's, brother. He said that he had borrowed the bike CE875 from D'Zia over the week end of 20th October but that over that period the bike did not remain in his possession as he had lent it to the Appellant. In this regard he said that he and the Appellant had been chilling at his house on St Mary's Road in Warwick in the evening and that they had been talking about girls, among other subjects. The Appellant asked to borrow the bike to pick up a friend. As the bike was not his, he only reluctantly agreed, assuming that the Appellant was talking about picking up a girlfriend. He could not say when during the night the Appellant left on the bike because he had turned in not too long after he had agreed to lend him the bike. He said that early the next morning the Appellant returned the bike to him. When the Appellant arrived at his house he woke him up and told him that he had messed up the bike. The Appellant's words were "*Yo, I messed up your bike*". He, Green, saw that there was a crack in the black muffler guard and the brake lever was bent. He could tell that the bike had fallen. He said that he was annoyed but he did not express it. He dropped the Appellant off at his house at Riviera Estate in Southampton. This was at about 5:00 a.m. and it was still dark. It took about 6 or 7 minutes from his house to the Appellant's house. They remained there together for about 15 to 20 minutes smoking marijuana together outside.

29. After this, Green said that he went to D'Zia's house, arriving there at about 5:45 a.m. - 6 a.m. He remained there until about 8 a.m. when D'Zia dropped him off back home. He kept the damage to the bike to himself but eventually D'Zia noticed the crack on the muffler guard.

30. Green went on to say that on three occasions over the ensuing two day period police officers had come to his house (presumably because of D'Zia's interview revealing his connection to bike CE875). He said that he spoke to the Appellant about this and urged him to let the police know that the bike was in his, the Appellant's, possession. He did not remember what the Appellant's response was but they did not come to an agreement and he did not talk to the Appellant any more about it.

31. After his Aunt (with whom he lived) had told him of yet another visit to his home by the police, he felt the need to turn himself in and let them know that he did not have the bike at the time of the incidents involving Mr Mallory and Mr Angelov which, by then, had been the subject of broadcast messages on WhatsApp, which he had seen.

32. Geneiko Green denied any involvement in the incidents and nothing to the contrary was suggested at trial. In cross-examination by Ms Mulligan, he added that when the Appellant returned to his house with the bike, not only had he said "*Yo, I messed up your bike*", he had also said that he, the Appellant, had gotten into an accident. However, he assumed that the Appellant was "*making up a sob story*" as to why he had taken so long to return the bike and he did not want to hear it. The Appellant did try to show how he went down from the accident but he did not give him a chance to say what happened and the Appellant seemed a bit upset. He said that after he had returned the Appellant to his home and whilst they were smoking marijuana, the Appellant apologized for messing up the bike. Later, when he spoke to the Appellant about going to the police, he said that the Appellant was concerned that if he told the police

that he had the bike, then they would think that he did the robbery. He said that it was possible that the Appellant was trying to tell him more of what happened but that he Green was not trying to hear it. He just wanted the Appellant to go to the police to tell them that he did not have the bike on the night of the incident.

33. Simone Wilson next testified. She is the aunt of Geneiko Green with whom he resided at the time in question. She supported Geneiko Green's account of reluctantly loaning the bike to the Appellant. She recalled that it was about 9:00 p.m. on the night of 22nd October that the Appellant came to her house to see Geneiko. She went inside leaving the Appellant and Geneiko outside and said that later during the night she heard the Appellant ask Geneiko to borrow the bike. She heard Geneiko say that he should not be lending the bike because it was not his but that Geneiko still lent the bike and at some point she heard the bike leave the yard. She said that later, after three o'clock in the morning when she was awake in her bedroom, she heard the bike return.

34. Troy Woods next testified. An habitual offender, Woods testified that in around October to November 2018, he was in remand at the Westgate prison awaiting trial for a string of offences. It was there that he met the Appellant but it was on the second or third day of the Appellant's arrival that he got a chance to talk to him about why he was in jail. They spoke about the offences for which the Appellant was charged and later in the afternoon he and the Appellant were playing cards and "*shooting the breeze*" about why they were at Westgate. And it was then, when he told the Appellant about his own offences, which were motor-bike related, that the Appellant "*opened up about what he did*". He said that he found what the Appellant had to say "*attractive*" because he had done his crimes on a bike; that is, in his words "*the same f……g shit*", he was doing.

35. He said that the Appellant told him that around 2:00 a.m. to 2:30 a.m. he was riding a bike, which belonged to a girl, with his mate and they started following someone and then turned around in Southampton to chase someone else. At the

time the streets were quiet. The Appellant said that the mask or visor must have scared the second person off, so they turned around to follow the person they were following from the beginning, and ended up on Harbour Road. He said that he told the Appellant that the cameras at Barnes' Corner would have (caught) him. The Appellant continued to narrate that from Harbour Road they ended up in the gentleman's yard where the stabbing happened. The Appellant told him that he had tried to stop the person from stabbing him but ended up being cut himself. That the Appellant showed him where he got cut from trying to stop the other person from stabbing the man and Woods demonstrated to the Court the fleshy area between the index finger and thumb where he said the Appellant showed him he had been cut.

36. Woods continued to recount that the Appellant told him that after the stabbing he and his accomplice ended up on Keith Hall Road where he, the Appellant, was trying to wipe the blood off himself and the bike. After that, the Appellant said that he and his accomplice, whom Woods said remained nameless throughout other than by reference to a first name "David", went to Cedar Hill and they separated. Woods said that he tried to get the full name of the accomplice but the Appellant "*wouldn't give that person up.*"

37. Woods admitted that his reason for plying the Appellant for information about the offences was so that he could provide it to the police, which he later did, through DS Jason Smith, the officer in charge of the investigation of the case. Woods insisted however, that he did this not because of any promise he had received for lenient treatment in respect of his own offences, but simply because he wished to assist the police and because he hated seeing young men like the Appellant "*waste their lives*", the way he had.

38. Woods admitted that he was an habitual offender, having first been convicted when he was merely 14 years old. At the time of this trial he was 48 years old and had "*for my whole life*" been committing offences of dishonesty. As he came

also to acknowledge, the string of offences for which he had been awaiting trial when at Westgate Prison in November 2018, involved the use of a motor bike to fake accidents with cars in order to extort money from their drivers. This manner of obtaining money by dishonesty had been his established *modus operandi* over the many years of his criminal offending.

39. Unsurprisingly, Woods was extensively cross-examined by Ms Mulligan about his own criminal background, the reliability of his account of his conversations with the Appellant and his motives for assisting the police. The point of this detailed cross-examination was to establish with the jury that Woods was not to be believed, that he had concocted the reported confession of the Appellant from newspaper reports he had seen of the incidents of 23rd October 2018 along Harbour Road and of the attack upon the victims. Moreover, that Woods' motive for doing so was to obtain a lenient sentence which he had in fact managed to get by way of the sentence of 3 years' probation imposed on 7th November 2018. This was imposed for his string of offences of obtaining property by deception, only five days after his interview with the police when he reported the Appellant's "confession" about this case and notwithstanding his long criminal record.

40. It was, indeed, established in cross-examination of Woods that, on 1st November 2018, DS Jason Smith and DC Anneka Donawa of the Bermuda Police had visited and interviewed him at Westgate Prison and on 2nd November 2018 he had been taken to the Hamilton Police Station for another interview. While there was a full written and audio/video record of the interview on 2nd November, there was no such record of the one on the 1st November, although the officers had arranged in advance, according to DC Donawa, to visit Woods at the prison, at Woods' request "*to speak with us in relation to another matter"*. According to DC Donawa, he, Woods, "*then informed us about the information he had pertaining to this matter*" relative to Alex Wolffe. While no record was made of this first interview, DC Donawa said that DS Smith took some notes and this was confirmed by DS Smith when he testified.

41. These notes were made available to the defence at the commencement of the trial and DS Smith was cross-examined by Ms Mulligan about them, especially as to a reference in them to Woods having himself raised the subject of probation at the first meeting with the officers. When it was suggested to him by Ms Mulligan that he, DS Smith, had spoken to Woods about "*his hope that he would get probation*", DS Smith was firm in his response that he had not done so. DS Smith acknowledged that while Woods had raised the subject, he insisted that no promise was made to him. Nor indeed, said DS Smith, could any promise have properly been made in that regard to Woods because he, DS Smith, was not the prosecuting authority.

42. While these lines of cross-examination took place before the jury and so DS Smith's and DC Donawa's veracity was open to their scrutiny, Ms Mulligan had also complained to the learned trial judge about the lateness of the disclosure of DS Smith's notes of the first Woods meeting, that which occurred at Westgate Prison. She described this lateness as hampering her ability to cross-examine on the issue of whether Woods had been incentivized to testify against the Appellant. Ms Mulligan applied to the judge for an order that DS Smith be directed to provide a full witness statement of his meeting with Woods on the 1 November at the prison[1]. This order was refused by the learned trial judge, with him ruling instead that Ms Mulligan would be free to cross-examine DS Smith (as indeed she did) about what was said or not said at the first meeting with Woods.

43. Ms Mulligan renews this complaint by way of a ground of appeal before us, criticizing the learned trial judge's decision in this regard. We will come below to consider this and the further issue of the adequacy of the judge's treatment of Troy Woods' evidence in his directions to the jury.

[1] DS Smith had already filed a witness statement dated 10 April 2019 , setting out his conduct of the investigation, including reference to the first meeting and interview of Woods and attaching his notes of the first meeting

44. Ms Mulligan also complained about other late disclosure in the case and had applied to the trial judge to stay the proceedings on the grounds of late disclosure, lost evidence and an alleged failure on the part of the prosecution to preserve evidence. This related to a wide category of forensic material and reports which, although available, were not relied upon by the prosecution and not disclosed to the defence until after 4th April 2019, on the eve of the commencement of the trial. As identified by the trial judge at page 11 of his ruling of 26th April 2019, this material included in particular, the working notes of the Helix Lab (on their inconclusive DNA analysis of items of clothing recovered from the Appellant's home); CCTV footage (from cameras along Harbour Road); the results of fingerprints lifted from mirrors of CE875 (there were insufficient ridge details for comparison); the phone log of a Mr Robin Smith-Gibbons (regarded by the police as a possible accomplice to the offences but cleared by an alibi witness, his girlfriend, herself regarded by the police as truthful and reliable); an aerial map of the route of the chase of Mr Mallory adduced through him (Prosecution exhibit 1); an Incident Report as to the Appellant's mother having made a complaint to the police about two men seen lurking around her residence and whom the defence sought to suggest were the real perpetrators of the offences charged against the Appellant.

45. The trial judge concluded that while these aspects of the prosecution disclosure were inexcusably late, there was no basis for concluding that the Appellant would be prejudiced to the extent that he could not have received a fair trial. In fact, he concluded that the late disclosure of material or absence of forensic analysis on the part of the prosecution and the police could serve to discredit the prosecution's case and assist the Accused's case. As he noted at page 15 of his ruling of 26th April 2019:

> "*Indeed, during the course of the trial Ms Mulligan, quite rightly, used some of the disclosed material to the Accused's benefit in cross examining the Prosecution witnesses and advancing the Accused's defence. In*

respect of the non-disclosure, she may have effectively poked holes in the police authorities' investigation of this matter. These are matters which Ms Mulligan can, and probably will, address to the jury if the time comes. For example: All of the forensic evidence that was disclosed late, such as the DNA and fingerprints, do not in any way link the Accused to what occurred at #90 Harbour Road. This supports the Accused's case that he had nothing to do with the offences committed.

The CCTV footage, and the lack thereof, does not link the Accused with riding CE875 at the time before, during or after the commission of the offences. This supports the Accused's defence.

The evidence of DS Smith that he spoke to various householders in the Keith Hall Road extension area and that they did not see nor hear anyone cleaning a bike in the wee hours of the morning of 23rd October 2018. This discredits the evidence of Troy Woods who said that the Accused told him that he went to Keith Hall Road to clean CE875.

The evidence that the mother of the Accused made a complaint of two persons lurking outside her residence. This supports the Accused's apparent case that others may have been involved in the commission of the offences.

The failure of the police to obtain a statement of the girlfriend of Mr Smith-Gibbons as to his whereabouts on 23rd October 2018, and the disclosure of the photos of Mr Smith-Gibbons. This supports the Accused's apparent case that others may have been involved in the commission of the offences.

The overall failure of the police to pursue possible lines of inquiry or obtain certain pieces of evidence, if there were any such failures, may actually be beneficial to the Accused. Ms Mulligan, I am sure, will seek to persuade the jury that because of what she deems to be failures in the police investigation of this matter, that there is insufficient evidence upon which to convict the Accused. Particularly in the absence of any other evidence to suggest that the Accused took steps to destroy any evidence (other than the evidence of Mr Woods that the

Accused told him that he cleaned CE875 on Keith Hall Road).”

46. These conclusions as to the potentially exculpatory value of the late disclosure or non-disclosure of evidence, were unexceptionable in the context of this case. The trial judge, in his directions to the jury, also dealt with them appropriately in the context in which they were raised by the defence.

47. Ms Mulligan nonetheless now argues by way of an elaboration of this complaint on appeal that the trial judge had misunderstood the complaint. She says that the Appellant was not arguing that there was a failure to investigate for the most part, but rather, more sinisterly, that the police had investigated and selectively chosen which bits of the investigation to disclose to the Appellant in advance of trial, on the basis of whether or not it might assist the Appellant to establish his innocence.

48. Ms Mulligan offered no evidential basis for this argument, relying instead it seemed, on the mere supposition that the lateness of the disclosure or the unavailability of evidence, was itself a proper basis for this more sinister inference. While the investigative and prosecutorial failings were glaringly apparent and deserving of criticism (and were in fact criticized by the learned trial judge), they do not justify such an inference.

49. We are satisfied that this complaint gave no basis for a stay of the proceedings and was properly rejected. The test throughout was whether any failure of disclosure on the part of the Prosecution risked the Appellant not being given a fair trial. Only where such a risk arose, would it have been exceptionally appropriate to stay his trial instead of allowing all attendant issues - such as the availability or unavailability of evidence - to be examined and resolved as part of the trial process. The trial judge correctly identified the governing principles from

the case law at pages 12 to 14 of his ruling. In particular from paragraph 4-78 of **Archbold** (2019):

> *"Whilst serious failings on the part of the police or the prosecution (which, in the case under consideration, were late disclosure of matter that there was a duty to disclose, and wrongful destruction of items taken from the scene of the crime) may make it unfair to try a defendant in a particular case, that will be a rare occurrence in the absence of serious misbehavior; if it is not such a case, then the only issue is whether it remains possible for the defendant to have a fair trial:* ***R v Sadler*** *[2002] EWCA Crim 1722…"*

50. And further from **R v Feltham Magistrates Court, ex parte Ebrahim** [2001] EWHC 130 (Admin), at [25] to [28] in terms which we adopt and endorse:

> "25. *Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:*
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> *The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.*
>
> *26. We have derived the first of these principles from the judgment of Sir Rodger Ormrod in R v Derby Crown Court ex parte Brooks at p 168 and the second from the judgment of Lord Lane CJ in Attorney-General's Reference (No 1 of 1990) at p 644B-C. The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between. The power of a court to regulate the admissibility of evidence by the use of its powers under Section 78 of the*

> *Police and Criminal Evidence Act 1984[2] is one example of the inherent strength of the trial process itself to prevent unfairness. The court's attention can be drawn to any breaches by the police of the codes of practice under PACE, and the court can be invited to exclude evidence where such breaches have occurred.*
>
> *27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."*

51. Those were all principles and observations to be appropriately applied in the context of this case. We conclude that the learned trial judge was correct in his assessment that there was nothing presented by way of the complaints to suggest that the Appellant would not have received a fair trial. This is the subject of **Ground 5** of the Appellant's grounds of appeal which is accordingly refused.

52. The Appellant testified in his defence and came, through Ms Mulligan, to raise for the jury's consideration, some of the very criticisms anticipated by the learned trial judge about the state of the evidence in the case. He testified that at the time of the offences in October 2018, he resided with his mother and uncle at #12 Riviera Road in Southampton Parish.

53. He described himself as being about six-feet tall and it became accepted in the trial that he is in fact 5' 11". It was also obvious that he could not be described as being of a thin or tiny build. These were facts which became the subject of

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[2] Like that in the similar Bermuda legislation – the Police and Criminal Evidence Act 2006. (PACE)

submissions to the jury, given the varying descriptions of the man who attacked Mr Angelov with the knife as being around 5' 7" – 5' 9" and the other, who on the prosecution's case was the Appellant, as shorter than him and of thin or tiny build.

54. The Appellant also testified that he has worn prescription glasses since primary school and that his vision is blurry when he takes his eye glasses off. His myopia was confirmed by the formal admission of the evidence of his optometrist Dr Douglas Gilfether. The Appellant also testified that on 23rd October 2018, he did not have contact lenses.

55. His reliance on eye glasses became another factor for the jury's consideration given that neither Mr Mallory nor Mr Angelov spoke of either of the assailants wearing glasses. If the assailants in both incidents were the same two men one of whom on the prosecution's case was the Appellant, then at least on the occasion of the attempt at robbing Mr Mallory, the Appellant would have been the rider. This the Appellant asked the jury to conclude was impossible because he would not have been able to ride without his glasses on and no witness spoke of either assailant wearing glasses.

56. These factors were of course, on the judge's directions to the jury, all matters properly for the jury's consideration, along with all the other admissible evidence in the case, and the jury must be regarded as having taken them into account when convicting the Appellant. These factors are now nonetheless urged by Ms Mulligan as factors which, she submits, go to show the unreliability of the prosecution's identification of the Appellant as one of the assailants and as rendering the Appellant's conviction unsafe.

57. This Court must therefore now consider all the factors and circumstances of the case, bearing in mind that the foregoing criticisms came to be considered by the jury in the context, as well, of the Appellant's evidence as to his whereabouts on

the night to early morning of 22nd /23rd October 2018, and more particularly, as to what became of CE875 which had admittedly been in his possession that night.

58. The following is the narrative of his evidence as summed up by the learned trial judge, as to how he came to be in possession of CE875 (from pages 116 -121 of the transcript of summation):

> "*He said that on the evening of the 22nd October 2018 he was at home with two unnamed girls watching Netflix and listening to music, just chillin' when Geneiko Green, who he calls Neiko, came by.*
>
> *He and Neiko became friends when they both worked at The Reefs in the summer of 2018 and Neiko is older than him. Neiko chilled with them and at some point he asked Neiko if he had the $100 that he owed him. He figured that is why Neiko came to his house. Neiko said that he had to get his bank machine card from his house and he said he will go with him. He did not have any transportation of his own or a phone and he and Neiko left on a bike that Neiko had but which he had not seen before. He said that at the time he was wearing a light-grey shirt, (and he gave Defendant Exhibit 13), and navy-blue sweat pants and his camouflage green and black Shark helmet, which had goggles that can be pulled down to the face. … They arrived at Neiko's house, went into the kitchen and Neiko went to look for the bank card. .. Neiko came back and said that he was going to the ATM and he went to the shed in the back yard. He had been to this shed before chillin' with Neiko where, amongst other things, they had smoked weed, meaning Marijuana…. He told you that he asked Neiko if he could use the bike to go get some more weed..Neiko agreed for him to use the bike and so he went inside the shed to use someone's phone.. He said it was about 2 a.m. in the morning and that he reached Jahvon Taylor who(m) he met at The Reefs… He asked Mr Taylor if he had any weed and Mr Taylor said to him to "come check him". So he went to Mr Taylor's house on Khyber Pass, which was five minutes away from Neiko's house, travelling the same way that he came to Neiko's house. He used the*

bike and was wearing his camouflage helmet. When he got to Mr Taylor's house, Mr Taylor had a girl over and when asked if he had any weed, Mr Taylor said "No." He then asked Mr Taylor for some money for some more weed and was given $300. He was there for about ten minutes… He further told you that he went to his friend Zamar White's house on Keith Hall Road extension. And you see that from (the map) Defence Exhibit 16, to get some more weed. He had not had any contact with Mr White before but he headed to his house as he expected Mr White to be up as usual. he is usually up at all hours in the morning and usually has weed…"

59. And from pages 176-177 of the transcript where the learned trial judge summarizes the defendant's account:

> *"As he entered onto Keith Hall Road he was robbed of CE875 by two persons and in the process of being robbed he was cut by a knife which was thrust at him by one of the persons who was on his right. He managed to run away from them and get to Zamar's house and not wanting the two men who robbed him to hear him, he knocked on Zamar's window. He could see Zamar sleeping through the slats in the venetian blinds but Zamar did not wake. At this time he could see that his finger was bleeding. After about twenty minutes he walked on the dirt path from Zamar's house and within 60 seconds he saw CE875 lying on the ground with the key in the ignition. He got on CE875 and rode to Neiko's, who he tried to tell what happened to him, but Neiko did not want to hear it. Neiko then took him home, where he went straight to sleep. Over the course of the next couple of days Neiko was telling him to go to the police to tell them that he, Neiko, did not have CE875 in the wee hours of 23rd October 2018. On 26th October he went to the police. "He', meaning the Accused.*
>
> *He said that he told his side of the story of what happened to Neiko but that Neiko did not want to hear it, and that he told Mr Amory and Mr Wolffe [identified as two officers at Westgate Prison] when he went into Westgate on remand.*

> *He said he wanted to tell DS Smith after he was charged but he could not.*
> *He said that he told Mr Woods what happened, which is what he said in Court, and that he never confessed to Mr Woods."*

60. The Appellant's account of being ambushed by two men sometime after 2:00 a.m. on 23rd October, and of CE875 having been taken from him at knife point and later, within about 20 minutes, recovered by him abandoned along a dirt path, was obviously aimed at providing him an alibi for the exact times of the commission of the offences against Mr Mallory and Mr Angelov. Such an alibi was essential because he could have had no hope of convincing the jury that CE875 was, in fact, not the bike ridden by the assailants at least in the attack upon Mr Angelov, and so his own connection to CE875 had to be explained. If the jury were to accept his account, the inference would have been that his ambushers were the men who committed the attacks upon Mr Mallory and Mr Angelov and returned the bike to the place where he recovered it, all within 20 minutes or so.

61. The factual assessment of his account was a matter for the jury. Its inherent implausibility was such as not likely to have given them much pause. This was frankly acknowledged by Ms Mulligan when she accepted, in response to a question from this Court, that the jury could reasonably have regarded the Appellant's account as implausible.

62. In their deliberations leading to the conviction of the Appellant, the jury would have had in mind the directions and warnings given by the learned trial judge especially about the inherent weaknesses of the identification evidence, including the obvious disparities between the height and build of the assailants as described by Mr Angelov and Mrs Angelov (albeit at trial, contrary to her earlier estimate of 5' 8", she estimated the taller of the assailants as being 5' 10" tall) and the height and build of the Appellant. The jury would have had in mind,

as Mr Richards argued before us, that persons engaged in a life and death struggle do not fight standing upright. Recollections by witnesses involved in or observing such a struggle, of relative heights and weights, are unlikely to be precise.

63. The jury was also adequately directed by the learned trial judge on other related issues going to identification, including the fact that no mention was made of either assailant wearing eye glasses, the absence of any forensic evidence linking the Appellant to the crimes and the evidence of Geneiko Green and Jahvon Taylor (who testified as a defence witness) that the Appellant was wearing clothing and a helmet on the night of 22nd October which did not match the clothing or head wear of either assailant.

64. These were all matters of fact for the jury and it was well within the bounds of their reasonable deliberations to have regarded them as explicable in all the circumstances of the case or as insignificant in light of the evidence of the Appellant's connection to CE875 and his reported confession to Troy Woods, which the jury may well also have accepted. This incriminatory evidence pointed to the Appellant as one of the two assailants involved in the attacks upon Mr Mallory and Mr Angelov. We therefore do not accept Ms Mulligan's submissions that the case should have been withdrawn from the jury on account of the weakness or unreliability of the identification evidence.

65. The jury would also have considered the discrepancies between Geneiko Green's account of how the Appellant came to borrow CE875 and the Appellant's account of his spontaneous taking of the bike for his late night quest in search of marijuana. The irresistible inference for the jury - accepting Geneiko Green's account as truthful as they would have been entitled to do - was that the Appellant wished to avoid the conclusion that he had planned to use, and obtained in advance, a bike for the commission of robberies.

66. These conclusions address **Grounds of Appeal 1, 2, and 3**, which assert that the evidence of identification adduced by the Prosecution was unreliable and which we therefore regard as unsubstantiated.

67. Ms Mulligan pressed grounds of appeal which focused on other aspects of the trial process.

68. A number of these, **Grounds 4**, **7** and **8**, relate to matters of which the learned trial judge reminded the jury in the latter aspects of the summation of the Appellant's case as extracted above, *viz:* the Appellant's explanation to the jury that he had given an early account of what may be described as his 'ambush alibi' to two prison officers, PO Amory and PO Wolffe, soon after his incarceration at Westgate.

69. About this Ms Mulligan complains that while the prosecution had been allowed to invite the jury to find that the Appellant's ambush alibi was a recent fabrication (because it was not mentioned before it was first raised at trial in response to the prosecution's case), she was earlier prevented by the learned trial judge from adducing the evidence of officers PO Amory and PO Wolffe in anticipation of and to refute any suggestion of recent fabrication.

70. A further ground of appeal, **Ground 6**, complains that the learned trial judge erred in not requiring the Prosecution and the Police to make full disclosure of the circumstances and contents of the first meeting between the 'jailhouse informant', Troy Woods, and the investigators in this case (ie: DS Smith and DC Donawa), prior to Ms Mulligan's cross-examination of DS Smith on that subject.

71. The first of these two issues, the subject of **Grounds 4, 7 and 8**, when raised during the trial by Ms Mulligan, gave rise to applications by the Prosecution for orders of Public Interest Immunity (PII), orders which were granted by the

learned trial judge in circumstances and for reasons which must now be examined. **Ground 6** will be examined separately below.

Grounds 4, 7 and 8 : the trial judge's refusal to allow the testimony of Prison Officers Amory and Wolffe.

72. There is some further necessary background to this complaint. The Appellant had been interviewed by the police on their first encounter with him about these offences on 25th October 2018. Then, the Appellant chose to make no answers to the questions. While that was his right, a consequence was that no mention was made to the authorities by the Appellant on his earliest opportunity, of his ambush alibi.

73. As appears from the narrative of Geneiko Green's evidence above, nor was any mention made of it to Green by the Appellant on the morning of 23rd October when he returned CE875, nor during subsequent interactions between them on that or the next day when discussions were had about reporting to the police. The Appellant's explanation to the jury for this was that Geneiko Green had made it plain to him that he was not inclined to listen. That continues to be his explanation presented by Ms Mulligan on his behalf to this Court about this failure to have told Green about the ambush alibi.

74. No explanation appears, however, to have been offered as to why the Appellant had not told his mother (who testified on his behalf at trial) or his father, with both of whom he had interacted shortly after the events on 23rd October, about the 'ambush'. Such a report might have been expected to include the account about the cut to his finger which he claimed was inflicted by one of his ambushers.

75. Against that background of the absence of an early report of his ambush alibi, Ms Mulligan had successfully applied on 11th April 2019 to a judge for the

issuance of *writs of subpoena ad testificandum* requiring the attendance on 15th April 2019 at the trial, of PO Carmel Amory and PO Anthony Wolffe.

76. The reason for the application, from the point of view of the defence, appears from an affidavit subsequently sworn by the Appellant on 24th April 2019[3] in which he sought to explain, among other things, that the attendance of the named officers was required in order to elicit from them, evidence of his intake interview at the Prison when he claimed that he had given them a full account of his ambush alibi. It appears however, from this affidavit that he may have been mistaken about the identity of PO Anthony Wolffe because, having seen him subsequently (it appears at the Court house), he said that he was not the person to whom he had been introduced as bearing that name and so he had surmised that that second person, (i.e. apart from PO Amory), must have been an undercover police officer engaged in collecting intelligence at the Prison. All the more reason, he deposed in his affidavit, why he should have been allowed to adduce evidence of what transpired between himself and his interlocutors, whoever they might have been, at his intake interview.

77. It may have been of some significance also, as the Appellant deposed about his intake interview at paragraph 7 of his said affidavit, that "*When all three of us were seated, PO Amory asked me a series of questions having to do with gangs in Bermuda and, in particular, whether I was affiliated with any gang and whether I had any conflicts that I knew of with anyone presently in custody.*"

78. If such questions were indeed asked, they could well have been aimed at ensuring the safety of the Appellant himself while incarcerated at Westgate Prison. That is an established reason for the conduct of intake assessment

[3] And which was used to ground an application of "no case to answer" at the close of the Prosecution's case and for yet a further application by Ms Mulligan for dismissal of the Prosecution's case on grounds of abuse of process. These applications became the subject of a formal written ruling issued by the learned trial judge on 26 April 2019 refusing them and calling upon the Appellant (then the Accused) to answer. More will be said below in relation to that final ruling.

interviews. Depending on what information was then forthcoming from the Appellant, the intake assessment interview could also have resulted in the obtaining of sensitive intelligence.

79. In the event, it appears that in response to a PII Application made by the Prosecution during the trial, the learned trial judge refused to allow Officers Amory and Wolffe to testify. This was although, as explained now by Ms Mulligan, they had been subpoenaed only to enquire as to whether, during the Appellant's intake interview, he had made mention of his ambush alibi. But this does not appear to have been explained as the reason for the subpoenas. It certainly is not so explained on the face of the subpoenas themselves. And so, having been served, Prison Officers Amory and Wolffe appear to have brought the subpoenas to the attention of the Prosecution and the Prosecution became sufficiently concerned to raise a PII Application.

80. As Ms Mulligan reports, the learned trial judge, having upheld the Prosecution's PII Application, then released PO Amory and PO Wolffe from their subpoenas. It appears that he had taken and granted the Application on the *ex parte* basis without notice to the defence. During the hearing of the Application, he had been presented with certain documentary material which appears to have been the subject of the Application, grounded by an affidavit from a police officer identified as Acting Inspector Pedro.

81. *Ex tempore* reasons for his decisions were given by the judge on 15 and 16 April 2019, as appears from the Trial Record in the following terms:

> "*Monday, 15th April 2019 ... – re application for public interest immunity... at 2:52 p.m.*
>
> *Wolffe AJ:*
> *Yes. I will give you my entire order. Having heard from Ms Burgess and reviewed the Affidavit of Inspector Pedro, I am satisfied that the information that the*

Prosecution does not wish to be disclosed does not weaken the prosecution's case or strengthen the Defendant's case. In particular I am satisfied that the subject information is in respect of covert operations within the Police Services, technical operations, surveillance, discreet information about the criminal conduct in Bermuda, identification of informants and sources; therefore I hereby order that no questions at the trial shall be heard in respect of those heads of information.

At 2:53 p.m. submissions.
Tuesday 16th April, 2019 at 3:07 p.m.

Wolffe AJ:
Right. I wish to read out some orders that I've made in relation to an application before me, that being that, having heard Ms Burgess [for the Prosecution] I am satisfied that pursuant to section 8(2) of the Disclosure and Criminal Reform Act 2015, that no notice should be given to the Accused person or his lawyer in respect of this application re public interest immunity, and I so order.

And in that regard, having heard from Ms Burgess and reviewed the evidence of the disclosed documents, I am satisfied that the material does not weaken the Prosecution's case nor does it strengthen the Defence case.

In those circumstances I rule that it is in the public interest not to disclose the following:
1: The contents of an intake assessment carried out on 2nd November 2018, in respect of the Accused; and
2; The names and identities of individuals who carried out the said intake assessment.

Ms Burgess: I'm obliged my Lord --- Crown seeks to have officers released from Ms Mulligan's subpoena."

82. And so, without for the moment reflecting upon the appropriateness or otherwise of the procedure adopted by the learned trial judge upon the PII Application, it appears that he was there addressing his mind to issues apprehended to have been raised by Ms Mulligan's subpoenas, even while she was seeking on the

Appellant's behalf simply to adduce evidence of the intake interview or assessment process, to lay the foundation for the Appellant's evidence to come of his telling of his ambush alibi and to rebut any suggestion from the prosecution that it was a recent fabrication.

83. Nonetheless, it follows from the learned trial judge's conclusion, after his own inspection of the classified material presented to him in response to the subpoenas[4], that nothing in that material could have weakened the prosecution's case or assisted the Appellant's case, including, it must be assumed, in regard to the ambush alibi.

84. But with typical persistence, Ms Mulligan did not let the matter rest there. She applied on 16th April to the judge for a review of his decision and for the holding of a *voir dire* in relation to the PII procedure, as to whether there might in fact have nonetheless been relevant evidence to be obtained from the Prison Authorities confirming the Appellant's account of his report to them of his ambush alibi.

85. The judge refused that application as well, for reasons set out in a ruling which he had reserved overnight and delivered on the morning of 17th April 2019 at 9:49 a.m. That ruling is transcribed at pages 11 to 18 of the Transcript of Proceedings. It will suffice for present purposes to extract relevant portions here:

> "*On behalf of the Defendant, Ms Mulligan invites the Court to conduct a voir dire and to review its decision in respect of a Public Interest Immunity application made by the Prosecution pursuant to section 8 of the Disclosure and Criminal Reform Act 2015, "The Act." The basis for Ms Mulligan's request for a voir dire is that she says, on the 2nd November 2018, after the Accused participated in an intake assessment at Westgate and which was conducted solely by Prison Officers Amory – that Prison Officer Amory left the room and went to retrieve a Mr*

[4] For reasons which have not been explained but into which we have seen no need to enquire further.

Wolffe. The full name of the Mr Wolffe is not known to her but she says that her client can provide an identification. It was at this time, Ms Mulligan says, that an "interview", in quotes, took place between PO Amory, Mr Wolffe and the Accused. …According to Ms Mulligan, in this interview, this Mr Wolffe told the Accused that he would try to assist him to sort things out. It was at this time that Ms Mulligan says that the Accused told Mr Wolffe and PO Amory what had happened in detail. Ms Mulligan did not say what the Accused was supposed to have said in detail to PO Amory and this Mr Wolffe, but she said that it was an exculpatory statement made by the Accused. Ms Mulligan submits that this exculpatory statement was made to a person in a position of authority and that since it was after the Accused was charged for the offences, this constitutes a breach of PACE, Judges' Rules and the Criminal Code, and likely the Constitution.

Ms Mulligan further submits that the details of this interview have not been disclosed and because it was not disclosed constitutes a loss of evidence and she requires disclosure from the Prosecution of this interview. Ms Mulligan states that it is through the process of a voir dire that she seeks to demonstrate to the Court that there has been an abuse of process. In doing so she seeks to call witnesses at the voir dire who she says will tell the Court what happened when the Accused met with PO Amory and this Mr Wolffe.

On behalf of the Prosecution Ms Burgess states that no such interview took place after the intake assessment was carried out, that in any event any exculpatory statement or self-serving statement supposedly made by the Accused would be inadmissible in any event.

Ms Burgess further states that Ms Mulligan had been disclosed all relevant used and unused material in this matter and that because no quote/unquote 'interview of the Accused" took place, there are no notes or evidence of such an interview.. Ms Burgess states that the Prosecution cannot disclose material evidence of something that does not exist." [Emphases added]

86. The learned trial judge then proceeded to refuse Ms Mulligan's applications, first, for the holding of a *voir dire.* This he did on the basis that it was an inapposite procedure for establishing that evidence did or did not exist, rather than for the exclusion of evidence. The judge went on to direct all the same, that "*the Accused can still say that he told persons the full story of what happened, and the investigating officers can be asked about whether an interview did, in fact, take place after the intake interview, or assessment. The jury will make out this decision (sic) as they see fit and the Accused will not be denied this opportunity. Of course, the Accused will have regard to the order that no questions are to be asked of the contents of the intake assessment, or who conducted the intake assessment.*"

87. In this regard it must be noted that DS Smith did indeed come to be cross-examined by Ms Mulligan about whether he was aware that the Appellant while at Westgate Prison, had spoken to someone whom he believed was a prison authority about the case, "*about what happened*". DS Smith denied knowledge of any such communication from the Appellant or of any such information being given to anyone by the Appellant.[5]

88. Secondly, the judge refused the application for the review of both of the PII Orders he had made for reasons he explained as follows:

> "*In respect of Ms Mulligan's request for a (re)view of both PII, or Public- Interest Immunity orders that I made, one on the 15th of April 2019 and the other on the 16th April 2019.*
> *On the 15th April 2019 I ordered that material (in respect) of covert operations within the police, technical operations, surveillance, discreet information about criminal conduct in Bermuda, identification of informants and sources shall not be disclosed due to public interest --- on public interest grounds.*

[5] Transcript of DS Smith's evidence taken on 24 04 2019 at page 95, lines 1 to 15.

> *On the 16th April 2019 I ordered that any material (in respect) of the contents of the intake assessment conducted on the Accused and the name of or identities of the intake assessment persons shall not be disclosed on the grounds of public interest immunity.*
>
> *In making this order it was in my view, and I so ordered, that the Prosecution need not give the Accused person any prior notice of the application for PII. Ms Mulligan submits that pursuant to section 8 (3) of the Act that she should have been given the opportunity to make representations to the Court prior to the ruling and she applies for a review of the Court ruling…*
>
> *In respect to the Court reviewing its ruling under section 8(3) (b), this should be read with section 8(4), whereby the Court is obliged, in any event, to keep under review the question whether at any time, at any given time it is still not in the public interest to disclose relevant unused material affected by the PII Order. I shall do so in this matter. If indeed Ms Mulligan did make a full application under section 8 (3) (b) for review, I have carried out such review and I conclude that it's still in the public interest not to disclose the material affected by both PII Orders."*

89. From that conclusion it must be assumed that the learned trial judge regarded nothing of the PII material shown to him as being probative of the Appellant's ambush alibi. There was also the definitive response from Ms Burgess on behalf of the Prosecution confirming that the putative record of interview did not exist. But even that conclusion by the Court and confirmation by the Prosecution did not finally resolve the question of the alleged Prison/Police interview of the Appellant. At the close of the Prosecution's case, Ms Mulligan once again sought to advance her application for a stay of the prosecution on the basis of abuse of process , "(*t)he difference this time*" as the learned trial judge described it in his full written ruling was "*that she has produced an affidavit of the Accused sworn on 24th April 2019*[6] *which Ms Mulligan says is evidence upon which the Court can decide that the interview took place and from which the Court, if this evidence is*

[6] That mentioned for the sake of context above.

accepted, can decide that an abuse occurred and that these proceedings can be stayed. Ms Mulligan further submits that evidence of this interview by the Accused would rebut any allegation of recent fabrication by the Prosecution should the Accused take the stand in his own defence and give his exculpatory version of what occurred on the night of the 23rd October 2018."

90. In refusing this final attempt to stay the prosecution (along with the refusal of the no case submission on grounds which we regard as justified as already explained above), the judge concluded that the trial process itself was well suited to determine whether or not the alleged interview took place[7]:

> "*The jury would therefore be (in) a position to evaluate whether such an interview took place and if so what was said in that interview, and in doing so, the jury would have regard to directions which the Court may give in relation to exculpatory statements, lies and recent fabrication.*"

91. This, in the end was indeed how the trial unfolded and the jury was directed accordingly. Ms Mulligan sought nonetheless, to persuade this Court that the learned trial judge fell into error in refusing her applications for a *voir dire* or a stay of proceedings for abuse of process.

92. We are not so persuaded. In the first place, there is simply no basis for concluding other than that the judge was correct in his assessment that it would have been inappropriate to conduct a *voir dire* into whether or not the putative interview as alleged by the Appellant, had taken place. He had found that the material presented on the PII application in response to the subpoenas neither "*weakened the Prosecution's case nor does it strengthen the Defence case".* He could not have so concluded if the material before him had revealed that an interview recording an account of the Appellant's ambush alibi had in fact taken

[7] At [22] of his Ruling of 26 April 2019.

place. The learned trial judge had also been assured by the Prosecution that no record of such an interview existed.

93. As Mr Richards now submits in response on this point, correctly understood, this is a ground of appeal that an interview was conducted with the Appellant on his reception at Westgate Prison outside the parameters and protections of the Police and Criminal Evidence Act 2006 and/or the Judges' Rules. However, these protections exist to ensure that, where the prosecution seeks to rely upon an inculpatory (or mixed) statement of an accused against him, the voluntariness of the alleged statement is clearly established before it may be admitted into evidence.

94. In this case not only has the Prosecution never sought to rely upon any evidence of confession made during any such interview, it does not accept that such an interview actually took place. On the contrary, it is the Appellant who has sought to rely upon an alleged exculpatory statement which he asserts he made during an interview in support of his case.

95. We do not see that there was anything further that the learned trial judge could sensibly have done to assist the defence in establishing the existence of a record which the prosecution, being mindful of its duty of disclosure, said did not exist and the primary evidential value of which would be nil, given its allegedly self-serving and exculpatory nature. See ***Roberts*** [1942] 1 All ER 187; ***Larkin*** [1943] KB 174; ***Oyesieku v Regina*** (1971) 56 Cr App R 240; all of which establish that a witness, including a defendant testifying in his own defence, may not be asked about a previous oral or written statement made by him and consistent with his evidence. Equally, evidence of the previous statement may not be given by any other witness (***Roberts)***. The previous statement, which may also be inadmissible as evidence of the facts contained in it under the rule against hearsay, is excluded as evidence of the accused's *consistency*.

96. As explained by ***Blackstone's***[8] at ***F6.38***, there are a number of statutory and common law exceptions to this rule, including statements in rebuttal of allegations of recent fabrication, the exception which was sought to be relied on by the Appellant at the trial.

97. The difficulty which confronted the Appellant there, however, was that the very existence of the previous consistent statement was not established by him and so there was no basis, other than his own assertion of its existence, upon which the jury could have assessed its consistency with his putative ambush alibi.

98. That basis was fairly and clearly left for the jury's consideration by the learned trail judge where he directed the jury, reminding them of the Appellant's evidence as follows[9]:

> "*Over the course of the next couple of days [(following the night of 23rd October 2018)] Neiko was telling him to go to the police to tell them that he Neiko, did not have CE875 in the wee hours of the 23rd October 2018.*
>
> *On 26th October 2018 he went to the police. 'He', meaning the accused.*
>
> *He said that he told his side of the story of what happened to Neiko but that Neiko did not want to hear it, and that he told a Mr Amory and a Mr Wolffe when he went to Westgate on remand.*
> *He said he wanted to tell DS Smith after he was charged but he could not.*"

99. No part of the transcript of evidence of the Appellant's cross-examination has been produced to show that it was positively put to him by the prosecution that his putative ambush alibi was a recent fabrication. While a full transcript of the cross-examination was not available, we are told by Mr Richards that the full

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[8] 2018 Edition
[9] On 15 05.2019 at page 177 of the transcript, at lines 14 to 25.

Court Smart audio record of the cross-examination was available to both the prosecution and defence. We are therefore entitled to assume that had a positive suggestion of recent fabrication been put to the Appellant when he testified about the alleged report of his ambush alibi to PO Amory and PO Wolffe, this would have been brought to the attention of this Court.

100. It may, therefore, be that the Appellant's evidence of his alleged report was not, in principle, admissible at all. If so, the undue admission of such evidence was to his advantage. Further, it seems to us, that, if what was being suggested was, expressly or impliedly, that this alleged report was a recent fabrication, that was a matter properly left for the jury's consideration

101. It was, in this respect, properly open to the jury to take account of the Appellant's failure to tell Geneiko Green about the ambush, which was his very first and most natural opportunity to do so, had the incident occurred. That, along with his "no comment" answers at interview, was a factor for the jury's consideration when assessing his evidence about the alleged report-which the jury would necessarily have had to do, since the prosecution's case was that his account about the ambush alibi was wholly untrue.

102. In **Grounds 7 and 8** Ms Mulligan also complains about the *ex parte* procedure adopted upon the PII Application, in particular that notice of it ought to have been given to the Appellant in the first place.

103. With due regard for the requirements of section 8 of the Disclosure and Criminal Reform Act 2015, we do not accept this criticism.

104. Section 8(2) expressly provides that "*Unless the court orders otherwise, the prosecutor shall give the accused person prior notice of an application subsection (1) although he need not give the accused person any information about the relevant unused material that is the subject of the application.*"

105. It is clear from the reasons for rulings of the learned trial judge that he had addressed his mind to this subject of prior notice and expressly directed that notice not be given. When asked by Ms Mulligan to review his decision, he confirmed his earlier ruling that the material put before him should be protected on grounds of public interest immunity but undertook to keep the matter under review as required, in the interest of fairness, as the trial proceeded. This he doubtless did. In the end he was satisfied that the non-disclosure of the protected material would in no manner interfere with the fairness of the Appellant's trial. That was a matter for the judge to determine and we see no reason for concluding to the contrary.

106. Ms Mulligan had, however, raised the concern that no guidance has so far been provided by this Court on the procedural requirements of section 8, despite its potentially far-reaching implications for the fairness of the disclosure process in criminal trials and so for the fairness of the trials themselves. She cited the judgment of the House of Lords in ***Regina v H and C***[10] as providing the leading exposition of the common law on the subject of public interest immunity applications and invited this Court to adopt the learning from that judgment on the appropriate procedure, as being applicable in Bermuda.

107. We consider that in the absence of local procedures to guide the application of section 8, and in the paramount interest of ensuring that applications for public interest immunity do not interfere with the right to a fair trial, it is appropriate to do so.

108. For these purposes, we consider that the guidance from the following passages from ***R v H and C*** beginning at [19], can readily be applied in respect of applications under section 8 and without undue hindrance upon the discretion vested in the trial judge by subsection 8(2), to order that notice not be given:

[10] [2004] UKHL 3

"19. *The English law of Crown Privilege, later public interest immunity (or PII) W was largely developed in civil cases. This was because, before and even after the Attorney General's 1981 Guidelines, disclosure was left largely to the judgment of the prosecuting authorities and the prosecution and only exceptionally did the court make any ruling. Thus the defence were commonly unaware of what had not been disclosed and there was no judicial decision against which a defendant could appeal.*

20. The shortcomings of this unsatisfactory regime were vividly exposed by the Court of Appeal's ground-breaking decision in ***R v Ward*** *[1993] 1 WLR 619, to which reference has already been made. The effect of the judgment was to require the prosecution, if it sought to claim PII for documents helpful to the defence, to give notice of the claim to the defence so that, if necessary, the court could be asked to rule on the legitimacy of the prosecution's asserted claim: see pages 660-681. The procedural implications of this judgment were refined by the Court of Appeal six months later in* ***R v Davis*** *[1993] 1 WLR 613. The court there distinguished between three classes of case: page 617. In the first, comprising most of the cases in which a PII issue arises, the prosecution must give notice to the defence at least (of) the category of the material they hold (that is, the broad ground upon which PII is claimed), and the defence must have the opportunity to make representations to the court. There is thus an inter partes hearing conducted in open court with reference to at least the category of the material in question. The second class comprises cases in which the prosecution contend that the public interest would be injured if disclosure were made even of the category of the material. In such cases the prosecution must still notify the defence that an application to the court is to be made, but the category of the material need not be specified; the defence will still have an opportunity to address the court on the procedure to be adopted but the application will be made to the court in the absence of the defendant or anyone representing him. If the court considers that the application falls within the first class, it will order that procedure to be followed. Otherwise it will rule. The third class, described as "highly*

exceptional", comprises cases where the public interest would be injured even by disclosure that an ex parte application is to be made. In such cases application to the court would be made without notice to the defence. But if the court considers that the case should be treated as falling within the second or first class, it will so order. The court thus modified to a limited extent the ruling in ***R v Ward*** *that notice of the making of an application should always be given to the defence: page 618. The test laid down in R v Davis was applied in* ***R v Keane*** *[1994] 1 WLR 746, 750 where the court stressed*

"that ex parte applications are contrary to the general principle of open justice in criminal trials. They were sanctioned in ***Reg v Davis*** *[1993] 1 WLR 613 solely to enable the court to discharge its function in testing a claim that public interest immunity or sensitivity justifies non-disclosure of material in possession of the Crown. Accordingly, the ex parte procedure should not be adopted, save on the application of the Crown and only for that specific purpose."*

It is plain from the observations of the court at page 752 that the prevailing test of materiality and an excess of caution on the part of prosecutors were by this time tending to impose an undue and inappropriate burden on judges. In ***R v Turner*** *[1995] 1 WLR 264, 267, the court emphasized the need to scrutinize, with great care, applications for disclosure of details about informers. The procedural regime established by* ***R v Davis*** *was in effect sanctioned by sections 3(6), 7(5), 14(2), 15(2) and 21(2) of the Criminal Procedure and Investigations Act 1996 …*

21. The years since the decision in R v Davis and enactment of the CPIA have witnessed the introduction in some areas of the law a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a "special advocate", who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those

constraints, is charged to represent that party's interests… The courts have recognized the value of a special advocate even in situations for which no statutory provision is made'.

109. Their Lordships then reflected on ethical problems which may arise for a special advocate from the novel nature of his relationship with his client*, "in acting in a way hitherto unknown to the legal profession" and continued:*

"None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant."

110. Their Lordships, in conclusion, recognizing the need for great care in the procedural steps, went on to advise as follows, in terms which we also adopt:

"*Conclusions*
34. It would be unduly complacent to suggest that the guiding principles are now uniformly applied as they should be. ***R v Early*** *[2002] EWCA Crim 1904, [2003] 1 Cr App R 288 is disturbing evidence to the contrary, although the miscarriage in that case was promptly rectified on appeal. It is encouraging that, of the cases which have reached the Court and led to a finding of violation, there has been only one (**Lewis**) in which the first instance criminal trial (as opposed to any appeal) took place after the domestic disclosure regime was put on a statutory footing by the 1996 act. Recent reports by various investigators have however highlighted the need for very great care in handling the whole process of disclosure.*

35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the

prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands. If the material contains information which the prosecution would prefer that the defendant did not have, on forensic as opposed to public interest grounds, that will suggest that the material is disclosable. If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been privately shown material damning to the defendant will, as the Court of Appeal envisaged (paragraphs 31 and 33 (v)), be very exceptional indeed.

36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) what is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above) [not quoted here]. In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

37. Throughout his or her consideration of any disclosure issue the trial judge must bear constantly in mind the overriding principles referred to in this opinion. In applying them, the judge should involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but

> *taking full account of the specific defence which is relied on. There will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed, since special counsel, even if appointed, cannot then receive any instructions from the defence at all…*
>
> *39. The answers to the certified questions must be gathered from a reading of the whole of this judgment. Provided the existing procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings are operated with scrupulous attention to the governing principles referred to and continuing regard to the proper interests of the defendant, there should be no violation of article 6 of the Convention."*

111. Nor, we would add, should there be a breach of section 6 of the Bermuda Constitution. It is seen from all the foregoing that transparency in the trial process is the hallmark of open justice and a fair trial. We cannot help but think that had the foregoing procedures been adopted for dealing with the PII application at the trial in this case, much of the misgivings which have emerged in the arguments about the intake interview of the Appellant would have been avoided. Had notice of the PII application been given to the defence, it is likely that Ms Mulligan would have been required to make it expressly clear that all she was interested to see, if it existed, was any record of the intake interview to establish whether or not the Appellant had disclosed his 'ambush alibi'.

112. From all we now know, she would then have been told that no such record of a reported 'alibi' existed and that any existing record contained sensitive information that could neither assist her client's case nor diminish the Prosecution's case. Had she insisted on seeing any such record all the same, the issue for the learned trial judge would have been very clearly defined and would certainly have been dealt with and settled without the various disruptive

applications that Ms Mulligan, perhaps understandably, felt obliged to remake at different stages of the trial. Given the learned trial judge's determination that there was nothing to help the Appellant's case or diminish the prosecution's case among the material presented to him, (the decision which he undertook to keep under review), the outcome would inevitably have been the same.

113. In the end, it is clear that there was no substantive unfairness in this regard affecting the Appellant's trial. His account of his ambush alibi was fairly reminded to the jury by the learned trial judge, along with the other evidence touching upon the inherent improbabilities, as argued by Ms Mulligan, of the Appellant being one of the offenders. These included such considerations as the height differentiations, the Appellant's myopia with no report of either assailant wearing eyeglasses, the differences between the attire or head wear of the assailants and that which the Appellant was reported by Geneiko Green and Jahvon Taylor to have been wearing or carrying on the night of 23rd October 2018 and the absence of any forensic evidence pointing to the Appellant as one of the assailants. See in this regard pages 176 -183 of the transcript. The Appellant's evidence was fully summed up to the jury at pages 116 to 156 and his account that he told PO Amory and PO Wolffe about his 'ambush alibi' during his intake interview, was specifically reminded to the jury by the judge at pages 132 -133. There was no other proper basis upon which this issue could have been left with the jury. This ground of appeal must be refused.

Ground 6: that the learned trial judge erred in not requiring the Crown and Police to make full disclosure of the circumstances and contents of the first meeting between the "jailhouse informant" Troy Woods, and the investigators in the case prior to the Appellant's counsel cross-examining the Senior Investigating Officer, DS Smith.

114. As discussed above, it was established at the trial that DS Smith and DC Donawa met with Troy Woods at Westgate Prison and later at the Hamilton Police station. DS Smith's evidence on this issue was that no formal interview took place at the

first meeting at the Prison but that one did at the Police Station. DS Smith also provided a witness statement explaining the steps he took in the course of the investigation generally and exhibiting his notes from his day book of his investigation. Included in those notes was that of his first meeting with Troy Woods at the Prison.

115. These notes reveal that Woods had indeed raised the subject of probation at the first meeting.

116. Ms Mulligan was able to cross-examine DS Smith about that meeting with Woods and in particular about what was said and by whom about the subject of probation. This cross-examination established that while Woods had raised the subject, the officers had made no offers or promises to him to secure his assistance in testifying against her client. She was however, later able to submit to the jury that Wood's motive for testifying against her client was that he had hoped to gain a reduction in sentence for assisting the police.

117. More to the point for present purposes, Ms Mulligan was able to cross-examine Woods about his motive for assisting the Police and as to whether he felt incentivized to lie against her client by concocting his alleged confession. She was later able to invite the jury to have regard to the fact that only five days later, Woods secured a 3-year probationary sentence notwithstanding his prior criminal record and that this sentence likely reflected his assistance to the Prosecution in this case. The question of a motive in Woods for concocting her client's confession would thus have been left squarely for the jury's consideration.

118. There are nonetheless two arguments now raised on appeal by Ms Mulligan as to the 'unfairness' of allowing Troy Woods' evidence to be considered by the jury.

119. The first is to the effect that she was hampered in her representation of the Appellant by the late disclosure of DS Smith's notes and the absence of a full statement from him, all of which she complains limited her ability to cross-examine him about his enlisting of Woods' assistance.

120. While the prosecution's late disclosure of relevant material was noted disapprovingly by the learned trial judge, it also appears from paragraph 31 of his ruling of 26 April 2019 that no applications for adjournments were sought to enable Ms Mulligan to review material or to seek instructions on material when disclosed. This was not consonant with defence counsel having been put at significant disadvantage. Rather, it is only consistent with the record showing that extensive cross-examination of both DS Smith and Troy Woods took place and full submissions were ultimately made to the jury on the issue of Woods' credibility and reliability as a witness.

121. The second argument raised by Ms Mulligan now is to the effect that it was not sufficient to discover, during cross-examination, what DS Smith would say transpired at the first meeting with Troy Woods. The argument is developed in written submissions by Ms Mulligan as follows:

> "*The Appellant had a right and the Prosecution had a duty to disclose information about that meeting, as follows: (1) what Mr Woods claimed the Appellant had told him; (2) What if anything Mr Woods was seeking for his information; (3) what if anything was promised or suggested might be done to assist him; (4) What encouragement, instructions or lack of any instructions was provided by the Police to Mr Woods when he indicated he was going to continue to pump the Appellant for information to pass on to the Police, thereby making him an agent of the Police and duty bound to respect the provisions set out in the Police and Criminal Evidence Act*".

122. In support she cites the English and Canadian case authorities of **Roy v The Queen** [2004] EWCA Crim 2236 and **R v Hebert** [1990] SCJ No 64, [1990] 2 SCR 151 both of which stand for the proposition that the use of police informants or undercover operatives to elicit confessions or other inculpatory information from accused persons while in custody, could be in violation of their constitutional privilege against self-incrimination and such as to render the information inadmissible and where admitted, render the trial unfair and a conviction unsafe.

123. Where the issue arises, the court is called upon to consider whether evidence obtained by such means should be admitted and by section 93 of PACE, will exclude the evidence if its admission would render a trial unfair:

> "93 (1) *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*
>
> *(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."*

124. As Mr Richards submits, this very issue had however, been raised before the learned trial judge. It was dealt with by him in paragraphs 33 – 34 of the ruling of 26th April 2019 in terms which have not been expressly criticized by Ms Mulligan before this Court.

125. First the learned trial judge concluded in this regard that "*there is little or no evidence that Mr Woods was an agent of the police. The evidence so far*[11] *is that the conversations between the Accused and Mr Woods occurred prior to any*

[11] Up to that stage of the trial at the close of the Prosecution's case.

conversations between DS Smith and DC Donawa on 1st November 2018, and there is little or no evidence to suggest that Mr Woods had any extensive conversations with the Accused on 2nd November 2018 prior to Mr Woods giving his witness interview. Therefore, it would appear on the evidence , that (neither) DS Smith nor DC Donawa would have given any instructions to Mr Woods to secure a confession from the Accused as the evidence suggests that the Accused confessed to Mr Woods prior to Mr Woods even meeting with DS Smith and DC Donawa on 1st November 2018. ***Hebert [(above)]*** *can therefore be distinguished from the case at bar.*"

126. Next, the learned trial judge went on to observe [34], that if Ms Mulligan was concerned that Mr Woods was an agent of the police and therefore (as she suggested in her submissions then and suggests now) was a person in authority such as to have engaged the Appellant's right to be cautioned, she could properly have raised the issue of the voluntariness of his confession as one to be examined on a voir dire but had not done so. He concluded that it was inappropriate for the issue to have been raised after the event of the admission of the confession as it was, as grounds for a stay of the prosecution for being an abuse of process.

127. We are compelled to the same view of this argument as a ground of appeal. There having been no basis for a concern that Mr Woods was an agent of the police with the result that he elicited the confession from the Appellant unfairly, there is no basis for a finding that its admission into evidence at the trial was unfair.

Ground 9: The learned trial judge erred by permitting the Crown to lead rebuttal evidence concerning a collateral issue which the Crown submitted was relevant solely to the Appellant's credibility.

128. An issue arose during the trial on the Appellant's testimony after the close of the prosecution's case, regarding whether someone could stand on the steps at the

back of the Appellant's house and reach his bedroom window to tap on it to get his attention.

129. This is what the Appellant testified he believed his girlfriend had done, as she was also said by him habitually to have done, to get his attention. According to him, he then opened the door believing she was seeking to be let in, when he was attacked by a stranger who inflicted a stab injury to his left breast with a knife.

130. This evidence, given against the background of earlier evidence from his mother Mrs Marsha Wolffe, of other stalking activity by unknown men, was aimed at suggesting to the jury that others, who wished to silence the Appellant, were responsible for the assaults upon Mr Mallory and Mr Angelov.

131. This development in the trial, which obviously arose *ex improviso* from the Prosecution's point of view, led to an application to the Court to allow the introduction of rebuttal evidence. The application was granted by the learned trial judge and evidence was adduced from DC Llewellyn Edwards to show that the Appellant's bedroom window could not have been reached by someone of the height of the Appellant's girlfriend (said to be 5' 3" tall) standing, as the Appellant had suggested, on the landing outside his window. DC Edwards' account was supported by photographic evidence of measurements taken *in situ.* The inference which the Prosecution invited the jury to draw, was that the incident had been staged by the Appellant who must also have inflicted the knife injury to himself.

132. By this ground of appeal, Ms Mulligan criticizes the decision to have allowed the prosecution's rebuttal evidence on the basis, as she puts it, that "*This issue, going to the Appellant's credibility on a collateral point, and not to an issue in the case regarding what took place on 23rd October 2018, the Crown ought not to have been permitted to call rebuttal evidence.*"

133. In support Ms Mulligan cites the House of Lords' decision in ***O'Brien v Chief Constable of South Wales Police*** [2005] UKHL 26, but that case deals with the circumstances in which evidence of 'similar facts' can be admitted in a civil suit and so is not at all on point here.

134. There is, however, a general rule, based on the desirability of avoiding a multiplicity of essentially irrelevant issues, that evidence is not admissible to contradict answers given by a witness to questions put in cross-examination which concern collateral matters, i.e. matters which go merely to credit but which are otherwise irrelevant to the issues in the case. See ***Blackstone's*** (above) at F7.42, at page 2574 -2575; citing ***Harris v Tippett*** (1811) 2 Camp 637; ***Palmer v Trower*** (1852) 8 Exch 247 and the more recent cases, ***TM*** [2004] EWCA 2085 and ***Busby*** (1981) 75 Cr App R 79.

135. But assuming that this is the principle upon which Ms Mulligan seeks to rely, it too would miss the point of what transpired in the trial and from which, as indicated above, it was quite obvious that the defence had raised *ex improviso*, a new propositional line of defence, one which the Prosecution could not have foreseen.

136. That having been so, the more apposite principle is that declared a hundred and eighty years ago by Tindal CJ in ***Frost*** (1839) 4 St Tr Ns 85 and cited at ***Blackstone's*** (above) at F6.10 pages 2536- 2537:

> "*There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises,* ***ex improviso*** *which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose* ***ex***

***improviso** may not be answered by contrary evidence on the part of the Crown.*"

137. As ***Blackstone's*** also note (ibid), Lord Goddard CJ, in ***Owen*** [1952] 2 QB 362, said of this statement 9at p. 367) that it was in "*probably wider language than would be applied at the present day'. Under the modern law, it is for the judge, in the exercise of his discretion, to determine whether the relevance of the evidence in question could **reasonably** have been anticipated'.*

138. Here we do not consider that the learned trial judge was wrong to have regarded the matter as having arisen *ex improviso* within the meaning of the modern test and so to have exercised his discretion to allow the prosecution to adduce the evidence in rebuttal.

139. Unanticipated though it no doubt was, the relevance of the new line of defence was clear: consistent with the Appellant's 'ambush alibi', the jury were now to be left with the suggestion that the men who had ambushed, robbed him of CE875 and used it to commit the attacks upon Mr Mallory and Mr Angelov, were now out to silence him.

140. The rebuttal evidence was clearly necessary and relevant to counter that unforeseen suggestion. In our view it was admitted in the proper exercise of discretion by the learned trial judge and so this ground of appeal also fails.

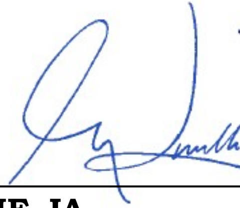
141. The result is that the Appellant's appeal against conviction is dismissed and his conviction is upheld.

CLARKE P:

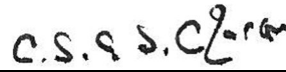
142. I agree.

BELL JA:

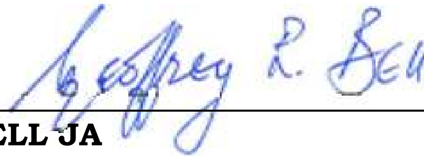
143. I also agree.



SMELLIE JA



CLARKE P



BELL JA